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### Supreme Court of New York, Nassau County - Bursac v. Suozzi

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**SUPREME COURT OF NEW YORK  
NASSAU COUNTY**

Bursac v. Suozzi<sup>1</sup>  
(decided October 21, 2008)

Alexandra Bursac “was arrested and charged” in Nassau County with driving while intoxicated (“DWI”) and with driving while ability impaired by drugs (“DUI”).<sup>2</sup> Approximately one week after her arrest, Bursac’s name and picture were added to the County’s drunk driving “Wall of Shame.”<sup>3</sup> Bursac claimed that the publication of her name and picture to the “Wall of Shame” violated her right to due process under both the United States Constitution<sup>4</sup> and the New York Constitution.<sup>5</sup> The Nassau County Supreme Court held that Bursac’s due process rights were violated as the “publishing and maintaining [of] the petitioner’s name, picture and identifying information . . . on the County’s . . . website[] . . . is sufficient to be the plus in the stigma plus due process analysis.”<sup>6</sup>

In May 2008 Nassau County Executive Thomas Suozzi and Nassau County Police Commissioner Lawrence Mulvey implemented the “Wall of Shame” program as a way to publicize the names of motorists arrested for driving while intoxicated in Nassau County.<sup>7</sup> The stated purpose of the creation of the “Wall of Shame” was to punish those arrested for driving while intoxicated by “mak[ing] sure their friends, neighbors and families know about it.”<sup>8</sup> As part of the program the names and photographs of those arrested were published on

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<sup>1</sup> 868 N.Y.S.2d 470 (Sup. Ct. Nassau County 2008)

<sup>2</sup> *Id.* at 472.

<sup>3</sup> *Id.* at 473.

<sup>4</sup> U.S. CONST. amend. XIV, § 1, states, in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”

<sup>5</sup> N.Y. CONST. art. I, § 6, states, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law.”

<sup>6</sup> *Bursac*, 868 N.Y.S.2d at 481 (internal quotations omitted).

<sup>7</sup> *Id.* at 472.

<sup>8</sup> *Id.* (internal quotations omitted).

the County Executive's website.<sup>9</sup> In addition, Suozzi and Mulvey announced the program through several press conferences with the intention of encouraging media outlets to publish the "information to insure that the shaming was public and widespread."<sup>10</sup>

On approximately June 10, 2008, Alexandra Bursac "was arrested and charged" in Nassau County with DWI and DUI<sup>11</sup> in violation of sections 1192 (2)<sup>12</sup> & 1192 (4)<sup>13</sup> of the New York Vehicle and Traffic Law ("VTL").<sup>14</sup> Approximately one week following her arrest, Bursac's name and photograph were published "on the county[']s website" pursuant to its "Wall of Shame" program.<sup>15</sup> At the time the photograph was published Bursac had not yet been convicted on the DWI charge.<sup>16</sup> Bursac requested by letter that the County Executive remove her information from the county's website.<sup>17</sup> Following the County Executive's refusal to remove her information, she commenced a lawsuit alleging that the "Wall of Shame" program deprived her of her constitutionally protected right to "due process and the equal protection of the law."<sup>18</sup> More specifically, Bursac claimed that the "Wall of Shame" program was unconstitutional as it denied her the "presumption of innocence" and the right to "a hearing and procedural due process."<sup>19</sup>

Before making a determination on Bursac's due process claim, the court first examined whether the Article 78 proceeding<sup>20</sup>

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (internal quotations omitted).

<sup>11</sup> *Bursac*, 868 N.Y.S.2d at 472.

<sup>12</sup> N.Y. VEH. & TRAF. LAW § 1192 (2) (McKinney 2009) provides, in pertinent part: "No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva . . . ."

<sup>13</sup> N.Y. VEH. & TRAF. LAW § 1192 (4) (McKinney 2009) provides: "No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter." The court dismissed "the DUI drug charge . . . as the urine test for drugs was negative." *Bursac*, 868 N.Y.S.2d at 472.

<sup>14</sup> *Bursac*, 868 N.Y.S.2d at 472.

<sup>15</sup> *Id.* at 473.

<sup>16</sup> *Id.* at 472.

<sup>17</sup> *Id.* at 473.

<sup>18</sup> *Id.*

<sup>19</sup> *Bursac*, 868 N.Y.S.2d at 473 (internal quotations omitted).

<sup>20</sup> N.Y. C.P.L.R. 7801 (McKinney 2009) provides, in pertinent part:

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever

she commenced was the proper procedure.<sup>21</sup> Article 78 of the New York Civil Practice Law and Rules (“CPLR”) provides a procedure for “judicial review of administrative determinations involving the exercise of discretion.”<sup>22</sup> This mandamus to review is appropriate when a determination is administrative and involves a judgment made without a hearing.<sup>23</sup> The appropriate standard of review in an Article 78 proceeding “is whether the [administrative] determination was arbitrary and capricious or affected by an error of law as opposed to the substantial evidence standard required in certiorari proceedings.”<sup>24</sup> The court determined that Bursac’s commencement of an Article 78 proceeding was an appropriate procedure by stating that “[a] citizen must have an avenue to test the action of the C[ounty] E[xecutive], which may have an impact on a constitutionally protected right.”<sup>25</sup> Since Bursac’s claim was properly brought as an Article 78 proceeding, the court could examine her due process claims.<sup>26</sup>

The Nassau County Supreme Court found that the publication of names and pictures of arrestees on the “Wall of Shame” “is permissible under certain circumstances except when the circumstances amount to stigma plus.”<sup>27</sup> In making this determination the court noted that publication on the “Wall of Shame” satisfies the stigma component of the stigma plus test, but does not rise to the level of infringing any constitutionally protected liberty or privacy interests.<sup>28</sup> Furthermore, any harms from the act of being on the list itself is merely a “deleterious effect [flowing] directly from a sullied reputation.”<sup>29</sup>

The trial court found that the problem with the Nassau County “Wall of Shame” was not the list of arrestees in and of itself, but ra-

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in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.

<sup>21</sup> *Bursac*, 868 N.Y.S.2d at 474, 475.

<sup>22</sup> *Id.* at 474 (internal quotations omitted).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 474-75 (internal quotations omitted).

<sup>25</sup> *Id.* at 475.

<sup>26</sup> *Bursac*, 868 N.Y.S.2d at 475.

<sup>27</sup> *Id.* at 478 (internal quotations omitted).

<sup>28</sup> *Id.*

<sup>29</sup> *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004)(alteration in original) (quoting *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994)).

ther the method in which the County Executive publicized the list.<sup>30</sup> The “scope and permanency of public disclosure on the Internet . . . distinguishes the County’s ‘Wall of Shame’ from traditional and regular forms of reporting and publication such as print media.”<sup>31</sup> The major flaw the court found in the “Wall of Shame” program was that it was published in multiple places on the Internet where it could be easily accessed, searched, and archived for viewing at any time and at any location for an unspecified duration of time.<sup>32</sup> It is this permanence of publication that constitutes the plus in the analysis, and by publishing the “Wall of Shame” in this manner the court found that the County violated Bursac’s due process rights.<sup>33</sup>

The United States Constitution and the New York Constitution afford protections to its citizens through their respective Due Process Clauses. Both state that “no person shall be deprived of life, liberty or property without due process of law.”<sup>34</sup> In analyzing Bursac’s due process claim the Nassau County Supreme Court applied well-established federal precedent by noting that the United States Supreme Court in *Paul v. Davis*<sup>35</sup> held that “reputation alone does not implicate any ‘liberty’ or ‘property’ interest sufficient to invoke the procedural protection of the due process clause, and that something more than simple defamation by the state official must be involved to establish a constitutional claim.”<sup>36</sup> *Paul* dealt with the dissemination of a flyer prepared by two Kentucky police departments.<sup>37</sup> The purpose of the flyer was to alert local merchants of individuals who had been arrested in the area for shoplifting.<sup>38</sup> Davis was included in the flyer because of an arrest for shoplifting.<sup>39</sup> At the time of the flyer’s publication Davis had not been adjudicated on the shoplifting charge.<sup>40</sup> After the flyer was distributed the charges were dis-

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<sup>30</sup> *Bursac*, 868 N.Y.S.2d at 480.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* at 479-80.

<sup>33</sup> *Id.* at 478-79.

<sup>34</sup> *Id.* at 476.

<sup>35</sup> 424 U.S. 693 (1976)

<sup>36</sup> *Bursac*, 868 N.Y.S.2d at 476-77.

<sup>37</sup> *Paul*, 424 U.S. at 694-95.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 695.

<sup>40</sup> *Id.* at 696.

missed.<sup>41</sup> Davis' claim was that the inclusion of his name and picture on the flyer deprived him of a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.<sup>42</sup>

The stigma plus test is the standard for elevating a defamation claim to a constitutional due process claim.<sup>43</sup> In order "[t]o prevail on a 'stigma plus' claim, a plaintiff must show (1) the utterance of a statement 'sufficiently derogatory to injure his or her reputation, . . . and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights.'"<sup>44</sup> Such a burden or alteration must be "*in addition* to the stigmatizing statement."<sup>45</sup> The mere imposition of a stigma by the government does not rise to the level of infringement of a constitutionally protected liberty or property interest absent some change in status suffered by the plaintiff.<sup>46</sup> Such changes in status necessary to satisfy the plus requirement include the deprivation of property, termination of employment, and interference with business.<sup>47</sup> However, these changes must be a direct result of the defamation: "'[D]eleterious effects [flowing] directly from a sullied reputation,' standing alone, do[es] not constitute a 'plus' under the 'stigma plus' doctrine.'"<sup>48</sup>

Justice Brennan dissented in *Paul* and noted that:

[Without] constitutional restraints on such oppressive behavior, [like police officials labeling innocent individuals as criminals without trial,] the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for . . . punishment by those primarily charged with fair enforcement

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<sup>41</sup> *Id.*

<sup>42</sup> *Paul*, 424 U.S. at 696.

<sup>43</sup> *Bursac*, 868 N.Y.S.2d at 477.

<sup>44</sup> *Sadallah*, 383 F.3d at 38 (quoting *Doe v. Dep't of Pub. Safety*, 271 F.3d 38, 47 (2d Cir. 2001)).

<sup>45</sup> *Id.* (internal quotations omitted) (emphasis in original).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* See also *Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004) (holding that termination of government employment satisfies the plus requirement); *Greenwood v. New York*, 163 F.3d 119, 124 (2d Cir. 1998) ("[G]overnment defamation combined with the deprivation of a property interest in clinical privileges g[ives] rise to a due process liberty interest.").

<sup>48</sup> *Sadallah*, 383 F.3d at 38 (alteration in original) (quoting *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994)).

of the law.<sup>49</sup>

In delivering the lead opinion in *Paul* Justice Rehnquist narrowly interpreted *Wisconsin v. Constantineau*,<sup>50</sup> a case which the court of appeals relied on to find that Davis had a constitutionally protected liberty interest in his own reputation.<sup>51</sup> *Constantineau* dealt with a Wisconsin statute<sup>52</sup> that allowed certain officials to make a determination to “forbid the sale or gift of intoxicating liquors to one who by excessive drinking produces described conditions . . . , such as exposing himself or family to want or becoming dangerous to the peace of the community.”<sup>53</sup> Enforcement of this statute was carried out via the posting of a notice containing the names of such individuals to whom the sale of alcoholic beverages was forbidden in stores that sold alcohol.<sup>54</sup> The determination and subsequent public posting of the notice was done without a hearing or any process of review, leaving the target of the ban without recourse once one of the many statutorily authorized officials had made a determination that he should be forbidden from obtaining alcohol.<sup>55</sup>

The issue in *Constantineau* is not the content of the statute, but rather the lack of procedural due process protections.<sup>56</sup> The “posting” of a person under the statute had the effect of “giving notice to the public that . . . the particular [posted] individual’s behavior . . . [f]ell within one of the categories enumerated in the statutes.”<sup>57</sup> In analyzing the issue the Supreme Court recognized that the district court noted “[i]t would be na[i]ve not to recognize that such posting or characterization of an individual will expose him to public embar-

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<sup>49</sup> *Paul*, 424 U.S. at 714 (Brennan, J., dissenting)

<sup>50</sup> (*Constantineau II*), 400 U.S. 433 (1971).

<sup>51</sup> *Paul*, 424 U.S. at 701.

<sup>52</sup> The Wisconsin statute provided that town supervisors, mayors, chiefs of police, aldermen, trustees, county superintendents, the chairman of the county board of supervisors, district attorneys, and the spouse of the person accused under the statute, had the authority to forbid the sale or gift of alcohol by personally serving the person against whom the ban was levied and distributing in writing such a notice to stores and distributors of alcohol. *Constantineau*, 400 U.S. at 434, n.2 (quoting WIS. STAT. § 176.26 (repealed 1971)).

<sup>53</sup> *Constantineau II*, 400 U.S. at 434 (internal quotations omitted) (quoting WIS. STAT. § 176.26 (repealed 1971)).

<sup>54</sup> *Id.* at 435.

<sup>55</sup> *Id.* at 437.

<sup>56</sup> *Id.* at 436.

<sup>57</sup> *Id.*

rassment and ridicule.”<sup>58</sup> Moreover, the Supreme Court agreed with the district court’s determination that “procedural due process requires that before [an individual,] acting pursuant to State statute[,] can make such a quasi-judicial determination, the individual [burdened by the action] must be given notice of the intent to post and an opportunity to present his side of the matter.”<sup>59</sup>

In reaching its conclusion the Court reasoned that the importance of procedural protection is evident in the fact that “most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.”<sup>60</sup> In that vein the Court noted “where the State attaches ‘a badge of infamy’ to the citizen, due process comes into play.”<sup>61</sup> Furthermore, an individual’s “ ‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.’ ”<sup>62</sup>

In *Constantineau* the United States Supreme Court 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.”<sup>63</sup> This holding is not unique. In *Rosenblatt v. Baer*<sup>64</sup> Justice Stewart, in his concurrence, described a person’s right to protect his or her name as essential to our concept of ordered liberty and stated that “[t]he protection of private personality, like the protection of life itself . . . is entitled to [no] less recognition by this Court as [is] a basic [right] of our constitutional system.”<sup>65</sup>

Justice Rehnquist, however, interpreted the phrase “because of what the government is doing to him” from the *Constantineau* opinion to mean that “the governmental action taken in that case de-

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<sup>58</sup> *Constantineau II*, 400 U.S. at 436 (internal quotations omitted). See also *Constantineau v. Grager (Constantineau I)*, 302 F. Supp. 861, 864 (1969) (finding section 176.26 unconstitutional).

<sup>59</sup> *Constantineau II*, 400 U.S. at 436 (quoting *Constantineau I*, 302 F. Supp. at 864).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 437 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

<sup>62</sup> *Id.* (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

<sup>63</sup> *Id.*

<sup>64</sup> 383 U.S. 75 (1966).

<sup>65</sup> *Id.* at 92 (Stewart, J., concurring).



prived the individual of a right previously held under state law,” and that the state action of “[p]osting . . . significantly altered her 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.”<sup>66</sup> Accordingly, Justice Rehnquist continued, noting that, “[t]he stigma resulting from the defamatory character of the posting was doubtless an important factor . . . , but we do not think that such defamation, standing alone, deprived Constantineau of any liberty protected by the procedural guarantees of the Fourteenth Amendment.”<sup>67</sup> Justice Rehnquist’s interpretation views the defamation as it occurred in both *Constantineau* and *Paul* through the extremely narrow lens of whether the harm suffered by the individual was significant enough to cause that person undue harm. This interpretation is inappropriate as it neglects to recognize the fact that the liberty interest at stake is not the right to be free from governmental defamation, but instead the fundamental right to be free from criminal penalties without due process.

The flaw in Justice Rehnquist’s reasoning in *Paul* is apparent when viewed in conjunction with the opinion in *Constantineau*. It is not possible for *Paul* to be reconciled with *Constantineau*’s holding that it is necessary to provide the accused with notice and an opportunity to be heard before levying punishment upon the accused. These principles are not unique to *Constantineau*, but instead reflect larger principles apparent in every instance of the American judicial system. For example, the United States Supreme Court has recognized that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial,”<sup>68</sup> and that “[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused’s guilt or innocence solely on the evidence adduced at trial.”<sup>69</sup> These well-established principles are violated by the holding in *Paul*, which impermissibly allows a member of the executive branch of government to levy punishments without a trial where guilt or innocence would be determined.

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<sup>66</sup> *Paul*, 424 U.S. at 708-09 (internal quotations omitted).

<sup>67</sup> *Id.* at 709 (internal quotations omitted).

<sup>68</sup> *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

<sup>69</sup> *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

The New York Court of Appeals has also adopted the *Paul* stigma plus test when analyzing the Due Process Clause of the New York State Constitution.<sup>70</sup> In *Lee TT. v. Dowling*, the New York Court of Appeals dealt with individuals who wished to have their names expunged from the state's central registry of child abusers.<sup>71</sup> The court began its analysis by stating that in both instances, whether the federal and state "constitutional guarantee[s] [of due process] appl[y] depends on whether the government's actions impair a protected liberty or property interest."<sup>72</sup> The court further stated that "[t]here is no constitutional prohibition against the State maintaining a list of suspected abusers."<sup>73</sup> Citing *Paul*, the court adopted the stigma plus standard, and determined that "[a] loss of liberty results only if some more tangible interest is affected or a legal right is altered."<sup>74</sup> Additionally, the court in *Lee TT.* found that inclusion of the petitioners' names on the central registry constituted a significant stigma, and that their subsequent change and loss of employment satisfied the plus requirement.<sup>75</sup>

Furthermore, in *People v. Letterlough*<sup>76</sup> the New York Court of Appeals recognized that it is the exclusive domain of the "elected Legislature" to determine what form of punishment to levy for specific crimes, and therefore a sentencing court is without authority to impose other forms of punishment "not authorized by statute."<sup>77</sup> *Letterlough* involved an individual who was convicted of driving while intoxicated.<sup>78</sup> As part of Letterlough's probation, the sentencing court required him to affix a sign to any vehicle he operated that read "CONVICTED DWI".<sup>79</sup> The New York Court of Appeals held that this form of shame punishment was impermissible for the sentencing court to impose, because "the creation of punishment for crime rests within the realm of the Legislature."<sup>80</sup> The court also stated that the

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<sup>70</sup> *Lee TT. v. Dowling*, 664 N.E.2d 1243, 1249 (N.Y. 1996).

<sup>71</sup> *Id.* at 1246.

<sup>72</sup> *Id.* at 1249.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (internal quotations omitted) (citing *Paul*, 424 U.S. at 708-09).

<sup>75</sup> *Lee TT.*, 664 N.E.2d at 1250.

<sup>76</sup> 665 N.E.2d 146 (N.Y. 1995).

<sup>77</sup> *Id.* at 150.

<sup>78</sup> *Id.* at 147.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 150 (citing *People v. Byrne*, 570 N.E.2d 1066, 1069 (N.Y. 1991)).

judiciary “must act within the limits of their authority and cannot overreach by using their probationary powers to accomplish what only the legislative branch can do.”<sup>81</sup>

When compared to the holding in *Letterlough* it is clear that the scheme in *Bursac* is impermissible, not only substantively but because of how it was created. Based on the *Letterlough* court’s reasoning, it is not within the power of the court to impose novel punishments, nor is it within the power of the county executive to do so. The *Bursac* case is a clear example where the Nassau County Executive—who lacks the power to do so—imposed a form of punishment on individuals who have yet to be convicted. Moreover, the County Executive lacks the power to impose the punishment on individuals who have been convicted. Such a scheme that allows the county executive to create and administer punishment for crimes outside the judicial process clearly violates New York constitutional principles.

While the *Bursac* court reached the correct outcome—that the “Wall of Shame” containing pre-convicted arrestees is constitutionally impermissible—it did so using fundamentally flawed reasoning. The crux of the issue at hand is not merely one of defamation of a citizen by a governmental agency, but the levying of a punishment for a crime upon a citizen who has yet to be granted access to the constitutionally guaranteed judicial system. Even more troubling about the case at bar is that it is the county executive and police commissioner who are imposing the sentence upon the arrestees, neither of whom possess the official capacity to impose such punishment. By creating the “Wall of Shame” the Nassau County Executive has rendered the criminal process a sham by “convicting” people accused of a crime without the proper procedural safeguards of a hearing.<sup>82</sup>

Furthermore, the comparison of *Bursac* to cases such as *Paul* and *Lee TT*. is flawed. In *Paul*, the creation of the shoplifter list was compiled and distributed in order to curtail the increase in shoplifting activity.<sup>83</sup> Moreover, the list in that case was never intended for viewing by the general public.<sup>84</sup> Likewise, in *Lee TT*. the state central registry of child abusers is a resource intended to regulate those

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<sup>81</sup> *Letterlough*, 665 N.E.2d at 151.

<sup>82</sup> *See Bursac*, 868 N.Y.S.2d at 470.

<sup>83</sup> *Paul*, 424 U.S. at 694-95.

<sup>84</sup> *Id.* at 695 (noting that distribution of the shoplifter list was limited to 800 local businesses as compared to the widespread Internet access of the “Wall of Shame” program).

who work with children by preventing known abusers from gaining access to vulnerable children.<sup>85</sup> Also, as in *Paul*, this list is generally not open to public scrutiny.<sup>86</sup> Unlike *Paul* and *Lee TT.*, the list involved in *Bursac*—the “Wall of Shame”—exists for no other reason but to punish those who have been arrested for *allegedly* driving while intoxicated in Nassau County. Additionally, this list is not only intended for general viewing by the public, but it has been publicized and promoted to increase the ease by which the public can view it.

The facts in *Bursac* are much closer to those in *Constantineau*, and the analysis should have been the same in both of those cases. Both *Bursac* and *Constantineau* dealt with a notification system that placed a particular stigma on certain individuals without providing them with any procedural safeguards or process. The *Constantineau* court recognized that “[o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.”<sup>87</sup> This fact is completely overlooked by *Paul* and its progeny. Both the statutory scheme in *Constantineau* and Nassau County’s “Wall of Shame” levy the equivalent of a sentence in the form of an unsavory label, which could conceivably flow from a conviction in court. However, such “convictions” flow not from the criminal process but from determinations made by the executive branch of government. According to Justice Rehnquist’s interpretation of *Constantineau*, the petitioners in both *Bursac* and *Constantineau* sought to protect their liberty interest to be free from excessive governmental defamation.<sup>88</sup> However, this is flawed because *Bursac* and *Constantineau* were not seeking to be free from defamation, but rather to be free from convictions of crimes for which they had not received due process.

According to the holding in *Bursac*, the “stigma-plus” standard in *Paul* would allow for such an executive conviction so long as the amount of people who knew about it was limited. For example, the Nassau County Supreme Court finds that the flaw in the “Wall of Shame” is the fact that it is accessible via the Internet. Would the ruling have been any different if the “Wall of Shame” was a physical wall located in a public place somewhere in Nassau County? Under

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<sup>85</sup> *Lee TT.*, 664 N.E.2d at 1247.

<sup>86</sup> *See id.*

<sup>87</sup> *Constantineau II*, 400 U.S. at 437.

<sup>88</sup> *See Paul*, 424 U.S. at 708-09.

the *Paul* stigma plus test the answer conceivably would be that such an action would be permissible, which clearly exposes the problem with the *Paul* standard.

The major problem with the “Wall of Shame” is its inclusion of those who have yet to be convicted of the crime for which they are being punished. The Nassau County Supreme Court uses this language to dismiss Bursac’s claim as an overly simplified lay notion of the concept of the presumption of innocence.<sup>89</sup> However, the court fails to realize that the true implication of this language is that it supports the notion that one has the right to stand trial and defend against the allegations against them.<sup>90</sup> By allowing the publication of the “Wall of Shame” for no purpose other than its stated goal of embarrassing and punishing those *arrested*—not convicted—of drunk driving, the government strips individuals of their right to have their guilt or innocence determined at trial. In addition, the “Wall of Shame” program has the effect of shifting the burden of proof from the prosecution, to prove the guilt of the accused, over to the defendant, to prove his innocence.

The importance of a person’s reputation in the American legal system is apparent in the lengths the system goes to ensure that a person is not wrongly deprived of his good name. According to Justice Brennan, this is the purpose for the “concrete protection through the presumption of innocence and the prohibition of state-imposed punishment unless the State can demonstrate beyond a reasonable doubt, at a public trial with the attendant constitutional safeguards, that a particular individual has engaged in proscribed criminal conduct.”<sup>91</sup> In the instant case, the publishing of Bursac’s name and picture completely circumvents the system’s constitutional safeguards without so much as a cursory look as to whether the person has actually committed a crime. It also places upon the accused—in the eye of the general public—the stigma of being convicted of a crime for which he has not yet stood trial. It is this stigma, in and of itself, which is constitutionally impermissible, and the very reason the legal system requires criminal convictions be proven beyond a reasonable doubt.<sup>92</sup>

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<sup>89</sup> See *Bursac*, 868 N.Y.S.2d at 480.

<sup>90</sup> *Taylor*, 436 U.S. at 485.

<sup>91</sup> *Paul*, 424 U.S. at 724 (Brennan, J., dissenting).

<sup>92</sup> *Id.* at 724-25.

The Court in *Paul* rejects the notion of the importance of a person's reputation due to questionable reasoning compared to precedent at the time the decision was handed down. However, *Paul* and its progeny have become the leading authority in this field and the United States Supreme Court continues to find that damage done to a person's reputation alone does not constitute a violation of a constitutionally protected liberty interest. This reasoning must be changed because of the advent of technology, which is clearly evidenced by the facts presented in *Bursac*. In light of the *Bursac* decision, a person's reputation and her interest in keeping that reputation free of unwarranted blemishes is more important than ever before.

This struggle to reconcile the stigma plus standard with the increase in the availability of information is seen in *Bursac*. At the time the United States Supreme Court handed down its decision in *Paul*, inclusion in a flyer distributed to local merchants may in fact have stigmatized the included individuals but could have fallen short of the actual damages necessary to satisfy the plus requirement. As seen in *Bursac*, the dissemination of a similar list published on the Internet nearly automatically satisfies the plus requirement due to the nature of the publication. As such, it is apparent that the stigma plus test is no longer an appropriate measure of governmental defamation.

In *Bursac* the Nassau County Supreme Court, in applying *Paul*, found the County Executive to have the power to levy punishments outside of the constitutionally mandated trial process. This action by the County Executive clearly violates the procedural due process of those who are subject to such punishments. While the court ultimately determined that the County Executive cannot publish the information on the Internet, it is the courts' ratification of his unconstitutional actions which sets a frightening precedent for allowing officials to act outside of their official capacity.

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