VII. THE RIGHT TO REPUTATION

"[W]e hold that the right of reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law."

PAUL v. DAVIS

424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

Two local police departments in Kentucky sent flyers to all businesses in the area giving names and photographs of shoplifters who, the police said, were "known to be active in this criminal field." Among those so included was Edward Charles Davis, III. He had, in fact, once been arrested by a store's private guard but had pleaded not guilty to shoplifting, and the judge had dismissed the charge.

After the flyer came out, Davis filed suit in a federal district court under 42 U.S.C. § 1983.* Alleging that the public claim by the police that he was a criminal deprived him, without due process of law, of his right to liberty in a decent reputation, he asked for a declaration of his constitutional rights, an injunction against further distribution of the flyer, and monetary damages. The district judge dismissed the suit as not stating a cause of action under § 1983. The Court of Appeals for the Sixth Circuit reversed. The police then sought and obtained certiorari.

Eds.' Note: 42 U.S.Code § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws shall be liable to the injured party in an action at law, suit in equity, or other proper proceeding for redress."

Mr. Justice **REHNQUIST** delivered the opinion of the Court....

I

Respondent's ... complaint asserted that the "active shoplifter" designation would inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities. Accepting that such consequences may flow from the flyer in question, respondent's complaint would appear to state a classical claim for defamation actionable in the courts of virtually every State....

Respondent brought his action, however ... in a United States District Court.... He asserted ... a claim that he had been deprived of rights secured to him by the Fourteenth Amendment....

If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime ... presumably

obtains a claim against such officers under § 1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would not have claims equally cognizable under § 1983.

It is hard to perceive any logical stopping place to such a line of reasoning.... We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

II

The result reached by the Court of Appeals ... must be bottomed on one of two premises. The first is that the Due Process Clause of the Fourteenth Amendment and § 1983 make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state-law tort claims. The second premise is that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from the infliction by the same official of harm or injury to other interests protected by state law, so that an injury to reputation is actionable under § 1983 and the Fourteenth Amendment even if other such harms are not. We examine each of these premises in turn.

A

The first premise would be contrary to pronouncements in our cases. In the leading case of Screws v. United States (1945), the Court considered the proper application of the criminal counterpart of § 1983. In his opinion for the Court plurality in that case, Mr. Justice Douglas observed:

> Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.

After recognizing that Congress' power to make criminal the conduct of state officials under the aegis of the Fourteenth Amendment was not unlimited because that Amendment "did not alter the basic relations between the States and the national government," the plurality opinion observed that Congress should not be understood to have attempted

> to make all torts of state officials federal crimes. It brought within [the criminal provision] only specified acts done "under color" of law and then only those acts which deprived a person of some right secured by the Constitution or laws of the United States.

This understanding of the limited effect of the Fourteenth Amendment was not lost in the Court's decision in Monroe v. Pape (1961). There the Court was careful to point out that the

complaint stated a cause of action under the Fourteenth Amendment because it alleged an unreasonable search and seizure violative of the guarantee "contained in the Fourth Amendment (and) made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." [Davis], however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded.

Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* * extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.... [T]he procedural guarantees of the Due Process Clause cannot be the source for such law.

Eds.' Note: "By its own force."

B

The Second premise ...–that the infliction by state officials of a "stigma" to one's reputation is somehow different in kind from infliction by a state official of harm to other interests protected by state law– is equally untenable. The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation ... for special protection.... While ... a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government ... this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.... The Court of Appeals, in reaching a contrary conclusion, relied primarily upon Wisconsin v.

Constantineau (1971). We think the correct import of that decision, however, must be derived from an examination of the precedents upon which it relied, as well as consideration of the other decisions by this Court, before and after *Constantineau*.... While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

In United States v. Lovett (1946), the Court held that an Act of Congress which specifically forbade payment of any salary or compensation to three named Government agency employees was an unconstitutional bill of attainder.... The Court, while recognizing that the underlying charge [of subversive activities] upon which Congress' action was premised "stigmatized [the employees'] reputation and seriously impaired their chance to earn a living," also made it clear that "[w]hat is involved here is a congressional proscription of [these employees] prohibiting their ever holding a government job."

Subsequently, in Joint Anti-Fascist Refugee Comm. v. McGrath (1951), the Court examined the validity of the Attorney General's designation of certain organizations as "Communist".... There was no majority opinion in the case.... [But] at least six [justices] ...

viewed any "stigma" imposed by official action of the Attorney General ... as an insufficient basis for invoking the Due Process Clause of the Fifth Amendment.

In Wieman v. Updegraff (1952), the Court again recognized the potential "badge of infamy" ... from being branded disloyal by the government.... But it did not hold this sufficient by itself to invoke the procedural guarantees of the Fourteenth Amendment; indeed, the Court expressly refused to pass upon the procedural due process claims....

... [T]he Court returned to consider further the requirements of procedural due process in this area in the case of Cafeteria Workers v. McElroy (1961). Holding that the discharge of an employee of a Government contractor in the circumstances there presented comported with the due process required by the Fifth Amendment, the Court observed:

> [T]his is not a case where government action has operated to bestow a badge of disloyalty or infamy *with an attendant foreclosure from other employment opportunity*. (Emphasis supplied.)

Two things appear from the line of cases.... The Court has recognized the serious damage that could be inflicted by branding a government employee as "disloyal," and thereby stigmatizing his good name. But the Court has never held that the mere defamation ... was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment....

It was against this backdrop that the Court in 1971 decided *Constantineau*. There the Court held that a Wisconsin statute authorizing "posting" was unconstitutional because it failed to provide procedural safeguards of notice and an opportunity to be heard, prior to an individual's being "posted." Under the statute "posting" consisted of forbidding in writing the sale or delivery of alcoholic beverages to certain persons who were determined to have become hazards ... by reason of their "excessive drinking." ...

There is undoubtedly language in *Constantineau* which is sufficiently ambiguous to justify the reliance upon it by the Court of Appeals:

> Yet certainly where the state attaches "a badge of infamy" to the citizen, due process comes into play....
>
> Where a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential. (Emphasis supplied.)

... We should not read this language as significantly broadening those [earlier] holdings ... if there is any other possible interpretation of *Constantineau*s language. We believe there is.

We think that the italicized language ... referred to the fact that the governmental action ... deprived the individual of a right previously held under state law– the right to purchase or obtain liquor.... "Posting," therefore, significantly altered his status as a matter of state law, and

it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards.... [W]e do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.

This conclusion is reinforced by ... Board of Regents v. Roth (1972). There we noted that "the range of interests protected by procedural due process is not infinite" and that with respect to property interests they are

> of course ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....

While *Roth* recognized that governmental action defaming an individual ... could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment....

This conclusion is quite consistent with our most recent holding ..., Goss v. Lopez (1975), that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation ... it also took care to point out that Ohio law conferred a right upon all children to attend school and that the act of the school officials suspending the student ... resulted in a denial or deprivation of that right.

III

It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law; and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. In Bell v. Burson (1971), for example, the State by issuing drivers' licenses recognized in its citizens a right to operate a vehicle on the highways of the State. The Court held that the State could not withdraw this right without giving petitioner due process. In Morissey v. Brewer (1972), the State afforded parolees the right to remain at liberty as long as the conditions of their parole were not violated. Before the State could alter the status of a parolee because of alleged violations of these conditions, we held that the Fourteenth Amendment's guarantee of due process of law required procedural safeguards.

In each of these cases ... a right or status previously recognized by state law was distinctly altered or extinguished.... But the interest in reputation alone ... is quite different from the "liberty" or "property" recognized in those decisions. Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which

the State may protect against injury.... And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons we hold that the interest in reputation asserted in this case in neither "liberty" nor "property" guaranteed against state deprivation without due process of law....

IV

Respondent ... also alleged a violation of a "right to privacy...."

While there is no "right of privacy" found in any specific guarantee of the Constitution, the Court has recognized that "zones of privacy" may be created by more specific constitutional guarantees.... See Roe v. Wade (1973). Respondent's case, however, comes within none of these areas. He does not seek to suppress evidence seized in the course of an unreasonable search. And our other "right of privacy" cases ... deal generally with substantive aspects of the Fourteenth Amendment. In *Roe* the Court pointed out that the personal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" as described in Palko v. Connecticut (1937). The activities detailed as being within this definition were ... matters relating to marriage, procreation, contraception, family relationships, and child rearing and education....

Respondent's claim is far afield from this line of decisions. He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest....

Reversed.

Mr. Justice **STEVENS** took no part in the consideration or decision in this case.

Mr. Justice **BRENNAN,** with whom Mr. Justice **MARSHALL** concurs and Mr. Justice **WHITE** concurs in part, dissenting.

... The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham.... The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection.... The result ... is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights....

... [I]t is first necessary to dispel some misconceptions apparent in the Court's opinion.... [T]he implication ... that the existence vel non [or not] of a state remedy ... is relevant to the

determination whether there is a cause of action under § 1983, is wholly unfounded. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape (1961)....

Equally irrelevant is the Court's statement that "[c]oncededly if the same allegations had been made about respondent by a private individual, he would have nothing more than a claim for defamation under state law." ... The action complained of here is "state action" allegedly in violation of the Fourteenth Amendment....

... An official's actions are not "under color of" law merely because he is an official; an off-duty policeman's discipline of his own children, for example, would not constitute conduct "under color of" law. The essential element of this type of § 1983 action is abuse of his official position.... [T]he police officials here concede that their conduct was intentional and was undertaken in their official capacities.

Therefore, beyond peradventure, it is action taken under color of law and it is disingenuous for the Court to argue that respondent is seeking to convert § 1983 into a generalized font of tort law....

The stark fact is that the police here have officially imposed on respondent the stigmatizing label "criminal" without the salutary and constitutionally mandated safeguards of a criminal trial. The Court concedes that this action will have deleterious consequences for respondent....1 [N]othing in the record appears to suggest the existence at that time [of Davis's arrest] of even constitutionally sufficient probable cause for that single arrest on a shoplifting charge. Nevertheless, petitioners had 1,000 flyers printed ... proclaiming that the individuals identified by name and picture were "subjects known to be active in this criminal field [shoplifting]," and trumpeting the "fact" that each page depicted "Active Shoplifters" (emphasis supplied)....

Petitioners [police] testified:

> "Q. And you didn't limit this to persons who had been convicted of the offense of shoplifting, is that correct?
>
> "A. That's correct....
>
> "Q. Now, my question is what is the basis for your conclusion that a person– a person who has been arrested for the offense of shoplifting is an active shoplifter?
>
> “A. The very fact that he's been arrested for the charge of shoplifting and evidence presented to that effect.
>
> "Q. And this is not based on any findings of the court?

"A. No, sir." ...

[Footnote by Justice Brennan.]

... [T]he Court by mere fiat and with no analysis wholly excludes personal interest in reputation from the ambit of "life, liberty, or property" under the Fifth and Fourteenth Amendments, thus rendering due process concerns never applicable to the official stigmatization, however arbitrary, of an individual. The logical and disturbing corollary of this holding is that no due process infirmities would inhere in a statute constituting a commission to conduct ex parte trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an "active murderer," a homosexual, or any other mark that "merely" carries social opprobrium. The potential of today's decision is frightening for a free people. That decision surely finds no support in our relevant constitutional jurisprudence.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. See, e.g., Bolling v. Sharpe [1954]; Stanley v. Illinois [1972]." Board of Regents v. Roth (1972). "Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual ... generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska (1923). Certainly the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished rights enjoyed by a free people, and therefore as falling within the concept of personal "liberty."

> [A]s Mr. Justice Stewart has reminded us, the individual's right to his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being– a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." Rosenblatt v. Baer (1966) (concurring opinion). Gertz v. Robert Welch, Inc. (1974).

It is strange that the Court should hold that the interest in one's good name and reputation is not embraced within the concept of "liberty" or "property" under the Fourteenth Amendment, and yet hold that that same interest, when recognized under state law, is sufficient to overcome the specific protections of the First Amendment. See, e.g., Gertz v. Robert Welch, Inc. (1974); Time, Inc. v. Firestone (1976). [Footnote by Justice Brennan.]

We have consistently held that

> "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau [1971].... Board of Regents v. Roth (1972). ...

Today's decision marks a clear retreat from Jenkins v. McKeithen (1969), a case closely akin to the factual pattern of the instant case, and yet essentially ignored by the Court. Jenkins, which was also an action brought under § 1983, both recognized that the public branding of an individual implicates interests cognizable as either "liberty" or "property," and held that such public condemnation cannot be accomplished without procedural safeguards designed to eliminate arbitrary or capricious executive action.... [A]lthough the Court was divided on the particular procedural safeguards that would be necessary in particular circumstances, the common point of agreement, and the one that the Court today inexplicably rejects, was that the official characterization of an individual as a criminal affects a constitutional "liberty" interest....

Moreover, *Constantineau* ... did not rely at all on the fact asserted by the Court today as controlling– namely ... that "posting" denied Ms. Constantineau the right to purchase alcohol for a year. Rather, *Constantineau* stated: "The *only* issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." (Emphasis supplied.) ...

I had always thought that one of this Court's most important roles is to provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth. It is a regrettable abdication of that role and a saddening denigration of our majestic Bill of Rights when the Court tolerates arbitrary and capricious official conduct branding an individual as a criminal without compliance with constitutional procedures designed to ensure the fair and impartial ascertainment of criminal culpability. Today's decision must surely be a short-lived aberration.

Editors' Notes

(1) **Query:** Is there a contradiction in a political system's endorsing the concepts of human dignity and autonomy and at the same time allowing public officials to destroy the reputations of citizens without following any sort of legal process? Does Rehnquist leave the right to a reputation without federal legal protection?

(2) **Query:** From his article "The Notion of a Living Constitution," would one have expected Rehnquist to be sympathetic to the interpretive *mode* of fundamental rights? What *mode* did he use here? Insofar as he and Brennan each used the *technique* of stare decisis, who had the better of the argument?

(3) **Query:** Brennan referred to Rehnquist's opinion for the Court in Time v. Firestone (1976; reprinted above, p. 606), holding that a private citizen's right to reputation may take precedence over a magazine's First Amendment right to freedom of the press. How can one square Rehnquist's opinions in these two cases?

(4) Some commentators have suggested either that the fear of additional burdens on the

federal judiciary moved some of the justices to join Rehnquist in *Paul* or that considerations of federalism and deference to state judges were dominant. See Laurence H. Tribe, *American Constitutional Law* (Mineola, N.Y.: Foundation Press, 1978), pp. 970

(5) Ingraham v. Wright (1977) held, 54, that corporal punishment of children in the Dade County, Fla., school system was not a cruel and unusual punishment in the constitutional sense. In dissent, Stevens expressed the view that *Paul* "may have been correctly decided on an incorrect rationale." Perhaps, he wrote,

> the Court will one day agree with Mr. Justice Brennan's appraisal of the constitutional interest at stake in [*Paul*] and nevertheless conclude that an adequate state remedy may prevent every state-inflicted injury to a person's reputation from violating 42 U.S.C. § 1983.

What was Stevens' point?

(6) For an analysis of cases dealing with the concept of "liberty," see Ernest H. Schopler, "Annotation: Supreme Court's Views as to the Concept of 'Liberty' under Due Process Clauses of Fifth and Fourteenth Amendments," 47 L.Ed.2d 975 (1977).