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Due Process, Judicial Review, and the Rights of the Individual

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DUE PROCESS, JUDICIAL REVIEW, AND
THE RIGHTS OF THE INDIVIDUAL*

THE HONORABLE EDWARD D. RE**

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PROLOGUE

It is a special pleasure to be here at Cleveland-Marshall and to discuss an area of law that I have taught since I was a neophyte law teacher many years ago. I have continued to teach Administrative Law, and my perspective as a lawyer and teacher has been greatly expanded by my experience as a member of a large city-state administrative agency, and as chairman of a federal independent commission. As a federal judge I fully appreciate the role of the judiciary in reviewing the actions of administrative agencies. Hence, I am pleased to discuss the concepts of due process, judicial review, and the rights of the individual.

Since it cannot be questioned that public officers and administrative agencies vitally affect the lives and interests of all persons, it is important to know the legal controls and remedies that are available to assure that public officials act lawfully. This, of course, implies that all administrators and officers of government must act within the bounds of their delegated authority and comply with the constitutional limitations imposed upon the power of government.

It is also not questioned that powers to control the administration and administrative agencies are possessed by all three branches of government. For example, the executive may appoint and remove officials, and the legislative branch may repeal or amend statutes. On this occasion, I should like to stress the role of the courts, and express some thoughts on judicial review of administrative action.

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I. INTRODUCTION

Commencing with Chief Justice John Marshall we see the American origins and practical application of what may be regarded the truly distinctive American contribution to the common law. This special American contribution is the jurisdiction of the courts to review the actions of government to determine whether any person has been deprived of rights guaranteed by the Constitution and the law. Hence, in today's modern society of mass governmental regulation, few legal subjects are of greater importance than the power of the courts to review the actions of government.

Surely, one cannot minimize the role of the state in enforcing the criminal laws of the land. No body of law can so directly affect the life, liberty or property of the individual as the criminal law. Yet, it is a mistake to believe that only the criminal law can actually affect cherished rights of liberty and freedom. Under the guise or label of a civil proceeding, the state may, in effect, deprive a person of life and liberty, or "of all that makes life worth living." The quoted words are those of the Supreme Court in a habeas corpus proceeding brought by petitioners being held for deportation. The Court held that to deport a person who claimed to be a citizen "obviously deprives him of liberty. . . . It may result also in loss of both property and life; or of all that makes life worth living."¹ Most pertinent to our topic of judicial review are the following words of the Court: "Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law."²

In view of the phenomenal expansion of administrative agencies of all types, judicial review of administrative action is a subject of great practical value to both government officials and citizens alike. It may be well to add that, when one speaks of the countless administrative agencies, public bodies and officials, the reference is not only to the federal government. There are agencies, bodies and officials at all levels of government. From the town or village clerk, to the city fire or housing inspector, to the state civil service or public utility commission, to the Federal Trade Commission, the National Labor Relations Board and the many federal independent regulatory commissions, it is clear that these agencies *are* the government.

It is equally clear that these agencies in the performance of their respective functions have the power to grant, withhold or deny rights and privileges. Many of these agencies are charged with the responsibility of assuring individuals that they will receive rights and benefits granted by law. The ever-recurring question pertains to the individual who feels aggrieved because the very agency that was established to assure rights granted by law, has in fact denied the individual those rights that were guaranteed by the law.³

¹ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1921).

² *Id.* at 284-285.

³ *See Re, The Court's Enforcement of the Rule of Law*, 62 ST. JOHN'S L. REV. 601, 604 (1988).

The subject is of concern to public officials and citizens alike who wish to know the rights and remedies available to an individual who feels aggrieved by the actions of the state. Hence, the importance of the role of the courts in reviewing administrative action and, if warranted, setting it aside to insure compliance with the law of the land. The subject implicates the concepts of due process and judicial review, and highlights the ideal of a government of laws.

II. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Since more and more persons resort to the courts for a vindication of their rights, we find ourselves in a period described as a litigation or due process explosion.⁴ Although this explosion has caused serious problems of backlog in the courts, it is important to note that it also manifests a confidence in the courts as agencies of government. Many years ago, a scholar wrote: "When a plain man who thinks that he has been wronged by another declares that he 'will have the law on him,' it expresses his conviction that he can get justice from the courts."⁵ This confidence in the courts is not merely manifested in civil litigation between individuals. It also applies when the individual has a grievance against the government and its agencies.

Many reasons may be given to explain this tendency or trend. A letter of complaint to a mayor, governor or the President, setting forth a grievance against an official or administrative agency, may result in a reply prepared by the agency itself. Illegal or improper administrative action may reflect non-compliance with law, incompetence or indifference, and occasionally, venality or corruption. Often, in pursuing what may be regarded as broader governmental objectives, an official may transgress the statutory authority or the established lawful procedure. Corrective legislative action is usually slow and cumbersome. Thus a brief, and yet accurate answer to the question why an aggrieved individual will resort to the courts is to be found in the unique role of the judiciary in giving vitality to concepts of due process and the rule of law.

Since the Act of Settlement of 1701, the federal judges have been assured an enviable independence. In our Declaration of Independence a specific grievance against King George III pertained to the removal of judges at his pleasure. As a consequence, in Article III of our Constitution we adopted the language of the Act of Settlement, and federal judges hold office "during good behavior," removable only by impeachment.⁶ Beyond, and also in part as a consequence of independence, we have developed a sense of constitutionalism.

⁴ See Re, *The Administration of Justice and the Courts*, 18 SUFFOLK L. REV. 1, 2 (1984).

⁵ S. BALDWIN, *THE AMERICAN JUDICIARY* 376 (1905).

⁶ See Re, *Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 8 NO. KY. L. REV. 221, 223 (1981).

To an American it is fundamental that any law in contravention of the Constitution is null and void. This doctrine, enunciated in the case of *Marbury v. Madison*⁷ in 1803, followed the English tradition articulated in Sir Edward Coke's famous dicta in *Dr. Bonham's Case*⁸ in 1610. *Dr. Bonham's Case* arose from an exclusive patent King Henry VIII had given the Royal College of Physicians to regulate the practice of medicine in London, and which had been confirmed by Parliament. When Dr. Thomas Bonham, a Doctor of Medicine of the University of Cambridge, was imprisoned for practicing medicine without the College's approval, he brought an action for false imprisonment against the leaders of the College. Justice Coke set forth several arguments denying the authority of the College over Dr. Bonham, but it is his dicta in that case that has retained its vitality to the present day.

Justice Coke declared: "[t]he common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."⁹ This concept did not attain acceptance under the Parliamentary system in England. Nevertheless, its influence was felt in early American cases in the state courts before the adoption of the Constitution, and later served as the fundamental underpinning of *Marbury v. Madison*.

Apparently, the first American case which nullified a legislative act is the 1657 case of *Giddings v. Brown*¹⁰ in which a court in Boston struck down an act of a town meeting on the authority of *Dr. Bonham's Case*. Another case, which followed Lord Coke's dicta in pre-constitutional America, is *Trevett v. Weeden*.¹¹ In the *Trevett* case, a Rhode Island court struck down as null and void an act of the state Assembly which required the acceptance of paper money as legal tender. This decision is particularly significant in that it was handed down just one year before the meeting of the Constitutional Convention, and was undoubtedly in the minds of at least some of the framers at the Convention.

Pursuant to the doctrine of checks and balances, the Constitution serves as the instrument and symbol of restraint. While it vests substantive powers in each branch of government, it also checks and restrains the exercise of those powers within defined limits. Under this system of Constitutionalism the courts serve the unique function of ensuring that all officers of government perform their duties in conformance with the Constitution and the law.

⁷ 5 U.S. (1 Cranch) 137 (1803).

⁸ 8 Co. Rep. 114a, 77 Eng. Rep. 646 (Common Pleas 1610).

⁹ *Id.* at 652.

¹⁰ *Browne v. Geedings*, unpublished opinion mentioned in 2 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASS. 1656-1662 47 (Essex Institute, Salem, Mass. 1912).

¹¹ *Trevett v. Weeden*, unpublished opinion (Sup. C. of Judicature - C. of Assise and General Gaol Delivery 1786), discussed in C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 105-12 (2d ed. 1932).

In summary, under our Constitutional system, it is now basic that the courts may pass upon the constitutionality of statutes, and their meaning when they are applied to specific cases. As a consequence, it is also for the courts to say if any person has been deprived of any rights guaranteed by the Constitution and the laws enacted thereunder. Hence, any person who alleges a deprivation of due process or equal protection of the law may resort to the Courts for vindication of these constitutionally protected rights.

III. ORIGIN OF DUE PROCESS OF LAW

In Anglo-American law probably no concept is more important than that of due process of law.¹² It is from the guarantee of due process that all of the substantive and procedural rights embodied in the Constitution and laws acquire meaning and vitality. Indeed, it is at the heart of the common law system of jurisprudence.

The phrase "due process of law" implies that a person will receive fair treatment, and a procedure designed to achieve a just result. In the judicial context, it connotes an opportunity to be heard before a decision is made that will affect one's rights or legally protected interests. It applies both to personal rights, sometimes termed "liberty interests," and to property rights. The type or nature of the hearing to which one will be entitled, and when it will be granted, will depend upon the nature of the interest affected, and the degree or severity of the deprivation that may be imposed. To say that a person has been deprived of due process of law implies that the person has not been granted or has not received those protections or safeguards that are guaranteed to all persons under the law.

The phrase "due process of law," although not found in the Magna Carta, may be discerned in that document which first restrained the power of the English king to act unfettered by law.¹³ The widely acclaimed Charter of Liberty, in its 39th article, provides:

No freeman shall be taken or imprisoned or disseised, or exiled, or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or/and by the law of the land.¹⁴

The requirement to follow the law of the land, derived from the Latin words *per legem terrae*, constrained the king or the state to abide by a lawful process or procedure in imposing punishment upon a subject.

¹² Portions of this treatment of due process are derived from an article published in Italian in 1988 in the *Enciclopedia Giuridica, Enciclopedia Italiana* (1988).

¹³ See F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION* (1948), reviewed in *Re, Book Review*, 24 *ST. JOHN'S L. REV.* 185 (1949). On the authorship of Magna Carta see *Re, The Roman Contribution to the Common Law*, 29 *FORDHAM L. REV.* 447, 476-77 (1961).

¹⁴ *MAGNA CARTA* art. XXXIX (1215).

The concept of lawful or fair procedure was incorporated into the early state constitutions and was the antecedent to the phrase "due process of law." Indeed, an early Supreme Court case noted that: "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by law of the land,' in *Magna Carta*."¹⁵ The Court also noted that Lord Coke, in his commentary, stated that "law of the land" meant due process of law.¹⁶

The guarantees of due process of law are specifically set forth in the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Fifth Amendment, adopted as a part of the Bill of Rights, was originally interpreted to serve as a check upon the acts of the federal government only.¹⁷ The Fourteenth Amendment, adopted over three-quarters of a century later in the aftermath of the Civil War, applies expressly to the state governments.¹⁸ In more recent years, in a series of landmark decisions, the Supreme Court has held that most of the protections contained in the Bill of Rights have been incorporated into the Fourteenth Amendment and, therefore, are also binding upon the states.¹⁹ In addition to these constitutional provisions, there are specific statutory enactments that are designed to promote the enforcement of these constitutional guarantees.²⁰

In the American constitutional system, the judiciary plays a unique role in interpreting and applying the guarantees and freedoms enumerated in the constitution. On judicial review, it is the role of the courts to determine whether the enactments of the legislature, or the actions of an administrative or executive agency comport with requirements of due process of law. If the challenged governmental actions do not meet the constitutional standards of due process, the courts will overturn those actions in order to ensure that the aggrieved party receives the "due process" to which that party is entitled.

¹⁵ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856).

¹⁶ *Id.* (citing Coke, 2 Inst. 50).

¹⁷ *See Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

¹⁸ *See generally* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70-71 (1873).

¹⁹ *See, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (due process clause of Fourteenth Amendment guarantees Sixth Amendment right to jury trial on serious charge in state court); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to cross-examine witnesses applies to states by virtue of Fourteenth Amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (due process requires that Fifth Amendment right against self-incrimination be applied in state cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by unreasonable search and seizure in violation of Fourth Amendment is inadmissible in state court through Fourteenth Amendment).

²⁰ *See, e.g.,* Civil Rights Act of 1871, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)); *see also* *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980).

The courts have developed a body of case law that embodies the standards of due process that must be followed in particular cases. This body of case law, developed over time, provides guidance not only for all of the courts of the land, but also for all branches of government in defining and applying due process in different situations and cases.

IV. NATURE OF DUE PROCESS OF LAW

The basic premise of due process of law is that all persons are entitled to the benefits, protections, and privileges of the law of the land. As Chief Justice John Marshall stated in the landmark case of *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . ." ²¹ However, while it is clear that everyone is entitled to the protections of due process of law, the difficulty arises in the application of due process of law in the particular case or circumstance. It is therefore difficult, if not impossible, adequately and accurately to define due process because the concept is elastic and flexible, and must be adaptable to countless different contexts. As explained by Justice Felix Frankfurter, a professor at the Harvard Law School prior to his appointment to the Supreme Court:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, and past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.²²

There is a reluctance to define due process for fear that the definition may be interpreted in a way that would limit or restrict its application in a particular case. It is nevertheless helpful to note its elements or ingredients. On the assumption that the deprivation of a particular in-

²¹ 5 U.S. (1 Cranch) 137, 163 (1803).

²² *Joint Anti-Fascist Refugee Committee v. McGarath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

terest, by virtue of its importance, calls for a full adversary or evidentiary hearing, what are the basic or essential requirements of due process in such a case? In matters before administrative agencies, Judge Henry Friendly, of the United States Court of Appeals for the Second Circuit, set forth the following elements of a fair hearing, "roughly in order of priority":²³

1. An unbiased tribunal;
2. Notice and grounds for the proposed action;
3. An opportunity to show why the proposed action should not be taken;
4. The right to call witnesses;
5. The right to know opposing evidence;
6. The right to have the decision based only on the evidence presented;
7. The opportunity to be represented by counsel;
8. A record of the proceeding;
9. A statement of reasons;
10. Public attendance; and
11. Availability of judicial review.

The guarantees and protections of due process apply to both criminal and civil cases, as well as the countless civil matters in which a person comes into contact with administrative agencies and government officials. In criminal cases, what is termed a "liberty interest" is usually at stake. In civil matters, a liberty interest or a property right may be at issue. Although due process applies in all cases, the specific degree of protection may vary depending upon the nature of the interest threatened, and the competing governmental or other interests that must also be considered.

V. APPLICATIONS OF DUE PROCESS OF LAW

In our constitutional system, it is fundamental that persons are entitled to due process of law before they are deprived of a liberty interest or a property right. Property rights can take many forms, from tangible things such as land or money to intangible interests such as the right to a public education or an interest in continued employment. In order to pursue a claim based on a deprivation of a property right without adequate due process, a person must show a "legitimate claim of entitlement" to the interest affected by governmental action.²⁴ It is important to remember, however, that generally "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"²⁵

²³ Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-1295 (1975).

²⁴ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

²⁵ Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985) (quoting *Roth*, 408 U.S. at 577).

Since the due process clauses of the Fifth and Fourteenth Amendments govern only the federal and state governments, respectively, there must be some type of "state action" for a court to grant relief. Hence, the actions of a private party acting in a purely personal capacity are generally not restricted or restrained by the requirements of due process.²⁶ The Supreme Court has held that, for the purposes of determining whether an action is subject to the due process requirements of the Constitution, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."²⁷

A federal court of appeals has stated that, "[w]henver a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law."²⁸ Thus, courts have found state action and property interests sufficient to activate or require due process protection under the Fifth and Fourteenth Amendments in situations such as the firing of a government employee,²⁹ the termination of welfare benefits,³⁰ and the suspension of a student from a public school or state university.³¹

After a court has decided that there has been a deprivation of life, liberty, or property interest, and sufficient state or official government action to invoke the due process clause, the court must determine whether the person has been denied or deprived of due process of law. At a minimum, a deprivation of life, liberty, or property must be accompanied by "notice and opportunity for hearing appropriate to the nature of the case."³² Usually, the hearing must be held prior to the deprivation because it should occur "at a time when the deprivation can still be prevented."³³ When there is a significant governmental interest in postponing the hearing, a post-deprivation hearing may be sufficient to satisfy due process requirements,³⁴ although at some point the delay may be considered a constitutional violation.³⁵

²⁶ See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 169 (1970).

²⁷ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

²⁸ *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 155 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

²⁹ See, e.g., *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985); *Connell v. Higginbotham*, 403 U.S. 207, 208-09 (1971); *Poolaw v. City of Anadarko*, 660 F.2d 459, 463-64 (10th Cir. 1981).

³⁰ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970).

³¹ See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574-76 (1975); *Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988); *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 157-58 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

³² *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

³³ *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

³⁴ See *Dixon v. Love*, 431 U.S. 105, 115 (1977); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 320 (1908).

³⁵ See *Barry v. Barchi*, 443 U.S. 55, 66 (1979).

A hearing serves several purposes. First, the opportunity for the aggrieved or threatened party "to present his side of the case is recurrently of obvious value in reaching an accurate decision."³⁶ Thus, by allowing or requiring both sides to present their cases, the risk of factual error or mistake is reduced. Second, even when no facts are in dispute, allowing the affected party to respond or explain permits the responsible administrator or official to make a more informed decision, and permits a sounder exercise of discretion.

Whether the hearing or procedure involved was fair depends upon the nature of the interest affected, and all of the other facts and circumstances of the particular case. To determine whether due process has been denied, the court must ascertain the scope of the protection required in a particular setting, and reach an "accommodation of the competing interests involved."³⁷ In *Mathews v. Eldridge*,³⁸ the Supreme Court identified three factors that a court must balance or consider in evaluating a due process claim:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.³⁹

These formulations reflect the efforts of the courts to ensure the fairness of any governmental action while recognizing, at the same time, the need for a governmental body to function efficiently and economically. Indeed, to understand the application of due process requirements in a particular setting, one must recognize that "procedural requirements entail the expenditure of limited resources, [and] that at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection"⁴⁰ Thus, a student faced with disciplinary action by a public university would not be entitled as a matter of due process to the full panoply of procedural protections afforded a criminal defendant.⁴¹ Similarly, a government employee who has been discharged for cause has a right to be informed of the nature of the charges against him and to respond to the charges. Normally, however, the employee would not be entitled to a full-blown adversary hearing conducted under strict rules of evidence and procedures appropriate for the trial of criminal cases.

³⁶ *Loudermill*, 470 U.S. at 543.

³⁷ *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

³⁸ 424 U.S. 319, 335 (1976).

³⁹ *Id.*

⁴⁰ Friendly, *supra* note 19, at 1276.

⁴¹ See *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Gorman v. University of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988).

VI. DUE PROCESS AND A LAWFUL SOCIETY

A crucial function of the due process clauses is to give full force and effect to the ideal of fairness enshrined in the Constitution. This implies ensuring that all persons receive fair treatment, regardless of race, color, creed, national origin, or any other impermissible and improper criteria. In conjunction with the equal protection clause of the Fourteenth Amendment, the due process clauses protect minorities or others who may be subject to unfair or discriminatory actions from arbitrary or capricious governmental action. In attempting to effectuate and implement the ideals of equal justice and non-discrimination, Congress has enacted certain civil rights statutes prohibiting discrimination in voting, education, housing, employment, and other areas, on the basis of race, color, religion, national origin, gender, age, or handicap. These statutes are specific and go beyond the constitutional protections in that they have a broad application to the discriminatory actions of private individuals, as well as governmental agencies and officials.

An enforcement mechanism of the Fourteenth Amendment is the Civil Rights Act of 1871, 42 U.S.C. § 1983. This act, which was passed in response to post-Civil War racial abuses and terrorism, "provides for a broad and comprehensive civil rights jurisdiction, and was intended 'to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.'"⁴² Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Actions under this statute may be brought directly in the federal courts.

In 1978, the Supreme Court, in *Monell v. New York City Department of Social Services*,⁴³ held that a municipality is a "person" within the meaning of section 1983 and, therefore, could be liable under that provision for injuries resulting from a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"⁴⁴ or other action or policy constituting a governmental custom.⁴⁵

This new application of section 1983 was refined in later cases as the Supreme Court attempted to identify those officials whose actions con-

⁴² *Freeman v. Rideout*, 808 F.2d 949, 950 (2d Cir. 1986) (quoting *Burnett v. Grattan*, 468 U.S. 42, 55 (1984)).

⁴³ 436 U.S. 658 (1978).

⁴⁴ *Id.* at 690.

⁴⁵ *Id.* at 691.

stitute official policy, and when government practice constitutes custom or policy.⁴⁶ Of course, municipal liability requires that the official policy be causally linked to the injury suffered by the plaintiff.⁴⁷ Although a city was the subject of liability in *Monell*, the federal courts have applied its holding to other units of local government, further expanding the scope of section 1983.⁴⁸

In essence, section 1983 provides jurisdiction and a right of action in a federal court for a person whose constitutional rights have been abridged or denied by anyone acting under the color of state law. It is not limited to Constitutional violations involving racial discrimination, but functions as a source of relief for persons who have been deprived of a host of constitutional rights under the color of state law.⁴⁹

Section 1983 provides a right of action, for example, for someone whose home, in an outrageous manner, has been illegally searched in violation of the Fourth Amendment by police officers acting under the color of state law.⁵⁰ Analogous to section 1983 is 19 U.S.C. § 242 which provides an effective criminal enforcement mechanism against anyone who, acting under the color of state law, deprives anyone of "rights, privileges, or immunities secured or protected by the Constitution or laws" on account of race color, or alienage.⁵¹

It is to be noted that these statutes are aimed at state officials. Although there is no equivalent legislation applicable for federal officials, the Supreme Court established a similar remedy for a violation of constitutional rights in the famous *Bivens* case, decided in 1971.⁵² In the *Bivens* case, federal agents, in an outrageous manner, violated the plaintiff's constitutional rights "against unreasonable searches and seizures."⁵³ The Supreme Court, for the first time, held that the violation of the Fourth Amendment gave rise to an implied cause of action for damages for the injuries suffered "as a result of the agents' violation of the Amendment."⁵⁴ From the foregoing, it is clear that due process of law requires that all persons, including all public officials respect and abide by the rule of law.

⁴⁶ See *City of Canton v. Harris*, 489 U.S. 378 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).

⁴⁷ See *Monell*, 436 U.S. at 694 (municipal liability under section 1983 requires the official policy be causally linked to the act). Causation is often difficult to establish when the wrongful conduct involves failure to act. See, e.g., *Dorman v. District of Columbia*, 888 F.2d 159 (D.C. Cir. 1989).

⁴⁸ See, e.g., *Soderbeck v. Burnett County*, 752 F.2d 285 (7th Cir. 1985) (counties); *Wilkinson v. School Board of the County of Henrico*, 566 F. Supp. 766 (E.D. Va. 1983) (school boards); *Gay Student Servs. v. Texas A & M Univ.*, 612 F.2d 160 (5th Cir. 1980) (state universities).

⁴⁹ See generally *Blackmun, Section 1983 and Federal Protection of Individual Rights - Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985).

⁵⁰ See, e.g., *Monroe v. Pape*, 365 U.S. 167, 170-72 (1961).

⁵¹ 18 U.S.C. § 242 (1986); see *United States v. Price*, 383 U.S. 787, 794-96 (1966); *Screws v. United States*, 325 U.S. 91, 98-99 (1945).

⁵² *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

⁵³ *Id.* at 394.

⁵⁴ *Id.* at 397.

VII. CONCLUSION

The modern emphasis on due process, the availability of creative judicial remedies, and the role of the courts in reviewing actions of government officials, are some of the reasons which have caused countless persons to resort to the courts for a redress of all sorts of grievances. While these cases may burden the courts, they are also an expression of confidence in the judicial system. It is a tribute to the American legal system that any person can challenge governmental action in a court of law, and have the realistic expectation that, if there is a legitimate relevance, the wrong or grievance will be redressed.

Prior to his appointment to the Supreme Court, Justice Cardozo, with characteristic eloquence, stated that the "chief worth" of the judiciary is not manifested in the few cases "in which the legislature has gone beyond the lines that mark the limits of discretion," but rather, "in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and expression . . ."⁵⁵

Speaking of the role of the Supreme Court, also writing before his appointment to the Court, Justice Frankfurter noted:

I know of no other peaceful method for making the adjustments necessary to a society like ours — for maintaining the equilibrium between state and federal power, for settling the eternal conflicts between liberty and authority — than through a court of great traditions free from the tensions and temptations of party strife, detached from the moment.⁵⁶

In a federal system founded upon the separation of powers and the rule of law, all branches of government perform indispensable functions. Nevertheless, without the beneficial scrutiny of judicial review, government officials may on occasion forget that all public servants are duty bound to obey the law, and protect the rights of the persons whom they are to serve.

The guarantee of due process of law, as embodied in the Fifth and Fourteenth Amendments to the Constitution, and as interpreted by the courts, provides for fair treatment for all who are affected by government action. It implies that a person will receive fairness of treatment, and a procedure designed to achieve a just and equitable result. The guarantee of due process serves to check or control the misuses of abuse of power, and ensures that other rights and privileges protected by the Constitution and laws are given force and effect. By confining the agents of government to their properly delegated authority under the Constitution and laws, due process of law provides a fundamental cornerstone for a free and lawful society.

⁵⁵ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 92-94 (1921).

⁵⁶ F. FRANKFURTER, *LAW AND POLITICS* 52-53 (A. MacLeish & E. Prichard Jr., eds. 1939).

