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Due Process and the Failure of the Criminal Court

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By Steven Zeidman*Φ

It is hard to argue against due process, fairness and thorough pre-arrest investigations, even in the case of Eric Garner where the police officer was caught on videotape with his arm around Mr. Garner's neck as he ignores Garner's repeated cries that he could not breathe. Even with that direct evidence, it must be the case that due process demands, as Missouri Governor Jay Nixon stated regarding the homicide of Michael Brown, a full and fair investigation.^{[1] (# ftn1)}

The problem, however, is that in most criminal cases there is no such pre-arrest investigation, let alone a full one. While police organizations demand that officers receive the same rights as any other defendant, they should be very careful what they wish for. In the typical criminal case, where the accused is a person of color, it is usually arrest first and investigate later, if ever.

[\(<http://urbanlawjournal.com/files/2015/05/FreddieGrayPrecinctProtest.jpg>\)](http://urbanlawjournal.com/files/2015/05/FreddieGrayPrecinctProtest.jpg)

[“Protest at the Baltimore Police Department Western District building at N. Mount St. and Riggs Ave \(<http://commons.wikimedia.org/wiki/File:FreddieGrayPrecinctProtest.jpg>\)](http://commons.wikimedia.org/wiki/File:FreddieGrayPrecinctProtest.jpg).” by Veggies is licensed under **[CC BY SA 3.0 \(<http://creativecommons.org/licenses/by-sa/3.0/deed.en>\)](http://creativecommons.org/licenses/by-sa/3.0/deed.en)**

The homicides of Eric Garner and Michael Brown at the hands of police officers led to immediate calls for local and federal prosecutors to swiftly issue indictments, make arrests, and bring civil rights charges. Elected officials, however, cautioned against a rush to judgment and, citing time-honored principles of due process, asked for patience. New York City Mayor Bill de Blasio, speaking at a church the morning of a march held in August to demand justice for Mr. Garner, declared “We all believe in due process, fairness, a full investigation, a full legal process. We believe everyone should be treated equally in that process.”^{[2] (# ftn2)} Mayor James Knowles III of Ferguson, Missouri stated similarly “Justice must be done, so we have to give this officer due process, we do have to continue on and allow the investigation to go on as long as it's needed.”^{[3] (# ftn3)} Those messages

were
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investigations dragged on for months and innumerable witnesses were interviewed and testified in the Grand Jury.

Appeals to due process also surfaced in the related debate about how people should respond when police officers attempt to place them under arrest, even for minor transgressions. After all, the Garner tragedy started with his arrest for selling individual cigarettes, while Michael Brown was approached initially for jaywalking. In response to growing complaints over the use of force by police officers when effectuating arrests, de Blasio urged that “When a police officer comes to the decision that it’s time to arrest someone, that individual is obligated to submit to arrest . . . They will then have every opportunity for due process in our court system.”^{[4] (# ftn4)} To underscore his point, he referred subsequently to a “thorough” due process system.^{[5] (# ftn5)} New York Police Department Commissioner William Bratton, in lockstep with the Mayor, proclaimed that “The place to argue your case is in court, not in the middle of the street.”^{[6] (# ftn6)}

http://urbanlawjournal.com/files/2015/05/Bill_de_Blasio_11-2-2013.jpg

Mayor of New York, Bill de Blasio

http://commons.wikimedia.org/wiki/File:Bill_de_Blasio_11-2-2013.jpg (by [Kevin Case](#)

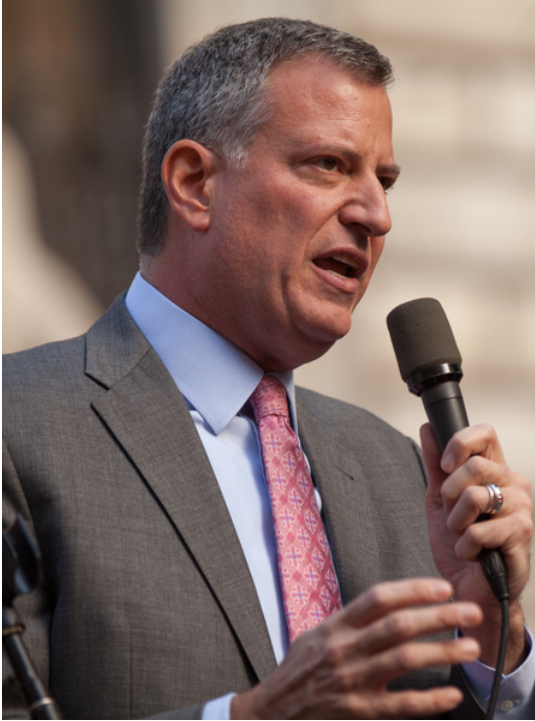
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The Due Process Clause of the Constitution commands that no one may be “deprived of life, liberty or property without due process of law.”^{[7] (# ftn7)} Although the clause itself speaks in general terms, it has come to be understood legally and popularly as requiring fair and established rules and procedures. As Supreme Court Justice Felix Frankfurter wrote almost 65 years ago, “Due Process is that which comports with the deepest



notions of what is fair and right and just.”[\[8\] \(# ftn8\)](#)

In the cases of Garner and Brown, the fairness, or due process, raised by the remarks of elected officials had to do with pre-arrest investigation. When Missouri Governor Nixon called for a “vigorous prosecution”[\[9\] \(# ftn9\)](#), he was chastised by police organizations demanding that police officers receive the same constitutional rights as all defendants, including the presumption of innocence. The Governor responded by saying he really was just trying to emphasize the importance of a full and fair investigation.[\[10\] \(# ftn10\)](#)

To anyone remotely familiar with the workings of Criminal Courts, the notion of a thorough due process system is quite foreign. More than half of the cases that enter the court end at the accused’s initial appearance before a judge [\(# ftn11\)](#). At that moment, none of the parties involved – prosecutor, defense attorney or judge – have done any kind of fact or legal investigation, and precious little is known about the charges or the accused. Cases are resolved in a matter of minutes in what has been described over and over again as assembly line justice.[\[12\] \(# ftn12\)](#). Rather than providing the

accused with an opportunity to argue his or her case, the process has been described, derisively but accurately, as meet ‘em, greet ‘em, and plead ‘em.[\[13\] \(# ftn13\)](#)

Flowery pronouncements of due process conjure up images of jury trials with the accused given the full panoply of rights afforded by the Constitution. In fact, jury trials are few and far between. In 2013, there were 209 misdemeanor jury trials in all of New York City, a paltry figure considering that there were more than 314,000 misdemeanor cases brought into the system.[\[14\] \(# ftn14\)](#). Looked at another way, in only .0006% of cases did the accused actually enjoy thorough due process and the chance to be heard in court.

While the Mayors of New York City and Ferguson wrestle with controversies over policing policies and behavior, they would be well-served to widen the lens and look at what happens after someone is arrested. It is misleading for public officials to proclaim that those targeted for arrest by urban police forces should passively submit to such authority and take comfort in the knowledge that they will, in Mayor de Blasio’s words, have their “opportunity for due process in our court system.” Such statements ring hollow for those who have experienced a post-arrest system that quickly, and often carelessly, processes their cases in a matter of minutes.

Officers Daniel Pantaleo and Darren Wilson were entitled to due process and they received it in abundance. Yet until such due process is also assured to the hundreds of thousands of people of color who are siphoned through our courts on a yearly basis, many people will continue to question the legitimacy and fundamental fairness of the criminal justice system.

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[\[1\] \(# ftnref1\)](#) More recently, even the brutal homicide of Walter Scott at the hands of Police Officer Michael Slager in South Carolina, has led to calls for due process and respect for the presumption of innocence. See, e.g., http://www.huffingtonpost.com/2015/04/08/police-group-walter-scott_n_7029748.html

[\[2\] \(# ftnref2\)](#) [2] Mayor Bill de Blasio, Remarks at Kingsboro Temple of Seventh-Day Adventists (Aug. 23, 2014) (transcript available at <http://www1.nyc.gov/office-of-the-mayor/news/847-14/transcript-mayor-de-blasio-delivers-remarks-kingsboro-temple-seventh-day-adventists-holds#/0> (<http://www1.nyc.gov/office-of-the-mayor/news/847-14/transcript-mayor-de-blasio-delivers-remarks-kingsboro-temple-seventh-day-adventists-holds#/0>)).

[\[3\] \(# ftnref3\)](#) Discussion: What's Next For Ferguson After The Death Of Michael Brown?, St. Louis on the Air (Aug. 11 2014), <http://news.stlpublicradio.org/post/discussion-whats-next-ferguson-after-death-michael-brown>.

[\[4\] \(# ftnref4\)](#) Yoav Gonene and Amber Jamieson, De Blasio Tells NYers: "Don't Resist Arrest", N.Y. Post, Aug. 13, 2014, available at <http://nypost.com/2014/08/13/de-blasio-tells-new-yorkers-dont-resist-arrest/>.

[\[5\] \(# ftnref5\)](#) *Id.*

[\[6\] \(# ftnref6\)](#) NYPD Commissioner Bratton on Broken Windows, Community Policing, and More, the Brian Lehrer Show (Aug. 12, 2014), <http://www.wnyc.org/story/commissioner-bratton-broken-windows-community-policing-and-more/>

[\[7\] \(# ftnref7\)](#) U.S. Const. amend. V; *id.* amend. XIV, §1 (“[N]o person shall... be deprived of life, liberty, or property, without due process of law”).

[\[8\] \(# ftnref8\)](#) *Solesbee v. Balcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissent).

[\[9\] \(# ftnref9\)](#) Missouri Gov Calls for “Vigorous Prosecution” of Ferguson Shooting Case (Fox News television broadcast Aug. 20, 2014), available at <http://www.foxnews.com/us/2014/08/20/missouri-gov-calls-for-vigorous-prosecution-ferguson-shooting-case/>.

[\[10\] \(# ftnref10\)](#) Police Upset with Comments Made by Gov. Nixon on Michael Brown Case (Fox2now St. Louis television broadcast Sept. 3, 2014), available at <http://fox2now.com/2014/09/03/police-upset-with-comments-made-by-gov-nixon-on-michael-brown-case/>.

[\[11\] \(# ftnref11\)](#) Lisa Lindsay et al., Criminal Court of the City of New York Annual Report 2013, N.Y.C. Criminal Ct. (2014). [hereafter Annual Report]

[\[12\] \(# ftnref12\)](#) *Argersinger v. Hamlin*, 407 U.S. 25, 36 (2009); Robert C. Boruchowitz et al., Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts, Nat’l Ass’n of Criminal Def. Lawyers, Apr. 2009. .

[\[13\] \(# ftnref13\)](#) See, e.g., Steve Zeidman, Justice is Swift as Petty Crimes Clog Courts, Collateral Consequences Res. Ctr. (Dec. 7, 2014), <http://ccresourcecenter.org/2014/12/07/justice-swift-petty-crimes-clog-courts/>.

[\[14\] \(# ftnref14\)](#) Annual Report, *supra* note 10, at 49.