

processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore, the limitations imposed by the Court on the states are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the context of the criminal processes maintained by the American States.”¹⁰²⁶

The Elements of Due Process

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a state may proceed instead by information.¹⁰²⁷ Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,¹⁰²⁸ even aside from the notice requirements of the Sixth Amendment.¹⁰²⁹ Where, of course, a grand jury is used, it must be fairly constituted and free from prejudicial influences.¹⁰³⁰

302 U.S. 319, 325 (1937), or whether it “offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses,” *Rochin v. California*, 342 U.S. 165, 169 (1952).

¹⁰²⁶ *Duncan v. Louisiana*, 391 U.S. 145, 149–50 n.14 (1968).

¹⁰²⁷ *Hurtado v. California*, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. *Albright v. Oliver*, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

¹⁰²⁸ *Smith v. O’Grady*, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of “burglary with explosives” carrying a much lengthier sentence voided). See also *Cole v. Arkansas*, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); *In re Ruffalo*, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); *Rabe v. Washington*, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

¹⁰²⁹ See Sixth Amendment, Notice of Accusation, *supra*.

¹⁰³⁰ *Norris v. Alabama*, 294 U.S. 587 (1935); *Cassell v. Texas*, 339 U.S. 282 (1950); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Pierre v. Louisiana*, 306 U.S. 354 (1939). On prejudicial publicity, see *Beck v. Washington*, 369 U.S. 541 (1962).