Bound By Oath | Season 1 | Episode 6: Procedural Due Process

John: Hello I'm John Ross from the Institute for Justice's Center for Judicial Engagement and this is Episode Six of Bound By Oath. If this is your first time listening to the podcast, you may want to back up and start with Episode One. On this episode, the due process of law. We'll start way back in the year 1215 with the historic roots of due process and then move on to some more modern due process controversies. Then we'll head to Harris County, Texas, to see why federal courts have said the county's system of money bail violates due process.

BBO Montage

John: We're going to do two separate episodes on due process. And that's because, for better or for worse, the Supreme Court says there are two kinds of due process. There is procedural due process: the procedures that you get to make sure the govt doesn't erroneously deprive you of life, liberty, or property. And then there is substantive due process. Substantive due process is the idea that even if the government gives you all the procedures in the world, there are some things it just can't do. Anyway, this episode will be on procedural due process. We'll tackle substantive due process in Episode 8.

Anthony Sanders: Historically due process is one idea that can mean a lot of things. But at its core and over the course of the centuries the idea that brings them all together is that the government cannot act arbitrarily.

John: That's Anthony Sanders. He's a senior attorney at the Institute for Justice, and he's also the new director of the Center for Judicial Engagement.

Anthony: The origins of due process are grand and yet a little more humble than they're sometimes made out to be. We could go back further, but really the idea starts with Magna Carta in 1215.

John: The nobility in England were revolting against King John for various tyrannical acts, and they forced him to sign a document called Magna Carta.

Anthony: King John had just lost a big war with France. And so because he had no other options he signed this document called Magna Carta that gave a lot of rights to his royal subjects not to the common people but just to the barons. They got certain protections, and one of them was enshrined in paragraph 39 of Magna Carta.

> **Magna Carta**: No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.

John: Over time, that last phrase "the law of the land," came to be synonymous with what we now call due process. If you look in your state's Constitution, there's a good chance there is a law of the land or a due process clause. Anyway, Magna Carta is a huge, historic moment. Even the King with all his power is constrained -- somewhat -- by law. But …

Anthony: Magna Carta did not last very long -- the original one at least. It was actually law if you want to call it that for about 10 weeks.

John: King John had no intention of abiding by it, and he went around attacking the barons' castles almost immediately.

Anthony: It didn't next appear in history in a big way for about 400 years. In the early 1600s King James the first of England -- who was also King James the sixth of Scotland -- came to the throne. This was a little controversial in England at the time because they hadn't had a Scottish King before.

John: In Scotland, kings had absolute power. In England, there were at least some moderate limits. There was the idea of freedom of speech and limits on the King's ability to establish religion or have people arrested.

Anthony: King James came with certain ideas about royal power that were a little alien to the English. Some of that came up in litigation in the court of the king's bench about the King's power versus the power of Parliament and versus the common law. And we know a lot about these battles between the king and other forces because of the work of a jurist and politician and lawyer and court reporter of the time called Edward Coke.

John: As a judge, Coke ruled a bunch of times that the King had overstepped limits on the authority of the Crown.

Anthony: So in Coke's struggles with the Crown he put forth the idea that Magna Carta and its law of the land and Judgment of its peers language bound the the king to respect the judgment of the courts and the rules of the common law.

John: Lord Coke's ideas about Magna Carta and due process are then very influential in America.

Anthony: The 17th century then came to be a fundamental building block on later American ideas of due process and constitutional order. Because throughout this raucous century, we have a lot of developments. We have the English Civil War which replaces the monarchy with some form of dictatorship under Oliver Cromwell. Then we get the monarchy back, but then the English don't like their new monarch. And we finally have the Glorious Revolution in 1688 and 1689 which cements the idea of parliamentary supremacy above the crown. All of this was background to the framers of the US Constitution. Above anything else, these framers did not want the kind of arbitrary power that the Kings of England had had before the Glorious Revolution.

John: During the American Revolution, the Founding Fathers looked back at the lessons of the previous revolution in England, and part of what they took from that is the idea of due process, that some process was due before the King or the executive branch could take away life, liberty, or property. But we also added something new, which was that the legislature had to abide by due process as well.

Anthony: It’s important to remember that Magna Carta only limited the crown, the power of the King. It did not limit Parliament. One reason is that Parliament really didn't exist at the time Magna Carta was first formed but later when Parliament was around Magna Carta was simply a statute. Now it was a very special statute, but it could at least in theory be changed by Parliament and over the years it has been changed many times and whittled down many times. So then at the time of the American Revolution the idea that there is a higher law that can be enshrined in a constitution that binds the executive, but also binds the legislature, comes to the fore.

John: And even before the Constitution, states were enacting their own Bills of Rights. Of the 13 original states, eight of them had a law of the land provision, the provision that is now synonymous with due process. And after the federal Constitution is adopted, the Framers add a due process clause in the Fifth Amendment. But it didn’t get much use.

Anthony: Of course the 5th Amendment didn't apply to the states. And so the due process clause in the Federal Constitution wasn't the subject of all that much litigation between the adoption of the Constitution and the Civil War.

John: For the most part, the important due process cases in the early republic were being decided in state courts under state constitutions.

Anthony: During the Revolutionary War, states systematically confiscated property that belonged to British subjects and to Americans who remained loyal to the King.

John: Which gave rise to due process claims. For instance, there is the famous case of *Bayard v. Singleton*. It's famous because it's probably the first time an American court struck down an act of the legislature as unconstitutional. In the case, the state of North Carolina had seized land from the Bayard family, who had sided with the British during the Revolutionary War. And then the state sold the property to a guy named Singleton. The Bayards sued Singleton to try and get their land back.

Anthony: Before the lawsuit could be resolved the North Carolina legislature intervened and passed a law that said Singleton the buyer of the seized property could keep it. But then the North Carolina Supreme Court said that the new law was unconstitutional. The court said it violated due process because the proper procedure was for a jury to decide whether Bayard or Singleton was the rightful owner. By siding with the buyer, the legislature had stripped the Bayards of their right to a fair procedure: a jury trial.

John: Another important case from before the Civil War is *Taylor v. Porter.*

Anthony: In *Taylor v Porter*, which was decided by a New York's highest court in 1848, a landowner challenged a state law that said the state could seize private land from Person A and turn it over to Person B to build a private road. The statute required notice and a hearing and a jury trial to establish what fair compensation for the seized property was. But the Court ruled that no matter what procedures were in place it violated due process to take property from A and give it to B. That's today what we would call substantive due process.

John: As we said the meaning of due process was mostly being hashed out in state court prior to the Civil War. But that didn't mean the Due Process Clause in the 5th Amendment of the federal Constitution wasn't important.

Anthony: Due process in the Fifth Amendment played a huge role in the pre-civil war debate over slavery. A common argument against abolition was that it deprives slave owners of their property without due process.

John: Here's John C. Calhoun, a senator from South Carolina and the preeminent constitutional theorist and defender of slavery.

> **John Calhoun**: Are not slaves property? And if so, how can Congress any more take away the property of a man in his slave than it could his life and liberty?

John: John Bingham, one of the Framers of the 14th Amendment, had a different take. Here's Professor Kurt Lash who was on Episode 2.

Kurt Lash: One of the most important things to John Bingham was the idea that all persons deserve to have their persons and property protected as declared under the Fifth Amendment to the American Constitution. And it's a theory with very interesting roots and you can find it in all kinds of writing both abolitionist writing and also Republican speeches at the time. The idea coming out of the abolition Republic Republicans during the antebellum period was that the Declaration of Independence announced the foundational principles of the American people and the equal right to life, liberty, and the pursuit of happiness. According to abolitionists, that

declaration had been translated into the due process clause of the Fifth Amendment. Of course that no one could be deprived of life liberty or property without due process of law. This became a key theory in abolitionism because whether or not you believe that blacks could ever be citizens, it was certainly conceded by everyone that they were persons. And no person should be denied their life or liberty without proper procedure before courts of law. So it became a very powerful legal argument that both influential abolitionists and Republicans like John Bingham embraced prior to the Civil War.

John: Obviously that legal argument did not win.

Anthony: Until the 14th Amendment.

> **Fifth Amendment**: No person shall be deprived of life, liberty, or property, without due process of law.

Anthony: John, that was the Fifth Amendment.

John: Oops. Hang on.

> **Fourteenth Amendment:** Nor shall any state deprive any person of life, liberty, or property, without due process of law.

Anthony: Yeah, so the language in the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment are nearly identical. The Fourteenth Amendment applies to the states and that was new.

John: But didn't the 14th Amendment apply the Bill of Rights including the 5th Amendment to the states? Why have a second Due Process Clause if the Fifth Amendment's due process clause now applied to the states?

Anthony: So you probably shouldn't read too much into what's going on here with the 14th Amendment. The Constitution sometimes overlaps in different ways. And what was really going on was the framers of the Fourteenth Amendment wanted to make darn sure that the states were not violating people's rights and one way to do that was to outright guarantee due process of law to all persons in the text of the amendment.

John: Fair enough. Anyway, after the 14th Amendment is enacted, the Supreme Court used the Due Process Clause to protect both substantive rights, the idea that there are some things the government just can't do, and also procedural rights. The government can put you in prison, but not unless it follows some procedures first. We'll dig into the substantive side on Episode 8.

Anthony: The first big case where the Supreme Court grapples with procedural due process after the 14th Amendment is *Hurtado v. California* in 1884.

John: Hurtado murdered a man who was having an affair with his wife. In broad daylight. In front of a crowd. He was tried and convicted, but he challenged his conviction on the basis that he was never indicted by a grand jury.

Anthony: So for centuries, one safeguard against arbitrary government was that you couldn't prosecute someone -- at least in the more serious cases -- unless a grand jury had taken a look at the allegations and the evidence and said there's enough to warrant a trial.

John: In the *Hurtado* case, the prosecutor had used a different method called an information. Instead of taking the evidence to a grand jury, the prosecutor just made a sworn statement to a judge that there was enough evidence to proceed with a prosecution. That's called an information. They still exist and are commonly used today. California state law allowed for informations in murder cases, but historically the common law stretching back for centuries required grand jury indictments and not informations in more serious cases. So did California's law violate due process?

Anthony: The Supreme Court said no. It said the common law, which we inherited from England, remained an important foundation of law and certainly a starting place when we're considering what procedures are required by due process. But the Court said that procedures can be improved upon, and the 14th Amendment doesn't forbid the states from experimenting with new procedures. The biggest takeaway from Hurtado is that due process is flexible. What we're really trying to get at here is arbitrary government and just because you don't have a grand jury doesn't mean you have arbitrary government.

John: Due process may be flexible, but it requires that procedures are meaningful. The government can't just go through the motions and then call that due process.

Anthony: So there's the case of *Moore vs. Dempsey*

John: Which started with what used to be called a race riot. In 1919, a small group of white men, including law enforcement, fired into a church outside Elaine, Arkansas where black tenant farmers were attending a union meeting. The people in the church returned fire, and a white man was killed. Over the course of the next three days, vigilantes and federal troops murdered over 200 African-American men, women, and children.

Anthony: Five white people were also killed, and after the massacre the only people arrested and prosecuted were blacks. Twelve African Americans were ultimately tried and sentenced to death by an Arkansas court.

John: Four years later, the case, which was being litigated by the NAACP, arrived at the Supreme Court. And the question was, had the trial comported with due process?

Anthony: So certain precise formal procedures were followed in *Moore v Dempsey*. You had this thing that looks like a trial. You had a jury. You have a defense counsel and prosecutor. You have a judge, but there was never any question the defendants were going to be convicted. Because there was an angry mob of people outside the courthouse who were going murder the defendants on the spot if they weren't convicted.

John: In an opinion written by Justice Oliver Wendell Holmes, the Supreme Court said that the trial violated due process.

Anthony: So *Moore v. Dempsey* was an important moment in the development of procedural due process. But it was basically confirming the time-honored principle that not only must there be procedure, but the procedure must be meaningful.

John: One of the first cases where the Supreme Court struck down a state law under the 14th Amendment for not having adequate procedures was *Tumey v. Ohio* in 1927.

Anthony: In *Tumey vs. Ohio*, the Court for the first but not the last time took up a peculiar institution in Ohio called mayoral courts. So then and even today in many towns in Ohio the mayor himself or herself will sit as a judge usually in small matters such as speeding tickets.

John: In the case, Ed Tumey got cited for illegally possessing alcohol and the mayor gave him a $100 fine.

Anthony: In *Tumey*, the mayor of the town actually got a bonus every time he found someone guilty.

John: For finding Tumey guilty, the mayor personally received $12. Profit. Straight into his pocket.

Anthony: There's a big problem there. And the Supreme Court rightfully found that you have a right to a neutral decision-maker when the state prosecutes you. And if your judge is making a profit off of your conviction, but not if you're found innocent, that violates due process.

John: We're going to come back to the *Tumey* case later in the episode because the issue of when a judge ceases to be a neutral adjudicator -- if they're issuing fines that then fund the court -- is still very much a live one today. But before we get to current procedural due process controversies, there is one more thing to talk about. And that's the distinction between rights and privileges.

Anthony: So the courts for a long time made a distinction between rights and privileges.

John: If you remember way back to Episode 3, the word privileges in the Privileges or Immunities Clause of the 14th Amendment essentially was a synonym for rights. Here, the word privilege is being used in the modern sense. A privilege is something that's given to you but can be taken away because it's not an inherent right.

Anthony: If the government was going to take away your rights, it had to give you due process first. Privileges though, like having a government job or receiving some kind of benefit from the government, those could be taken away without any due process.

John: There's a famous case from 1892 where the mayor of New Bedford Massachusetts fired a policeman without a hearing because the officer had engaged in political canvassing. The high court of Massachusetts ruled that that didn't violate due process.

Anthony: Justice Oliver Wendell Holmes, when he was a Justice on the high court of Massachusetts said -- actually you could say he quipped -- that while the officer had a right to talk politics, he did not have a constitutional right to be a policeman. That was a privilege, and it could be taken away without notice or a hearing.

John: But over the last century the distinction between rights and privileges has eroded. And in the 1970s, during what's called the due process revolution, it was mostly abandoned.

Anthony: And that revolution is really about expanding the things that people have a liberty or property interest in. The Court says if you lose your welfare benefits that could have really dire consequences. So you should get a notice and a hearing before a neutral decision maker before they can be taken away. Drivers' licenses are another example. That used to be thought of as a privilege, but in modern life, especially in rural and suburban areas, the ability to drive is really an important interest, and the Supreme Court says you get procedures before it's taken away.

John: There's cases about temporary suspensions from public school. Starting in the 1970s, the Supreme Court says that requires due process. If you're going to fire a public employee, that requires due process. There is even a due process right to notice and hearing before the government can seize consumer goods. In a 1972 case called *Fuentes v. Shevin*, a consumer had purchased a stove and a stereo on a payment plan, but she stopped making payments after the stove allegedly broke and there was a dispute about getting it fixed. The company she owed money to got a court order to have the goods repossessed. But in 1972, the Supreme Court

said that was unconstitutional without certain procedural safeguards to allow consumers to present their side of the story to the court. We're going to come back to the *Fuentes* case, but first a break:

Break

John: Welcome back. Procedural due process is part of centuries old legal tradition. Before the government can take away your life, liberty, or property it has to follow fair procedures. But just because the ideas are old, that doesn't mean that everything is settled. It still requires litigation to ensure that process is meaningful. Later in the episode we're going to talk about cash bail and the due process that is required to ensure that people aren't stuck in jail for no good reason. But first we're going to talk about a bunch of different situations where these ancient notions of what due process requires are still evolving.

Dana: There's been a presumption in the law for hundreds of years that people know what the law is and so we've all heard the expression ignorance of the law is no excuse.

John: That's Dana Berliner. She's IJ's Senior Vice President and Litigation Director.

Dana: It made a lot more sense when we were talking about laws that were a lot more knowable and obvious.

John: Do not murder people. Do not steal from people.

Dana: And what has happened since then is that -- particularly with process -- the government will design these incredibly baroque and unknowable -- baroque and difficult to understand procedures and then say that everyone is responsible for understanding them. And they just can't be.

John: To pick one example, there's the case of *Mosley v. Texas Health and Human Services Commission*, which was decided by the Texas Supreme Court earlier this year. Patricia Mosley is a state licensed nurse aide who worked in a group home. She was accused of neglecting a patient, and we don't know if she actually did it, but that's not what the case at this stage is about. It's about whether the procedures the state followed to strip her of her license and livelihood were fair.

Dana: Patricia Mosley was dismissed from her job and she wanted to challenge that. She had a hearing it didn't go well. She wanted to appeal. And the agency told her the process of how to appeal, and it was wrong. So that when she did appeal, the agency then came back and said, ah you have missed your deadline. True, it was the deadline that we told you. But that wasn't the real deadline. You should have figured it out.

John: This is how Texas Supreme Court Justice Jimmy Blacklock characterized the state's argument:

> **Justice Blacklock**: According to the government, instead of simply following its administrative rule, Mosley should first have read Chapter 48 of the Human Resources

> Code. Then she should have read Chapter 2001 of the Government Code, because Chapter 48 of the Human Resources Code refers to it. Then she should have compared those statutes to the Administrative Code sections quoted in the government's letter. Next, she should have correctly discerned that the Administrative Code sections quoted in the letter do not comport with the requirements of the Human Resources Code and the Government Code on the necessity of a motion for agency rehearing. After reaching that conclusion, she should have known that, even though in some sense the Administrative Code has "the force of law," it is nevertheless inferior to statutes. She therefore should have followed the statutes instead of the rules and moved for rehearing at the agency before seeking judicial review.

John: That was the government's argument. And a state appeals court agreed.

Dana: So many procedures right now are virtually impossible to understand. I frequently don't know how anyone functions in the world who is not a lawyer. Because so there so many steps ordinarily that people have to follow to just get their rights considered and it's very difficult to figure out what those steps are.

John: Fortunately, the Texas Supreme Court reversed. Patricia Mosley is going to get to appeal. But it took a lot of pro bono attorney work, and lots of people like Patricia simply aren't going to find legal help.

Dana: Another is a case that we litigated years ago in which the government of in New York had designed a system where they would hold a hearing about a redevelopment project and they would tell you it was a hearing about a redevelopment project.

John: You would get a letter in the mail that said, hey big news some exciting stuff is happening in your neighborhood. There's going to be a new development.

Dana: They would not however mention the fact that it was also a hearing about whether your property could be taken sometime in the future.

John: By eminent domain. And then used not for a public use like a road or a school but turned over to a private developer.

Dana: And they would definitely not mention that you had exactly 30 days after the decision from that city council meeting to challenge whether your property could be taken sometime in the future. And if you didn't do it, you can never do it.

John: Property owners were just supposed to read the statute and regulations and figure out how and when to challenge the seizure.

Dana: So they could condemn your property 10 years in the future and you would have absolutely no recourse.

John: IJ represented a property owner who had bought some buildings that were in complete disrepair on the waterfront in Port Chester, New York. He renovated and restored them. And just when he finished, city officials decided to seize them and give them to a developer. And he missed his chance to challenge that seizure in court because he didn't know about the 30-day deadline. So he and IJ sued and argued the lack of adequate notice violated due process.

Dana: And actually the federal courts said that when the government is depriving you of something -- in this case the ability to challenge whether your property can be taken from you -- they have to actually tell you about it.

John: Fun fact: Justice Sotomayor, before she was on the Supreme Court, ruled for our client twice in this case. Anyway, New York law now requires better notice and a more knowable procedure when it's going to use eminent domain. But still. Providing adequate notice is not a new idea, and it took nine years of litigation to win the lawsuit.

Dana: There are a couple issues that if the Supreme Court decides them could be very helpful. One has to do with notice. If the Supreme Court were to say that for any municipal deprivation of property rights or Liberty, the government has to send you a personal notice explaining what is going on, that would be a major advance. Another thing would be if the Supreme Court were to hold that processes have to be relatively knowable and in some cases ignorance of the law, if it's of complicated process, is an excuse. That would be a huge advance.

John: Another aspect of modern procedural due process is that government sometimes uses process as a weapon. In practice, procedures often aren't actually safeguards to protect

people's rights. They're just a bunch of hoops to make it costly to exercise those rights. For example:

Dana: In our Philadelphia forfeiture case, the person was notified that their property was being forfeited and they had to come to a courtroom.

John: We just negotiated a settlement in a class action against the city of Philadelphia. The city was using civil forfeiture to take cash and cars and homes from people without providing due process to ensure that the property was actually connected to a crime. The property would get seized, and then people would have to go to court to get it back.

Dana: And they had to come and they had to sit there for hours. And if they didn't show up, they lost any opportunity to challenge the forfeiture. But if they did show up nothing would happen. They would talk to the prosecutor. The prosecutor would try to get them to fill out lots and lots of paperwork. And they would be sent home to come back in another month to do the exact same thing. People would have to take off work. They would have to get there and if you wanted to fight the forfeiture you just had to keep showing up over and over again. And the purpose of this process was a war of attrition. You make people come in enough and miss enough days of work -- they're just going to give up. And that's what many many people did in Philadelphia.

John: That's process. They got notice. They got a hearing. But none of it was meaningful.

Dana: The courtroom was set up where the prosecutors occupied both the prosecution and the defense tables. The prosecutors called the cases. The prosecutors announced the result in the

cases. The prosecutors did virtually everything except a little bit of scheduling. And you were -- there was no actual neutral adjudicator. There was no knowable process other than come back over and over and hope for the best. There was not really an opportunity to present evidence. Although I suppose if you came back enough times maybe that could have happened. The court didn't even know for sure whether it was applying the rules of criminal or civil procedure, which are not the same.

John: Another area where legal tradition is still catching up with the modern world is with what it means to have a neutral decision maker. Before the break, we talked about *Tumey v. Ohio*, the 1927 Supreme Court case where the mayor personally profited from imposing fines and fees.

Dana: In *Tumey v. Ohio*, it was very simple. The judge was paid x amount of money for every case he decided and X plus Y for every case where he found someone guilty. So easy to see the incentives.

John: Modern courts and also prosecutors offices are still funded by fines and fees. But the funding mechanism is a little more complicated than in *Tumey v. Ohio*.

Dana: Now in order to understand what's really happening you've got to delve into municipal budgeting. You have to find out where exactly the money is coming from and what exactly it's getting spent on, which means like looking at receipts for hundreds of thousands maybe millions of dollars. So it's more difficult to bring these challenges. It's very expensive to bring these challenges. When people manage to bring them and put together the evidence, they can win

because these are the constitutional requirements of due process. But it takes so much to show how they apply to modern-day procedural systems.

John: So those are a bunch of big things in the arena of *civil* due process that are hot topics today. Notice must be adequate. Process has to be meaningful. Courts and prosecutors at some point aren't neutral if their budgets depend on fines and forfeitures. That's civil due process. But there is also a separate universe of issues with *criminal* due process.

Diana Simpson: Criminal procedural due process is totally different animal.

John: That's Diana Simpson. She's an attorney at IJ, and she's the lead attorney in a lawsuit we filed in April against the City of Chicago which is violating, among other things, due process by impounding people's vehicles without adequate safeguards to protect people's rights.

Diana: The criminal trial is the point at which you have the most protections in any realm whether civil or criminal.

John: With civil due process, you get notice and some kind of hearing. At a criminal trial, you get much more process.

Diana: You have a ton of constitutional protections at trial. And that's by design. And that is really the way that it should be because you're talking about putting someone in a cage for for a very long time based on the outcome of this trial. So one example is that the Fourth Amendment prohibits evidence being used against you at trial if it was obtained improperly.

John: The Fifth Amendment protects against self-incrimination and double jeopardy. And the Sixth Amendment has a right to a speedy trial and the right to assistance from a lawyer.

Diana: And then there's other things like the right to obtain exculpatory evidence that's in the government's possession. There's also the presumption of innocence and the requirement that the government prove its case beyond a reasonable doubt. These things aren't enumerated in the Bill of Rights. But the Supreme Court has read them into the Constitution as other protections of due process.

John: In a civil case, you aren't guaranteed a lawyer. The government doesn't have to prove its case beyond a reasonable doubt. In a criminal case, you get those additional protections. But there's a big catch. All of those additional procedural rights come at trial. They don't apply pretrial. And the vast majority of criminal defendants plead guilty before trial.

Diana: So the pretrial process is largely exempt from the kind of adversarial hearings that exist within the civil procedural due process world.

John: So not only do pretrial detainees not get the array of protections that attach at trial, but they don't even get the rights to adversarial hearing that you get in civil cases.

Diana: So this is something that is basically unregulated. And it really depends on what state you're in, whether you're in state court or whether you're in federal court -- and then what kind of protections the court wishes to extend to you.

John: Earlier I talked about *Fuentes v. Shevin*, the case where the Supreme Court ruled that a court couldn't order the repossession of stove and stereo without an adversarial hearing. That was in 1972. Three years later, in 1975 in a case called *Gerstein v. Pugh*, the Supreme Court ruled that while consumers may have a right to a hearing, pre-trial detainees, who are sitting in jail, do not have a right to quote "adversarial safeguards."

Diana: Think about that for a minute -- that the Constitution provides greater protection to someone keeping a refrigerator than for an imprisoned human being. That's absolutely crazy.

John: Which isn't to say that the pretrial context is devoid of process. There are a lot of processes. There are search warrants and arrest warrants, arraignments, grand jury indictments. There's a requirement that you are brought promptly before a magistrate after arrest. But according to Professor Niki Kuckes of Roger Williams Law School, pretrial defendants are not so much getting process as being processed. According to the Professor Kuckes, quote:

> **Kuckes article**: It is not an exaggeration to say that defendants constitutionally may be arrested, charged, prosecuted, and detained in prison pending trial with fewer meaningful review procedures than due process would require in the preliminary stages of a private civil case seeking the return of household goods.

Diana: States have the option to have more meaningful procedures which some of them have implemented sometimes but the Supreme Court has not required it.

John: So that leads to the question of why the Supreme Court hasn't required more meaningful pretrial process?

Diana: So one justification the Supreme Court gave in *Gerstein* was that while due process may not apply pretrial defendants do get protections provided elsewhere in the Bill of Rights -- namely the Fourth Amendment. There is a right to be free from unreasonable seizures, and that applies to pretrial defendants. What that means for criminal defendants awaiting trial is that they are entitled to a hearing where a judge must find probable cause to support the criminal charges. The defendant is not entitled to be present at that hearing and no hearing is required at all when a grand jury has indicted the defendant.

John: But as Professor Kuckes says, and by the way we'll post her article on ShortCircuit.org, that reasoning is not really very persuasive. There's no reason that two different parts of the Constitution can't both apply at the same time.

Diana: Another reason the Supreme Court gave for refusing to mandate these procedural protections pretrial was that it was just an initial stage and defendants are eventually going to get all kinds of rights when they go to trial. But there's a big problem with this logic. When you actually look at how many people go to trial, it's vanishingly small. So for example last year nearly 80,000 people were federal criminal defendants, but only 2% of those cases went to trial. 90% pleaded guilty with the remaining eight percent having their cases dismissed at some point. And trials have been on the decline. So for the past two decades the number of federal criminal defendants who have gone to trial has fallen 60%.

John: And at the state level, the numbers are similar.

Alec Karakatsanis: One of the scandals of our current American legal system -- this system of what's been called mass incarceration -- is that all of us -- lawyers, judges, all of us, our culture in general -- have become so desensitized to what it means for government agents to take someone from their home and family and church and school and community and put them in a cage. We do it so often that we're not moved by it anymore.

John: That's Alec Karakatsanis. He's the founder and executive director of Civil Rights Corps, a nonprofit law firm.

Alec: And one group of people whose desensitization has become nearly complete is the American judge. And as a result judges stopped requiring good reasons for the government to put people in jail cells. And I think that simple truth more than perhaps anything else explains the American money bail system. We stopped requiring good reasons to put people in jail cells so much so that the main reason that people are in jail cells in this country every single night is that they can't afford a monetary payment.

John: When we come back from the break, we'll head to Harris County, Texas, which operates the third largest jail in the country. We'll take a look at its system of cash bail and at how the Supreme Court's hands off approach to pretrial detention is playing out.

Break

Alec Karakatsanis: I don't think a lot of politicians and I don’t think the public at large fully comprehends how grotesque our jail cells have become. We have allowed our cages all over the country to become grotesque torture chambers.

John: That’s Alec Karakatsanis. He’s the founder and executive director of Civil Rights Corps, a nonprofit law firm. He’s suing Harris County, Texas, over its system of cash bail and its practice of detaining people accused of misdemeanors before trial. Harris County, which includes Houston, operates the nation’s third largest jail and about 50,000 people a year are arrested there for misdemeanors.

Alec: So when someone is sent to jail for even a short period of time we're sending them to a place where there is a significant chance they will be sexually assaulted; where they will be given a communicable infectious disease; where their medical treatment will be non-existent and grossly inadequate; where they are likely to be deprived of fresh air, adequate food, sunlight. Not only are they going to be missing the things that we all take for granted every day, but but we're also subjecting them and their bodies to incredible trauma. Many of my clients have been tasered numerous times in dark corners where there's no surveillance cameras in the jail. Others of my clients have been sexually assaulted routinely in jails. And then routinely my clients who are are in need of a very particular medication for liver issues, kidney issues, HIV, hepatitis, psychotropic medication for mental health issues, depression. They are not given that medication. So when someone is kept in jail for even a few days think about what happens to them. If they were if they had a low income job where there where you can't just take vacation

anytime you want and you miss a shift or miss a day or two of work you've now lost your job. If you are the sole caretaker of a young child, you don't know where your child is. Now maybe the state comes in and takes your child away because you were gone for a couple of days. If you had a medication that you needed for schizophrenia. Now you've gotten a break from your medication. And now you may have been have a psychotic break. If you are dependent on, like one of my clients, on a waiting list for a liver transplant and you missed the preparatory work that's required before you can be eligible and you miss a few days of that and maybe now your liver transplant is in jeopardy. So all of these things that people don't necessarily think about right. It's no surprise that all of the empirical evidence shows that even two or three days in jail make someone more likely to commit a crime in the future. Why is that? It's because people are more likely to commit crime when their lives are in crisis -- when you take away their job, when you take away their kids.

John: The Supreme Court has said it is permissible to incarcerate people before trial for two reasons: to ensure they don't flee and to prevent them from committing more crimes. But as we talked about before the break, what the Supreme Court hasn't done is stepped in and mandated that states take meaningful steps to ensure people aren't sitting in jail for no good reason. And so in the United States today, we put a lot of people in jail before their trials. Vastly more than we did even a few decades ago. Here's Nathan Hecht, the Chief Justice of the Texas Supreme Court, giving a speech to state legislators earlier this year.

> **Chief Justice Hecht**: Twenty-five years ago, a third of the jail population was awaiting trial. Now the percentage is three-fourths. Most of those detained are non-violent, unlikely to reoffend, and posing no risk of flight. Many are held because they're too poor

> to make bail. Though presumed innocent and no risk to public safety, they remain in jail, losing jobs and families, and emerge more likely to re-offend. The toll on them personally also burdens communities. And on top of that, taxpayers must foot the bill—a staggering $1 billion per year to jail those who should be released. Besides the costs, detaining someone solely because he's poor is against the law. It violates fundamental constitutional rights. In 21st-century Texas, it ought to be unthinkable.

Alec Karakatsanis: One of the defining features of the modern American legal system is the extent to which how our laws are written and inscribed on our monuments and in our constitutional scrolls -- the difference between those legal principles and how the law is lived and experienced every day. Particularly by impoverished people in our courts all over the country. And Harris County is no exception. In Harris County what happens every single day deviates enormously from what's supposed to happen if one were just reading the cases and reading the Constitution.

John: After we started making this podcast, the county reformed its system. We're going to describe the old system, which is still the way things work in most jurisdictions around the country. But spoiler alert, the lawsuit that we're talking about -- challenging Harris County's money bail system for misdemeanors -- was successful. Anyway, we talked to one of the plaintiffs who challenged the old system.

Loetha McGruder: I grew up in Oakdale, Louisiana. That's a little place small town. Everybody's in everybody business. Growing up was you know kind of tough, but I got through it moved here to Texas with my dad when I was 16.

John: That's Loetha McGruder. In 2016, she was a 22-year-old mother of two. Her oldest has Down's Syndrome.

Loetha: It was hard trying to have babysitters have somebody watching him all the time when I had to work sometimes double shifts, but I did it. I did it for a long time.

John: She had just moved to Houston and gotten an apartment and gone to a job interview. But on her way back home from the grocery store, she was pulled over for going 52 in a 40 mile an hour zone. And she gave the officer a false name.

Loetha: He told me that they were taking me to jail because it was a failure to ID, which at the time I was right down the street from my house, you know. It wasn't far -- you know could have been a warning or something like that just for a traffic stop. Which I don't even think I was going that fast because it was raining. But they put me in the back of the police car and by the time I got in the back of the police car. The officer was like you need to tell us your name now when your birthday. And I was like, okay, you're right. I gave him my name and I gave him my birthday.

John: Her bail was set at $5,000. If she'd been able to pay $500, she'd have been set free.

Loetha: When he told me that it was $5,000 and that I couldn't get a PR bond, you know, my heart just fell because I was like, You know how long I'm supposed to be in here.

John: A PR bond is a personal recognizance bond. It’s release with just a promise to come back to court.

Loetha: It's so many other women around here that don't even know what they're charged for, you know, how long they're going to be here. Should they be comfortable and -- their family isn't calling or can't get in contact with them. You know that -- watching that and just seeing that. It hurt me.

John: After two days in jail, she learned she was pregnant.

Loetha: After the two days in the holding cell they moved me down to medical, which was more than 15 women in one holding cell -- no beds, no cots, nothing. Just brick floor, you know cement that's it. It had a bunch of pregnant women in there that were farther in their pregnancy than what I was. And honestly the condition in there it’s very bad. Because those women were laying on the floor like the cement floor with bellies babies in their belly.

John: While she was in jail, she lost on out the job she had interviewed for. Her car was impounded, and her fiance had to bike to work.

Loetha: So he had to ride his bike to work every day while I was in jail and afterwards until we got another car. But what I what I lost the most was the fact that. I went to jail that day and I thought I was coming to a new city. You know: change. Everything's gonna be different. I'm gonna start over and this is going to be great. It didn't happen that way.

John: Ultimately, Loetha spent four days in jail. There was no inquiry into whether she was a flight risk or a risk to public safety. In Harris County, you didn't get process. You got processed.

Alec: So in Harris County, for example, people were brought in to video hearings in the basement of the jail. They're told to stand in front of a red square. They're not given a lawyer. They're not permitted to speak. They're not told really what the hearing is about or what it's purposes are. They're not provided any findings that explain the judges thinking. They're just told that they're free to go home if they give them a certain amount of money. And if you were too poor to pay that amount of money, you are stuck in jail. No judge had made a finding that you needed to be in jail. You were just in jail because you're poor. And that's the way the system works not just in Harris County but all over the country in all 50 states.

> **Man**: Your honor may I speak?
>
> **Judge**: No. Probable cause for your arrest Mr. Rodriguez. Bond is set at $5,000. You're denied a pretrial release bond.

John: We're going to play some clips from bail hearings in Harris County. At trial, thousands of these hearings were entered into evidence.

> **Judge**: Your bond will remain at $5,000. Your personal bond is denied. You want a lawyer or you going to hire your own?
>
> **Man**: Yeah, I want a lawyer. May I say something?
>
> **Judge**: No. Go ahead and step to your left.

John: Again a personal bond is basically being released without paying any money up front. The judges were pretty stingy with those.

Judge: You were also what?

Man: I was also asking if I can request a PR bond. I do work tomorrow.

Judge: Denied.

Man: I got a question sir. Do you think it's possible I could get a PR bond, because my job is on the line and my apartment too. Do you think that's possible?

Judge: It's possible but you're going to have to ask Judge Stanley when you get to him. It's not happening today.

Man: Can I get a PR bond?

Judge: Not from me. You can ask Judge Harmon when you get to him but here we are Friday night. You won't see him until Monday.

Judge: You've got a misdemeanor charge of driving with a suspended license and some kind of prior conviction…. There is probable cause in this case. Your bond is set at $1,000. Are you asking for a court appointed lawyer?

Man: Yes sir and may I ask one more question of the court?

Judge: What's your question?

Man: I have a custody hearing with my son and my daughter. That would be next Thursday. I really would like to make it to that. If I could get a PR bond if it pleases the

court that would make me very happy and my family happy. We're trying our hardest to get my family back together. My wife was also in the car she got arrested too--

Judge: It would make me happy if you could get out of jail on your own. I've lowered your bond but there's not going to be a personal bond….

Man: I promise you with everything in the world in court.

Judge: The bond is set at $1,000. I've lowered it. That's as good as it's getting today.

John: If you don't follow what's going on even for a split second, that could cost you your freedom.

Judge: Do you have any place else to live if I consider you for a personal bond?

Man: No sir I don't.

Judge: Alright your bond will stay at $1,500. I have to deny your personal bond. Would you like a lawyer to help you or are you going to hire your own?

Man: What is a personal bond?

Judge: A personal bond is where you have a place to stay. You just told me you don't have a place to stay so I'm not going to consider you for personal bond.

Man: I can stay at my --

Judge: Do you want a lawyer to help you with this or not?

Man: Yes I do. I can stay at my

Judge: I'll put you down for a lawyer. Go ahead and step to your left.

John: And you're really not supposed to talk without permission.

Judge: When you were interviewed by pretrial you refused to sign the bond. Now do you want me to --

Man: I couldn't read it. I didn't have any glasses.

Judge: Stop talking while I'm talking. You don't want to do that.

Judge: Why did they set it at two? He's got a bunch of juveniles but I'm showing he's here as an adult.

Man: They told me it was a misdemeanor --

Judge: Don't don't don't say anything

Man: Sorry. I apologize.

Alec: While we have this right in theory of being innocent until proven guilty the reality in our legal system is nobody exercises their right to trial to meet that standard -- to force the government to meet that standard. In reality the vast vast majority of people are pleading guilty. And they're pleading guilty largely because they're stuck in jail prior to trial. They can't get out because they can't make a payment. The vast majority of people that are arrested for low-level municipal crimes should be released right away after arrest and they should be told here's your next court date come back so we can get the legal process started.

John: But what happens when we do the opposite -- when we make pretrial detention the norm rather than the exception? I asked that question of Dr. Megan Stevenson who is an economist and professor of law at the Antonin Scalia Law School at George Mason University. Dr. Stevenson's research on Harris County's bail system was cited by both the Fifth Circuit court of appeals and the federal district court below.

Megan Stevenson: So it's long been documented that the people that are detained pretrial are more likely to be convicted. They receive harsher sentences. And they commit more crime in the future.

John: But until recently it hasn't been clear if there was just correlation or if in fact there is causation. Sure people who are detained pretrial have worse outcomes. But is that because they detained pretrial or is it because of something else?

Megan Stevenson: Research produced in the last couple of years makes it clear that there definitely is a causal path between being detained pretrial and adverse downstream consequences in terms of case outcomes.

John: In the past, researchers have done regression analysis comparing outcomes for people who get released pretrial and those who don't.

Megan Stevenson: This is a bit of a tricky research proposition. Earlier research has just compared case outcomes for detained groups and released groups and tried to control for some of the differences by using a multivariate regression.

John: You can control for criminal history and what people are charged with, but you can't control for things like how skilled a defendant's lawyer is or how strong the evidence against them is. But within just the last couple years, new studies have used research designs that avoid what's called omitted variable bias.

Megan Stevenson: In order to be able to identify the causal impact of pre-trial detention without concerns about confounds for these types of variables you need some sort of quasi experimental research design.

John: And there are a handful of different kinds of natural experiments that have allowed scholars to test for causation.

Megan Stevenson: An example of a an experimental research design that has been used in a paper that I wrote and and also in some papers other people have written is called the random assignment to judges research design.

John: Researchers can identify lenient and harsh judges and then look at a huge sample of defendants before each type of judge.

Megan Stevenson: On average the characteristics of these two groups should be very similar because they were randomly divided in half. And the only thing that is expected to really be different about these two groups of defendants is that one group had a higher rate of pre-trial detention than the other group.

John: Researchers including Dr. Stevenson used this method to study money bail in a handful of different cities. And as whole, the studies show that pretrial detention isn't just correlated with bad outcomes, it most likely causes them. Dr. Stevenson and some coauthors also studied the bail system in Harris County.

Megan Stevenson: So in the Harris County case we use two research designs to try and identify the impacts of pre-trial detention. The first one is a regression with a very rich set of controls including controlling for the bail amount. So we're comparing defendants that were released and detained on the same amount of bail and comparing what their case outcomes were and future arrest rates. We also use a different research design, which is a different type of natural experiment so to speak where we compare defendants that were arrested on Tuesday with defendants that were arrested on Thursday. Now what's different about these two groups? In general there's not a lot. Like the types of offenses that they're charged with are very similar. Their gender, race, demographic breakdown is very similar. The bail amounts are virtually identical of those that happened to be arrested on Tuesday versus arrested on Thursday.

John: But there is one difference, and that is that pretrial detention rates are higher for people arrested on a Tuesday than for people arrested on a Thursday.

Megan Stevenson: Thursday is a lot closer to a weekend. For whatever reason most people who bail out of jail do so within the first two days after arrest. And if those first two days after arrest are in the middle of the week, it might just be harder to get somebody on the phone to get them willing to take time off from school or work to come down and help you out.

John: Plus payday is on Friday, so family and friends are more likely to have cash on hand to pay bail at the end of the week.

Megan Stevenson: Meanwhile, you are much more likely to be able to reach somebody who is able to come and bail you out and your chances of being released are simply higher. So the main difference between those arrested on a Tuesday versus those arrested on Thursday is just that pre-trial detention rates wind up being lower.

John: Using data from hundreds of thousands of misdemeanor cases, Dr. Stevenson and her coauthors found that people detained pretrial in Harris County are more likely to plead guilty, more likely to be sentenced to jail, and receive longer sentences than similarly situated defendants. And they're more likely to commit crimes in the future. When the lawsuit against Harris County made it to federal court, the study was part of the evidence that the courts relied on. Here's a quote from the district court's 2017 opinion in the case, paraphrasing the study's findings:

> **District court ruling**: if, during the six years between 2008 to 2013, Harris County had given early release on unsecured personal bonds to the lowest-risk misdemeanor defendants 40,000 more people would have been released pretrial; nearly 6,000 convictions and 400,000 days in jail at County expense would have been avoided; those released would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors in the eighteen months following pretrial release; and the County would have saved $20 million in supervision costs alone.

John: So that's bad policy. And it raised two constitutional questions.

Alec: The first question presented in our case is: If the government wants to deprive a presumptively innocent person of her right to bodily liberty prior to trial, does it have to have good reasons? The second substantive constitutional right that this case implicates is the Equal Protection Clause of the Fourteenth Amendment. And it basically says that if the government determines that someone is eligible for release from custody can it make that release contingent solely on the person's ability to make a monetary payment. And if so, does the government have ...to offer really really good reasons for why it's making that release contingent on making a payment. And then the case raises some interesting procedural due process questions. So given that the government has to have good reasons for depriving me of my liberty and it it has to make a finding that depriving me of my core bodily liberty is necessary to further some important government interest given that what safeguards are required at a hearing before the government can do that? Is it allowed to deprive me of that liberty without even letting me speak? Is it allowed to deprive me of that at a hearing in the basement of a jail on video where I'm not permitted to confront any of the evidence against me? Is it allowed to deprive me of that without making any findings on the record so that I even know the reasons that it's done so that I can file an appeal. All these are questions that procedural due process answers.

John: In 2017, a federal district court said Harris County did not have good reasons. And it was not giving people adequate procedural safeguards. And then last year, in 2018, the United States Court of Appeals for the Fifth Circuit upheld the ruling.

> **Fifth Circuit**: As the district court found, the current procedures are inadequate. … Far from demonstrating sensitivity to the indigent misdemeanor defendants' ability to pay, Hearing Officers and County Judges almost always set a bail amount that detains the

> indigent. In other words, the current procedure does not sufficiently protect detainees from magistrates imposing bail as an “instrument of oppression.”

John: The case isn’t over. Right now the parties are wrangling over what exact procedures will replace the old ones. And there has been a significant development since the Fifth Circuit’s ruling, which is that the residents of Harris County voted the incumbent judges out of office and replaced them with judges who are open to bail reform and who want to settle the lawsuit.

Alec: One of the exciting things about the Harris County case is it's taking an area of the law that was utterly lawless. People are just being jailed on the basis of a chart, you know, if you're charged with this offense, it's $500. If you're charged with that offense, it’s a thousand dollars. Or numbers that judges are pulling out of their head, right? $1,400 $5,000. $73,000. These are bail amounts that judges set every day around the country. The Harris County case, and the other cases like it that we're bringing around the country, are bringing some intellectual and evidentiary rigor to that that decision. And they're asking does the government have good reasons, and has the government provided adequate safeguards in explaining why those reasons have been met?

John: Evidentiary rigor. One of the things the district court noted, was that even though the now-former Harris County judges were certain that money bail was crucial to ensuring that defendants would return to court, nobody was actually keeping track of how often defendants failed to appear after being released. And even though the they were certain that money bail was necessary to prevent crime, nobody was actually keeping track of new criminal activity rates. Vast numbers of people were being herded through this system, and no one was

analyzing whether it did what it was supposed to do. Which is yet another reminder that when rights are at stake, it's important that courts not accept government assertions at face value.

Conclusion

John: Okay, that's our show. We'll be back soon with an episode on substantive due process. But first, on episode seven, we're going to take a look at incorporation, the idea that the 14th Amendment takes the rights enumerated in the Bill of Rights, and applies them to the states. Way back on Episode One, we said it's only thanks to the 14th Amendment that you can sue a state in federal court for violating your right to free speech or your right to be free of unreasonable seizures. That's what the 14th Amendment was intended to do, but it's not something to be taken for granted because, as we'll see, for a long time the Supreme Court was not on board.

Credits: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was produced by Goat Rodeo. Writing and narration by John Ross. Vision and expert guidance by Sheldon Gilbert. Project management by Rachel Hannabass. Research and fact checking by Nicholas Mosvick. With voice work by, Dick Carpenter, Scott Bullock, Melanie Hildreth, Robert McNamara, Kirby West, and Paul Sherman.