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REPUTATION AS A CONSTITUTIONALLY PROTECTIBLE INTEREST

I. Introduction

State courts and legislatures have long recognized that a person has a legal right to enjoy his reputation free of false or derogatory characterizations by others.¹ Any unjustified statement which casts an individual in some unfavorable light will constitute an infringement of his reputational right and will give rise to an action for civil defamation.² That elaborate body of law is designed to provide a forum where an individual may publicly restore his tarnished character and possibly recover monetary damages.³

There is little reason to doubt the adequacy of this state remedy when one private individual defames another.⁴ Generally, the community is unwilling to accept a blanket derogatory appraisal of one man by another man.⁵ The mere fact that the wrongdoer is an employee of government does not necessarily change this reaction. Those occupying low level positions in government do not, in the community's view, speak on behalf of the state. Thus, the word of a secretary, busdriver, schoolteacher, or custodian does not take on more importance because that person happens to be a state or federal employee.

The situation is, however, drastically changed when a community-wide campaign to label someone a "criminal," "drunkard," or "Communist," is precipitated or condoned by the police, mayor, governor, Congress, or the President.⁶ Given the weight attributed by society to the word of public officials, and the high degree of trust society places in their offices, a party will be unable to effectively combat, in a state court proceeding, the effects of defamatory characterizations made by such officials. Once these public officials "brand" someone in the community, the community's thought and impressions about him change. Relationships with family, friends, employers, and neighbors may become strained, or completely severed.⁷ Unfortunately, personal opinion will change and become fixed before a state court has occasion to speak. A public forum and the award of damages after the fact cannot undo either the deep and unforgettable harm suffered by an innocent victim, or remove the impression etched upon the minds of those around him.⁸ The only means of adequately

1 *Fairbanks Publishing Co. v. Francisco*, 390 P.2d 784 (Alas. 1964); *Short v. News-Journal Co.*, 58 Del. 592, 212 A.2d 718 (1965); *Swede v. Passaic Daily News*, 30 N.J. 320, 153 A.2d 36 (1959); and *Rainier's Dairies v. Rariton Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955).

2 *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 343 P.2d 36 (1959); and *Smith v. Los Angeles Bookbinders Union*, 133 Cal. App. 2d 486, 284 P.2d 194 (1955).

3 *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967).

4 *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, 660 (D.C. Cir. 1966).

5 *Arno v. Stewart*, 245 Cal. App. 2d 955, 54 Cal. Rptr. 392 (1966); *Lamberti v. Sun Printing Ass'n.*, 111 App. Div. 437, 97 N.Y.S. 694 (1906); and *Hanson v. Fueling*, 160 Wis. 511, 152 N.W. 287 (1915).

6 *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); and *United States v. Lovett*, 328 U.S. 303 (1946). Cf. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

7 *Id.*

8 400 U.S. 433.

protecting an individual from such harm is to invoke the preventive safeguards of the Constitution, namely procedural due process.⁹

The due process clauses of the fifth and fourteenth amendments¹⁰ provide that before government may deprive an individual of an interest in "life," "liberty," or "property," it is incumbent upon the government to afford that person notice and an opportunity to be heard. The importance of this federal safeguard is that it permits an individual to contest and possibly prevent the implementation of proposed governmental action before any harm is actually incurred.¹¹

The Supreme Court, in *Wieman v. Updegraff*,¹² held that defamatory attacks by government upon a citizen's reputation may constitute a deprivation of "liberty." Conceived in the hectic days of the "Red Scare" following World War II, the notion of a constitutional interest in reputation was originally adopted to limit the government's ability to label someone a "communist" without having to substantiate the truth of that label. This standard curbed the government's discretion in defaming a citizen; however, its importance waned as the nation's fears of communism slowly diminished.

Recently, the issue of reputation as a federally protectible interest has again come to the fore. With the current surge in crime, a concerned public has demanded vigorous law enforcement.¹³ Federal, state, and local law enforcement agencies have responded by employing stringent investigative procedures.¹⁴ A police department may, for example, distribute to area merchants the name and photograph of "known" and "active" shoplifters thought to be operating in the community, regardless of whether or not the individual actually has been tried or convicted. The potential for harm is immense. Since the police are viewed as authorities in criminal justice, the community will generally accept the characterization of an individual as a criminal. Should the official "label," however, prove to be false, the question arises as to whether the police department's conduct is merely a traditional state defamation or a deprivation of "liberty" in violation of the Constitution.

In *Paul v. Davis*¹⁵ the Supreme Court reexamined the early cases of the "Cold War." It held that only when a defamation by the state is accompanied by the loss of some other "property" or "liberty" interest will the official characterization constitute a deprivation of "liberty." Thus, the repute of one's name, standing alone, is not an independent constitutional interest.

⁹ *Id.*

¹⁰ The fifth amendment applies to the federal government; it provides in pertinent part: No person shall be . . . deprived of life, liberty, or property, without due process of law.

The fourteenth amendment, applicable to the several states reads:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

¹¹ See e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Grannis v. Ordean*, 234 U.S. 385 (1914); and *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223 (1864).

¹² 344 U.S. 183. For the facts of this case see note 72, *supra*.

¹³ See, R. MEDALIE & P. WOLF, *CRIME—A COMMUNITY RESPONDS*, (Georgetown University Law Center, 1967).

¹⁴ See, e.g., the procedure employed to inhibit shoplifting during the Christmas season in *Paul v. Davis*, 44 U.S.L.W. 4337 (U.S. March 23, 1976).

¹⁵ *Id.*

The application of the Court's analysis produces most unsettling results. Government is now permitted to intentionally inflict grave personal harm upon an individual's character so long as it does not also deprive him of some interest ensured by the fifth or fourteenth amendments. Although relief may be available in state court after the defamation occurs, an award of monetary damages cannot neutralize the effects of an egregious label bestowed by government.

The only effective means of protecting a citizen's good name is to afford that individual an opportunity to contest proposed state action before it is effected. That objective could be attained by considering one's "name" as "property" within the meaning of the Constitution. While the Court has yet to address this issue, its decisions would permit such a construction of the due process clause.

II. Reputation Under State Law

The common law of each state recognizes that an individual holds a property interest in his name and reputation.¹⁶ Recognition of an individual's reputation as a state property interest has given rise to the law of civil defamation.¹⁷ That body of law—composed of the twin torts of libel¹⁸ and slander¹⁹—is designed to ensure one's right to remain free of false²⁰ and unjustified²¹ attacks upon his personal character. Despite the fact the law of defamation is riddled with "anomalies and absurdities,"²² its underlying theory is clear. Any unjustified communication which tends to diminish an individual's standing in his community constitutes an infringement of his property right in reputation.²³ Such communications may take one of several forms²⁴ and may impute a variety of

16 *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1927); *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906); *Magovirk v. Western Union Tel. Co.*, 79 Miss. 632, 31 So. 206 (1902); *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 A. 631 (1937); and *Holloman v. Life Ins. Co.*, 192 S.C. 457, 7 S.E.2d 169 (1940). *Cf. Green, Relational Interests*, 31 ILL. L. REV. 35 (1936).

17 *Rainier's Dairies v. Rariton Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1935).

18 Libel involves a written defamation and is actionable without any showing of special damages if the published statement is defamatory on its face. *See, Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219 (D. Colo. 1976); *J. GATLEY, LIBEL & SLANDER*, ¶ 141, (7th ed. 1974).

19 Slander involves an oral defamation and does not generally give rise to a cause of action unless there is a showing of pecuniary loss. *Id.* However, a slanderous statement which charges an individual with an infamous crime, *Wooton v. Martin*, 140 Ky. 781, 131 S.W. 783 (1910), a loathsome disease, *McDonald v. Nugent*, 122 Iowa 651, 98 N.W. 506 (1904), or incompetency in a trade, *Biggerstaff v. Zimmerman*, 108 Colo. 194, 114 P.2d 1098 (1941), is actionable regardless of monetary loss. *Cf. RESTATEMENT OF TORTS*, § 573 (1938); *GATLEY, supra* note 18 at 73.

20 Truth is a complete defense to an action for defamation. *See, e.g., Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976).

21 As to the various defenses that are available to a defendant in an action for defamation, *see GATLEY, supra* note 18 at 151; *W. PROSSER, LAW OF TORTS*, § 114, (4th ed. 1971) [hereinafter cited as "PROSSER"]; and *E. SEELMAN, THE LAW OF LIBEL & SLANDER*, ¶ 170, (1964). *Cf. Veeder, Absolute Immunity in Defamation*, 9 COLO. L. REV. 463 (1909).

22 PROSSER at 737.

23 *Id.* at 739-44; *J. SALMOND, LAW OF TORTS*, 398 (8th ed. 1934); and *G. BOWER, ACTIONABLE DEFAMATION*, 4 (2d ed. 1923).

24 *Aku v. Lewis*, 52 Hawaii 366, 477 P.2d 162 (1970) (television broadcast); *Gibson v. Kincaid*, 140 Ind. App. 186, 221 N.E.2d 834 (1967) (radio broadcast); *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933) (photograph); *Bennett v. Norban*, 396 Pa. 94, 151 A.2d 476 (1959) (gestures and acts); and *Newspaper Publishing Corp. v. Burke*, 224 S.E.2d 132 (Va. 1976).

derogatory characteristics.²⁵ However, a significant number of recent decisions involve the mass media and imputations of criminal activity or commercial wrongdoing.²⁶

The primary purpose in providing a means of redress for defamatory communications is to permit an aggrieved person the opportunity to publicly vindicate his good name.²⁷ A plaintiff who makes out such a case is, as a matter of law, also entitled to pecuniary damages.²⁸ Generally, an injured party may recover punitive damages when actual malice or recklessness is proven;²⁹ special damages, when the loss of a specific benefit is shown;³⁰ and general damages, which are presumed to flow from certain remarks.³¹ Nominal damages will also be assessed when the plaintiff demonstrates no more than the technical elements of a cause of action.³²

Thus, state law is designed to redress harms ranging from a mere nominal defamation to injuries suffered as a result of intentional and malicious wrongdoing. It is important to emphasize, however, that state law does not provide remedial action until the harm to one's reputation has been imposed. In order to challenge governmental action before that time, an individual must rely upon the due process protections of the Constitution.

III. Constitutional Protections

A. Procedural Due Process

The protections afforded by the due process clauses of the fifth and fourteenth amendments are, for the most part, procedural in nature.³³ Although the concept of due process has been described as "elusive"³⁴ and "undefinable,"³⁵ its fundamental requisites generally include notice and the opportunity to be heard before the government acts.³⁶ These elements are deeply rooted in the federal

25 *Katz v. Rosen*, 48 Cal. App. 3d 1032, 121 Cal. Rptr. 852, (1975) (unethical conduct); *Montandon v. Triangle Publications, Inc.*, 45 Cal. App. 3d 938, 120 Cal. Rptr. 186, (1975) (prostitution); *Cowper v. Vannier*, 20 Ill. App. 2d 499, 156 N.E.2d 761 (1963) (mental impairment); *Firestone v. Time, Inc.*, 305 So. 2d 172 (Fla. 1974) (adultery); *Stone v. Essex County Newspaper, Inc.*, 330 N.E.2d 161 (Mass. 1975) (commission of a crime). *See also*, *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219 (D. Colo. 1976) (improper business conduct); *Axelband v. Rony*, 277 F.2d 314 (9th Cir. 1960) (untruthfulness).

26 *Welsh v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046, 340 N.E.2d 539 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Levine v. Kiss*, 47 App. Div. 2d 544, 363 N.Y.S.2d 101 (1975); and *Dill v. Rader*, 533 P.2d 650 (Okla. 1975).

27 *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967); RESTATEMENT OF TORTS, § 577, comment b (1938).

28 *Hanson v. Krehbeil*, 68 Kan. 670, 75 P. 1041 (1904); *Ball v. White*, 3 Mich. App. 579, 143 N.W.2d 188 (1966); and *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904).

29 *Saunders Hardware Five & Ten, Inc. v. Low*, 307 So. 2d 893 (Fla. 1975); *Mauk v. Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903).

30 *Craney v. Donovan*, 92 Conn. 236, 102 A. 640 (1917); *Hassett v. Carroll*, 85 Conn. 23, 81 A. 1013 (1911).

31 *Indianapolis Newspaper Inc. v. Fields*, 254 Ind. 219, 259 N.E.2d 651 (1970); *Hughes v. Samuels Bros.*, 179 Iowa 1077, 159 N.W. 589 (1916).

32 *Hutchens v. Kuker*, 168 Neb. 451, 96 N.W.2d 228 (1963); *Jones v. Hester*, 262 N.C. 487, 137 S.E.2d 846 (1969).

33 *See*, 341 U.S. at 179 (Douglas, J., concurring).

34 *Hanna v. Larche*, 363 U.S. 420, 442 (1960).

35 *Id.*

36 *Ex Parte Wall*, 107 U.S. 265, 289 (1882).

common law of this country and are recognized as basic to our system of jurisprudence.³⁷ The right to prior notice and hearing is, however, not absolute. A person is entitled to these procedural safeguards only when the government's activity infringes upon some interest protected by the Constitution.³⁸

B. *Substantive Due Process*

Although the state may adhere to the procedural requirements of the Constitution, the significance of those procedures will be reduced to mere formalities when the state proceeds to enact arbitrary and capricious legislation. To prevent such an abuse, the Supreme Court has fashioned the doctrine of "substantive due process."³⁹ Roughly defined, substantive due process is the federal guarantee that no person shall be deprived of a Constitutional right as the result of an unreasonable or arbitrary exercise of legislative power.⁴⁰ Any action deemed to be violative of this doctrine constitutes a usurpation of legislative authority and is null and void.⁴¹ To invoke this protection, however, an aggrieved party must demonstrate more than mere hardship or an error in legislative judgment.⁴² It must be shown that a statute places unlimited discretion in the hands of a public official to adversely affect his interest in "life," "liberty," or "property."⁴³

C. *The Liberty Interest*

The concept of "liberty" found within the fifth and fourteenth amendments has never been precisely defined by the Supreme Court.⁴⁴ It is one of the "majestic"⁴⁵ constitutional terms which must draw its meaning from time and experience.⁴⁶ Clearly, however, the concept is not limited solely to the freedom against bodily restraint.⁴⁷ The Court has viewed liberty as encompassing the right to contract,⁴⁸ to engage in a particular livelihood,⁴⁹ and to obtain an education.⁵⁰ With respect to the general nature of that doctrine, the Court has observed that liberty extends to "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."⁵¹

37 *In re Oliver*, 333 U.S. 257, 273 (1947).

38 *Id.*

39 *Poe v. Ullman*, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting).

40 *Galvan v. Press*, 347 U.S. 522 (1954).

41 *Fleming v. Nestor*, 363 U.S. 603 (1960); *Nebbia v. New York*, 291 U.S. 502 (1934); and *Heiner v. Donnan*, 285 U.S. 312 (1932).

42 *Wickard v. Filburn*, 317 U.S. 111 (1942); and *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885).

43 291 U.S. 502; *Dent v. West Virginia*, 129 U.S. 114 (1889).

44 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

45 *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

46 *Id.*

47 262 U.S. 390.

48 *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Chicago, Burl. & Quin. R.R. Co. v. McGuire*, 219 U.S. 547 (1911); *Lochner v. New York*, 198 U.S. 45 (1905); *Butcher's Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884); and *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

49 *Traux v. Corrigan*, 257 U.S. 312 (1921); *Adams v. Tanner*, 244 U.S. 590 (1917); *Traux v. Raich*, 239 U.S. 33 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Minnesota v. Barber*, 136 U.S. 313 (1890); and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

50 262 U.S. 390.

51 *Id.* at 399.

Since personal and business relationships are built upon personal trust and confidence,⁵² the right to protect one's reputation is clearly "essential to the orderly pursuit of happiness."⁵³ A good reputation in the community is a fundamental requisite of friendship,⁵⁴ employment,⁵⁵ a professional career,⁵⁶ the borrowing of money,⁵⁷ and the extension of credit.⁵⁸ Indeed, this intangible interest provides the lifeblood for the entire constitutional scheme of ensuring an individual's liberty.⁵⁹ Such rights as the freedom to contract and to engage in a chosen occupation would become meaningless if government officials could summarily impose false or degrading labels upon any citizen.⁶⁰ Thus, as one's reputation is diminished in the community, his chances of pursuing a normal daily life are similarly diminished. Given this fact, an individual's good name and reputation certainly deserves the protections afforded by the due process clause to liberty interests.

D. *The Property Interest*

The fifth and fourteenth amendments also require that due process of law be afforded an individual when the government deprives him of an interest in "property."⁶¹ To have a property interest within the ambit of the Constitution, a person must have secured some benefit by way of the statutory or common law of the state or federal government.⁶² Furthermore, he must possess a "legitimate claim of entitlement" to that benefit.⁶³ An individual has such a claim when the source of the government's privilege causes him to justifiably rely upon its continuation in his daily life.⁶⁴ Thus, a statute conferring welfare benefits for an indefinite period of time creates an "entitlement" to the continued receipt of payments;⁶⁵ but an employment contract that is silent as to renewal does not create an "entitlement" to re-employment.⁶⁶

State law recognizes the existence of a property interest in one's character and good name.⁶⁷ To protect that right, an elaborate body of legal principles has been created by state courts and legislatures.⁶⁸ Considering the extent of the state's concern for reputation, it is difficult to challenge the proposition that an individual has a "legitimate claim of entitlement" in the continual protection of his personal reputation. Unlike contractual rights, which expire on a pre-

52 *Deon v. Kirby Lumber Co.*, 162 La. 670, 111 So. 55 (1927).

53 262 U.S. 390, 399.

54 162 La. 670, 111 So. 55.

55 344 U.S. 183.

56 328 U.S. 303.

57 *Hinkle v. Alexander*, 244 Ore. 267, 411 P.2d 829 (1966); *Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

58 *Reed v. Melnick*, 81 N.M. 608, 471 P.2d 178 (1970).

59 262 U.S. 390.

60 *Id.*

61 *See*, *Goldberg v. Kelly*, 397 U.S. 345 (1970).

62 408 U.S. 564, 576.

63 *Id.* at 577.

64 *Id.* *See also* 397 U.S. 345.

65 *Id.*

66 408 U.S. 565. *But see*, *Perry v. Sinderman*, 408 U.S. 593 (1972).

67 *See* note 16 *supra*.

68 *See*, *Donnelly, History of Defamation*, [1949] WIS. L. REV. 99; *Lovell, The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); and *Veeder, The History and Theory of the Law of Defamation*, 3 COL. L. REV. 546 (1903).

determined date, an individual has under state law a legal expectation, throughout his lifetime, to be free of unjustified attacks upon his reputation.⁶⁹

Hence, official statements or conduct which tends to diminish the reputation and good name of an individual may also constitute a deprivation of property in contravention of the fifth and fourteenth amendments.

IV. Reputation as a Constitutional Liberty Interest

A. Paul v. Davis⁷⁰

The notion that reputation is a protectible "liberty" interest has been recognized by the Supreme Court since the early days of the Cold War following the end of the Second World War.⁷¹ The development of that concept has been most confusing.⁷² The problem stems from the fact that the Court never laid

⁶⁹ The right to enjoy one's reputation terminates at death. *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 325 P.2d 659 (1958); *Hughes v. New England Newspaper Co.*, 312 Mass. 178, 43 N.E.2d 657 (1942). In the absence of a statute, the death of the defamed party abates a pending action which he has commenced. *Thompson v. Curtis Publishing Co.*, 193 F.2d 953 (3d Cir. 1953).

⁷⁰ 44 U.S.L.W. 4337.

⁷¹ 344 U.S. 183.

⁷² For example in *Cafeteria Workers*, the petitioner, an employee of a privately owned cafeteria operating on the premises of the Naval Gun Factory in Washington, D.C., was summarily dismissed from her employment duties for failing to satisfy the security requirements promulgated by the factory's security officer. The Supreme Court rejected the petitioner's claim that the government's characterization of her as a "security risk" plus the loss of her job was a deprivation of "liberty." Mr. Justice Stewart, writing for the majority, distinguished this case from *Wieman*.

Wieman involved a constitutional challenge to an Oklahoma statute which required state employees to take a loyalty oath as a condition of their employment. The oath required a public employee to state that he was not a member of any organization listed by the Attorney General of the United States as a "communist" or "subversive" group. The appellants failed, within the prescribed period, to submit to the oath. The appellee, a citizen and taxpayer of the United States, brought suit in district court to enjoin the state from paying compensation to the appellants. The Court struck down the statute as an arbitrary exercise of legislative authority:

Yet under the Oklahoma Act, the fact of association alone determines disloyalty or disqualification; it matters not whether the association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process.

Id. at 191.

The Court in *Wieman* also stated:

There can be no dispute about the consequences visited upon a person *excluded from public employment* on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.

Id. at 191 (emphasis supplied).

In *Cafeteria Workers*, the Court was convinced by the government's assertion that the characterization of Miss Brawner as a "security risk" would not affect her chances of obtaining public employment elsewhere. Therefore, since the former governmental employee had not been excluded from other public positions, the Court held that the labeling of the petitioner and the loss of her job did not constitute a deprivation of "liberty."

Ten years after its decision in *Cafeteria Workers*, the Supreme Court, in *Constantineau*, once again applied the *Wieman* standard. However, the *Constantineau* Court placed no significance upon the employment factor so heavily emphasized in *Cafeteria Workers*.

Constantineau involved a state statute which made it a misdemeanor to sell or give alcoholic beverages to persons deemed to be alcoholics by:

. . . the wife of such person, the supervisors of any town, the alderman of any city, the trustees of any village, the county superintendent . . . the mayor . . . the chairman of the board of supervisors of such county, the district attorney or sheriff. . . .

down the criteria necessary to bring a defamation within the scope of the Constitution. Although some guidelines were discussed in the early cases, they were completely disregarded in subsequent decisions.⁷³

It was not until 1976 that the Court, in *Paul v. Davis*,⁷⁴ attempted to conciliate this substantial body of case law and to isolate the requisite elements of an unconstitutional defamation. In *Paul*, local police had distributed flyers to area businessmen which included the names and photographs of "known" and "active" shoplifters thought to be operating in the community. Appearing on the flyers were the name and "mug shot" of Charles Davis. He had been arrested for a shoplifting charge but was not convicted. Davis argued that the state's labeling of him as a "thief," without an opportunity to confront and cross-examine witnesses against him, was violative of procedural due process. The Court, following a careful review of the precedents, rejected Davis' claim. Mr. Justice Rehnquist, writing for the majority, held that prior cases called for the showing of two elements—defamation by a public official and a substantial alteration or extinguishment of a state right or status. Since Davis was unable to establish the latter element, his action was dismissed.

B. A Conjunctive Test

1. A Badge of Infamy

The first part of the formulation of the Court in *Paul* requires the showing of an infamous characterization by government officials. Previous cases,⁷⁵ as well as *Paul*, have indicated that the government must impose, in the view of the community, a "deep stain"⁷⁶ or a "badge of infamy"⁷⁷ upon some innocent person. A charge by government that an individual within the community has committed some shocking, brutal, or shameful act, is an essential element to establishing a Constitutional claim.⁷⁸ If, as a consequence of such a "branding," the community displays no respect or regard for the defamed party, the government's conduct may offend due process.⁷⁹ Thus, for example, a traditional state def-

Wis. STAT. § 176.26(2) (1967).

The police chief of Hartford, Wisconsin caused to be posted a notice in all retail liquor stores in Hartford that sales or gifts of liquor to Miss Constantineau were prohibited for a period of one year. Although there was no indication that the "posted" individual had been foreclosed from obtaining public employment, the Court, per Justice Douglas, found that the police chief's characterization of the appellee as a "drunkard" was defamatory and violative of procedural due process:

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.

400 U.S. at 437 (emphasis supplied).

Thus, the question after *Constantineau* was: what must the government be doing to an individual in order to constitute a deprivation of liberty? The answer was supplied by the Court in *Paul*. See, text accompanying note 74 *infra*.

⁷³ Compare, *Wisconsin v. Constantineau*, 400 U.S. 433 and *Wieman v. Updegraff*, 344 U.S. 183.

⁷⁴ 44 U.S.L.W. 4337.

⁷⁵ 400 U.S. 433 and 344 U.S. 183.

⁷⁶ 344 U.S. at 191.

⁷⁷ *Id.*

⁷⁸ 400 U.S. 433.

⁷⁹ *Id.*

amation takes on Constitutional dimensions when the government accuses one of being a "communist" bent upon the destruction of the American political system,⁸⁰ or a "drunkard," unable to care for himself or his family.⁸¹

In limited instances, however, the government may be able to override an individual's desire to be free of denigrating characterizations. For instance, when the state has probable cause to believe an individual has committed a criminal offense it may arrest and prosecute that person in order to establish the truth of its allegation at trial. Since the proceeding effectuates society's interest in preventing certain conduct, any adverse publicity to the defendant's reputation is generally disregarded by the courts.⁸² Should the defendant be eventually acquitted, the state's accusations will not give rise to an action for defamation; otherwise, our system of criminal justice would effectively be paralyzed.⁸³ However, when state officials arrest without probable cause,⁸⁴ maliciously prosecute,⁸⁵ or attempt to publicly characterize someone as a "criminal" without providing for him a trial,⁸⁶ the delicate balance between individual and societal rights is disturbed. Consequently, such conduct by the government will be actionable in state court. This tortious conduct may also constitute a deprivation of liberty if it further operates to deprive an innocent individual of some constitutional interest in "liberty" or "property."

2. Deprivation of a Liberty or Property Interest

The second part of *Paul's* conjunctive test, that there be a substantial alteration or extinguishment of a state right or status, has been the source of persistent confusion.⁸⁷ Early decisions of the Court, for example, required that government foreclose a citizen from public employment;⁸⁸ recent cases, however, have suggested that a showing beyond the "badge of infamy" is unnecessary.⁸⁹ The majority in *Paul* reconciled the precedents by noting that each involved conduct by the government which deprived an individual of some form of government largess, such as the loss of all public employment opportunities⁹⁰ or the ability to purchase alcoholic beverages.⁹¹ Such rights are, of course, "property" and "liberty" interests within the meaning of the fifth and fourteenth amendments.⁹² Thus, the Court held that to bring reputation within the liberty concept, it is necessary to show state defamation plus the loss of some constitutional interest in property or liberty. The deprivation of such an interest is, however, standing alone, violative of due process. Hence, there is no need to inquire as to the im-

80 344 U.S. 183 See also, 341 U.S. 123 and 328 U.S. 303.

81 400 U.S. 433.

82 See, Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 TEX. L. REV. 157, 168 (1937). See also, Flynn v. Boglarsky, 164 Mich. 513, 129 N.W. 674 (1911); note 21 *supra*.

83 Harper, *supra* at 174.

84 Boies v. Raynor, 89 Ariz. 257, 361 P.2d 1 (1961); House v. Ane, 538 P.2d 320 (Hawaii 1975); Gigler v. City of Klamath Falls, 537 P.2d 121 (Ore. 1975).

85 Prentice v. Bertken, 50 Cal. App. 2d 344, 123 P.2d 96 (1942).

86 Jenkins v. McKeithen, 395 U.S. 411 (1969).

87 See note 72 *supra*.

88 367 U.S. 886; 344 U.S. 183; 328 U.S. 303.

89 400 U.S. 433.

90 344 U.S. 183 and 328 U.S. 303.

91 400 U.S. 433.

92 See text accompanying notes 44-69, *infra*.

pact of the state's characterization upon one's good name. No matter how great a harm may have been imposed, there can be no encroachment of due process unless the government's action curtails the enjoyment of another state benefit or a right protected under the first ten amendments to the Constitution.⁹³

By failing to treat reputation as an independently protectible interest, the Court has created a device whereby law enforcement agencies can, for example, summarily and deliberately categorize any individual as a convicted "prostitute," "rapist," or "child-molester" without first affording such person the opportunity to contest such an action by these agencies.⁹⁴ So long as government could design a scheme which does not deprive the victim of a right, other than the right to his good name, there would be no violation of the Constitution and no need for prior notice and hearing. According to the Court's decision in *Paul*, a person's right to seek redress in state court after the damage has been inflicted will act to deter public officials from taking such defamatory action. Should the state remedy prove an inadequate deterrent, however, the results may be devastating and irreparable. The "post-deprivation" remedies available at the state level do not always provide a sufficient form of relief.⁹⁵ When a private citizen attacks the reputation of another, a state remedy after the publication has been made or released is generally adequate.⁹⁶ In such instances, the community normally gives equal consideration to the word of the defamed individual.⁹⁷ When the wrongdoer is the government, however, the balance between the weight given to the statements of the respective parties drastically shifts in favor of the state.⁹⁸ Once the state "brands" an individual, there is substantial risk that the minds of his associates will be indelibly marked.⁹⁹ Public opinion may change, possibly resulting in a hesitancy on the part of the community to interact with that individual.¹⁰⁰ There may be serious impairment of the defamed individual's ability to lead a normal personal and business life.¹⁰¹

In order to adequately protect a private citizen, some mechanism must be made available to offset the heavy weight attributed by the community to the words and actions of government. That mechanism—prior notice and the opportunity to be heard—is embodied within the due process clause¹⁰² To trigger those protections, however, one must bring a claim of defamation within the concept of "liberty" or "property." In *Paul*, a firmly divided Court has made it most difficult to bring such a claim within the parameters of "liberty." A viable alternative may be found by treating reputation as an interest in "property."

93 44 U.S.L.W. at 4340-41.

94 *Id.* at 4346, n.9 (Brennan, J., dissenting).

95 *See, e.g.*, 383 U.S. at 93 (Stewart, J., concurring). Note, *Damages in Per Se Defamation*, 46 N.C.L. Rev. 160, 166-67 (1967).

96 *Afro-American Publishing Co. v. Jaffe*, 366 F.2d at 660; *Palmer v. Mahin*, 120 F. 737 (8th Cir. 1903). *Cf.* RESTATEMENT OF TORTS, § 623 (1938); and note 31, *infra*.

97 *See*, 245 Cal. App. 2d 955, 54 Cal. Rptr. 392; *Sassower v. Himwich*, 236 N.Y.S.2d 491 (1962).

98 367 U.S. at 901-02 (Brennan, J., dissenting); *cf.* *Beilan v. Board of Education*, 357 U.S. 399, 421-23 (1958) (Brennan, J., dissenting). *See also*, 419 U.S. at 575-76 and 400 U.S. at 437.

99 *Id.*

100 *Id.*

101 *Id.*

102 *See* note 10 *supra*.

V. Reputation as a Constitutional Property Interest

A. *The Nature of a "Property" Interest*

Constitutional protection of "property" is designed to safeguard those interests from which a person has obtained certain benefits.¹⁰³ Until recently, the Supreme Court held that only where a person was entitled to benefits as matter of "right," as opposed to a mere "privilege," would a constitutional challenge survive a motion to dismiss for failure to state a claim upon which relief may be granted.¹⁰⁴ In 1970, however, the Court in *Goldberg v. Kelly*¹⁰⁵ formally abandoned the rigid "right-privilege" doctrine and adopted an approach whereby the impact of the state action upon the private individual is examined.¹⁰⁶ *Goldberg* presented the question of whether a state could validly terminate public assistance payments to welfare recipients without first offering the recipient a hearing. The Court determined that when government confers some benefit upon its citizenry, that benefit may not be revoked without first providing an individual adequate notice and a meaningful hearing.

In *Board of Regents v. Roth*,¹⁰⁷ the Court gave further indication of the kind of property interests which are deemed worthy of constitutional protection. In that case the majority held that a non-tenured instructor at a state university did not possess a property interest in a contract with the state beyond the termination date of the agreement. Writing for the majority, Mr. Justice Stewart declared:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.¹⁰⁸

Although property interests are protected by the Constitution, *Roth* further noted that the origin of those interests is "an independent source such as state law."¹⁰⁹

The Court completed its picture of a property interest in *Goss v. Lopez*¹¹⁰ where nine public high school students were suspended without notice by the principal for alleged misconduct. Responding to the school board's argument that the students had been suspended for only a period of ten days, the Court held that the test of length and severity of a deprivation "is irrelevant to the question whether account must be taken of the Due Process Clause."¹¹¹ Rather, the controlling factor is the nature of the interest deprived; so long as the individual's concern is not *de minimis*, the protections of due process may be invoked.

103 408 U.S. at 576.

104 See, e.g., *Barsky v. Board of Regents*, 347 U.S. 442, 451 (1954). Cf. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

105 397 U.S. 254.

106 See, Comment, *Due Process Clause Requires Prior Hearing Before Termination of Welfare Benefits*, 23 U. FLA. L. REV. 422 (1971).

107 408 U.S. 565.

108 *Id.* at 577.

109 *Id.*

110 419 U.S. 565.

111 *Id.* at 576.

Given the broad parameters of "property" as developed by *Goldberg, Roth*, and *Goss*, and the myriad benefits conferred by the state upon its citizens, it is not surprising that property interests take on a wide variety of forms. For example, the termination of welfare benefits,¹¹² wages,¹¹³ an education,¹¹⁴ a driver's license,¹¹⁵ and parole rights¹¹⁶ may not be effected without due regard for the Constitution.

There is no apparent reason to exclude an individual's reputation from this growing list of property interests. The right to protect one's good name clearly satisfies the Supreme Court's formula of establishing a constitutional interest in property. The reputational right, which is derived from the common law of the states, creates a legitimate expectation that a person may enjoy his good name without unjustified interference by the government. As to the importance of this concern, Mr. Justice Stewart has observed:

The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.¹¹⁷

1. Reputation and the Three Elements of Property

The protection of one's "name" readily satisfies the requirement, established in *Roth*, that a constitutionally protected property interest must derive from an independent source. The common law of England¹¹⁸ and of this country¹¹⁹ has long recognized that an individual's "name" is a state property interest and, as such, is deserving of the legal protections afforded thereto.

An individual's concern for his reputation similarly meets the *Roth* mandate that one possess a "legitimate claim of entitlement" in the continued enjoyment of a state right. An individual's reputation is protected against unjustified invasions by the law of defamation. At any time during his lifetime,¹²⁰ an individual may avail himself of the remedies provided by state law to redress slanderous or libelous conduct. The only event which terminates this personal right is the individual's death.¹²¹ Unquestionably, this factor instills in a person a legitimate claim to the continual enjoyment of his reputational right. Unlike the contractual rights in *Roth*, which expired on a predetermined date, a person has a justifiable expectation throughout his lifetime to be free of wrongful attacks upon his reputation.

Although *Goldberg* and many other "property" cases¹²² involved the distribution and attempted revocation of tangible property, the form of the largess bestowed by the state is immaterial. *Goss*, which involved the right to obtain a

112 397 U.S. 254.

113 *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

114 419 U.S. 565.

115 *Bell v. Burson*, 402 U.S. 535 (1971).

116 408 U.S. at 471.

117 383 U.S. at 92 (Stewart, J., concurring).

118 *See*, Carr, *The English Law of Defamation*, 18 L. Q. REV. 255 (1902).

119 *See*, Lovell, *supra* note 68 at 1051.

120 *See* note 16 *infra*.

121 *Id.*

122 *See* notes 112-116 *supra*.

free public education, supports the contention that intangible concerns are equally deserving of the protections afforded physical forms of property. Clearly, then, the impalpable freedom against unjustified invasions of one's good name is a rightful expectation, and more than a mere "abstract need" or "unilateral expectation."

The final prerequisite to an invocation of the due process clause involves an examination of the deprived interest. The Court is not concerned with the gravity or weight of the resulting injury; rather, it inquires as "to the *nature* of the interest at stake."¹²³ That interest must be more than of *de minimis* importance.¹²⁴

What precisely constitutes a *de minimis* interest is not readily ascertainable. However, when those interests, which the Court has found to be of more than insubstantial importance,¹²⁵ are collectively viewed the *de minimis* standard begins to take form. The most glaring common characteristic of these interests is that each is necessary to maintain a decent and respectable life as known and enjoyed by modern society. For example, an individual's wages and welfare benefits are certainly an essential requisite since their loss may mean that one's family will go without food, clothing, or heat.¹²⁶ Likewise, termination of a driver's license may result in the loss of employment.¹²⁷ Depriving children of the ability to obtain an education is perhaps the most severe punishment a government may impose upon a minor; "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹²⁸ The loss of parole will result in the bodily restraint of the individual.¹²⁹

The continued enjoyment of one's good reputation is essential to leading a normal life.¹³⁰ It underlies, for instance, the ability to seek and hold gainful employment,¹³¹ to purchase a home or car,¹³² and to enjoy normal relationships with family and friends.¹³³ Therefore, since the protection of one's "name" is created by state law and instills in an individual a legitimate claim of entitlement to it, the reputational right should be considered "property" within the meaning of the fifth and fourteenth amendments. Under this construction of the Constitution, government would be prevented from bestowing a "badge of infamy" upon an individual without first permitting that person an opportunity to contest the validity of the badge.

B. A Practical Consideration

The inclusion of reputation on the Constitution's list of property interests creates an immediate and practical difficulty. Since the Supreme Court now

123 408 U.S. at 571.

124 419 U.S. at 575-76.

125 See, text accompanying notes 112-116 *supra*.

126 397 U.S. 264 (1970). Cf. *Nash v. Florida Indus. Comm'n.*, 389 U.S. 235, 239 (1967).

127 402 U.S. 535.

128 *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

129 408 U.S. 471.

130 See, 383 U.S. at 92 (Stewart, J., concurring).

131 344 U.S. 183.

132 *Reed v. Melnick*, 81 N.M. 608, 471 P.2d 178.

133 *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55.

excludes from consideration the severity of the harm imposed,¹³⁴ every defamatory state characterization effected without a prior hearing would be violative of due process. Federal courts may soon find their dockets filled with cases alleging no more than derogatory statements made by individuals employed by government while acting within the scope of their authority.¹³⁵ District court dockets are already overburdened with suits relating to other property interests.¹³⁶ One particularly troublesome area involves complaints filed by inmates of state penal institutions against security guards. Much to their chagrin, federal trial judges now find themselves adjudicating cases demanding the return of seven packages of cigarettes,¹³⁷ one pair of shoes,¹³⁸ and \$3.52.¹³⁹ The due process clause, however, can be construed in such a way so as to alleviate the problem of "small-claims" litigation in federal court.

VI. A Possible Construction of the Due Process Clause

It is an established principle of constitutional law that three elements must be demonstrated in order to invoke the protections of the fifth and fourteenth amendments. First, there must be a deprivation of life, liberty, or property; second, the deprivation must be caused by government; and third, it must have occurred "without due process of law."¹⁴⁰

Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,"¹⁴¹ at a minimum the phrase requires that government afford the aggrieved party an opportunity to be heard "at a meaningful time and in a meaningful manner."¹⁴² Generally, in those instances where a deprivation of property cannot be measured in monetary terms, the only time in which a "meaningful" hearing may be offered is *before* the loss is suffered. In *Goss*, for example, it is difficult to imagine how the state could have adequately redressed the harm done to a student's education resulting from a wrongful suspension. Normally, the only effective means of protecting someone from intangible injury is to prevent the implementation of the government's conduct.

On the other hand, when the harm to a property interest is slight and can be fully compensated in terms of dollars, a hearing offered by government within a reasonable time *after* the harm occurs could also be viewed as a meaningful hearing. When a state prison guard, for instance, illegally confiscates personal property belonging to an inmate, the taking should not be violative of due process if a procedure is available whereby the prisoner may seek the return of his

134 419 U.S. at 575-76.

135 See, Comment, *State Prisoner's Allegations Concerning the Imposition of Solitary Confinement, the Conditions of that Confinement, and the Failure of Prison Officials to Return His Diamond Ring, Were Each Sufficient to State a Cause of Action Under 42 U.S.C. § 1983*, 51 NOTRE DAME LAW. 1046, 1057-62.

136 *Id.*

137 *Russell v. Bodner*, 489 F.2d 280 (3d Cir. 1973).

138 *Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972).

139 *Weddle v. Director, Patuxent Inst.*, 436 F.2d 342 (4th Cir. 1970).

140 *Kimbrough v. O'Neil*, 523 F.2d 1057, 1062 (7th Cir. 1975) (Stevens, J., concurring).

141 339 U.S. at 313.

142 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); see also, 339 U.S. 313 and *Grannis v. Ordean*, 234 U.S. 385 (1914).

property or reimbursement for the value of its loss.¹⁴³ If the state or federal government, therefore, provides a means of fully and adequately redressing a property harm effected by its agents, the deprivation will not have been imposed without the due process of law.¹⁴⁴

Consequently, under this construction of the Constitution, federal courts would be able to effectively limit the scope of their adjudications to cases which probe the limits of the "property" concept, in contradistinction to merely redressing ordinary tortious conduct. It therefore vitiates the "floodgate" argument as a reason for excluding reputation from the constitutional protections afforded property interests.

VII. Reputation and the Adequacy of the State Remedy

The adequacy of a state remedy provided after a defamation has occurred is dependent upon the community's reaction to the characterization.¹⁴⁵ An important factor to be considered is the source of the libelous or slanderous statement.¹⁴⁶ When that source is a private individual there is little reason to question the sufficiency of the available remedy.¹⁴⁷ The truth of the characterization is a matter of one man's word against another.¹⁴⁸ Recognizing that an individual's judgment of his neighbor may be erroneous, in jest, or the result of a spiteful motive, a community generally attaches equal weight to the word of both parties.¹⁴⁹ The potential for injury to one's reputation is, therefore, tempered by the fact that society will consider the derogatory label with some degree of skepticism.¹⁵⁰ Consequently, the harm resulting to an individual's good name is generally neither significant nor irreparable.¹⁵¹ A proceeding which permits

143 This notion was applied by Justice Stevens while a member of the Seventh Circuit Court of Appeals in *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975). *Cf.* 523 F.2d at 1062-67.

144 *Id.* Where only property rights are at stake, the Supreme Court, on several occasions, has held that the mere postponement of a hearing is not violative of procedural due process, provided, however, the opportunity for a hearing subsequent to the harm is adequate. *See, e.g.,* *Fahey v. Malone*, 332 U.S. 245 (1947); *Bowles v. Willingham*, 321 U.S. 503 (1931); and *North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

145 For example, a number of courts have held that when the utterance in question is defamatory or calculated to injure one's reputation, the statement is actionable although intended in jest. *Coots v. Payton*, 365 Mo. 180, 280 S.W.2d 47 (1955). However, when a statement is published in jest and is so understood by the recipient, no action for defamation will arise. 245 Cal. App. 2d 955, 54 Cal. Rptr. 392.

146 245 Cal. App. 2d at 955, 54 Cal. Rptr. at 392; *Lamberti v. Sun Printing & Publishing Ass'n.*, 111 App. Div. 437, 97 N.Y.S. 694; and *Hanson v. Fueling*, 160 Wis. 511, 152 N.W. 287. *Cf.* Note, *supra* note 95 at 164.

147 366 F.2d 649. *Cf.* Note, *supra* note 95 at 166-67.

148 In situations where the community remains neutral as to the defendant's characterization of the plaintiff, a cause of action may still be established. However, relief is properly limited to an award of nominal damages. *See, Sassower v. Himwich*, 236 N.Y.S.2d 491 (1962). *See also, Miller v. Woods*, 338 S.W.2d 412 (Ky. 1960); *Boulet v. Beals*, 158 Me. 53, 177 A.2d 665 (1962); and *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975).

149 *See* note 146 *supra*.

150 *Id.*

151 A comparison of cases involving allegations of "communist" affiliation reveals that characterizations by the government have more of an impact upon the community than those of private individuals. *Wieman, McGrath, Lovett*, each involved an official defamatory charge that resulted in severe economic consequences. However, in actions against private individuals, the actual damages sustained generally fell short of such adverse results. *Compare, Joopanenko v. Gavagan*, 67 So. 2d 434 (Fla. 1953); *Herrman v. Newark Moring Ledger Co.*, 48 N.J. 420, 138 A.2d 61 (1958); and *Ward v. League for Justice*, 57 Ohio Abs. 197, 93 N.E.2d 723 (1950).

the defamed party to officially exonerate himself and recover damages is generally adequate vindication.¹⁵²

This conclusion is not necessarily altered merely because the wrongdoer happens to be an employee of the government. However, when a citizen's opinions and statements are regarded by society as the official view of the government, the sufficiency of the state's remedial powers becomes questionable. No longer is the truth a matter of one man's word against another; it is the word of government against that of a private individual. The effect upon a community of an unsavory label personally attached, for example, by the President,¹⁵³ Congress,¹⁵⁴ a state legislature,¹⁵⁵ or the police,¹⁵⁶ is significantly different from the effect of a defamatory statement made by an ordinary citizen.¹⁵⁷ Unlike private individuals, government officials occupy positions of public trust and confidence; they also maintain and have access to many sources of confidential and secretive information. In the mind of the community, therefore, there can be no error in judgment or spiteful motive; certainly government would not intentionally brand someone a "criminal" or "communist" if it were not true.¹⁵⁸ Since the government's label is presumed to be correct, many members of the community will undeniably accept the uncontested characterization of the defenseless individual.¹⁵⁹

In such instances a hearing after the government has acted may well be meaningless. Once public officials bestow an infamous badge upon a citizen, it will be most difficult for him to maintain harmonious relationships within the community.¹⁶⁰ His ability, for example, to secure a job,¹⁶¹ an education,¹⁶² and a career¹⁶³ may be severely curtailed. These harms, as well as many others, do not lend themselves to a neat mathematical formula. Indeed, monetary damages can never adequately compensate an individual for the loss of his ability to engage in the normal activities of daily life.¹⁶⁴

Thus, the only effective means of protecting a person against such egregious state action is to prevent it. The only "meaningful time" in which the government can offer a "meaningful hearing" is before these harms are suffered. Thus, the government's failure to afford a proceeding before it imposes a "badge of infamy" should be violative of procedural due process.

152 See note 147 *supra*.

153 341 U.S. 123.

154 328 U.S. 303.

155 395 U.S. 411 and 344 U.S. 183.

156 44 U.S.L.W. 4337 (police chief); 400 U.S. 433 (same).

157 The Supreme Court has expressly recognized that a defamatory attack by the government may have an irreparable effect in the community. For example, in *Goss*, the Court stated:

If sustained and recorded, those charges [of misconduct in school] could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. 419 U.S. at 575.

This notion of irreparable harm is implicit in the rationale espoused by the Court in several other cases. See, 367 U.S. at 901-02 (Brennan, J., dissenting); 344 U.S. 183 (loss of employment opportunities); 328 U.S. 303 (same); 341 U.S. 123 (virtual termination of charitable organizations).

158 *Id.*

159 *Id.*

160 See, e.g., 344 U.S. 183.

161 419 U.S. 565; 344 U.S. 183; and 328 U.S. 303.

162 *Id.*

163 419 U.S. 565.

164 See, note 157 *supra*.

Under this proposed interpretation of the due process clause, the fifth and fourteenth amendments would be infringed only in those limited circumstances in which public officials, occupying positions of trust and confidence, intentionally or recklessly engage in a scheme to defame the name and reputation of an innocent citizen. Federal courts, therefore, could reserve their resources for cases involving substantial issues and, at the same time, ensure the legitimate expectation of all citizens to be free of serious official invasions upon their standing in the community.

VIII. Conclusion

The Supreme Court in *Paul v. Davis* clearly indicates that a citizen may protect his reputation under the "liberty" concept of the Constitution. To establish a constitutional claim, however, it must be shown that the government's conduct will result in the loss of some other interest ensured by the fifth or fourteenth amendment. Therefore, under *Paul's* formulation, the determinative factor as to whether the due process clause applies is the nature of the *injury* suffered; that is, the defamation must result in the loss of some other "property" or "liberty" interest. Although defamation by a governmental official may seriously impair an individual's reputation, without depriving him of a "property" or another "liberty" interest, an individual is now unable to adequately protect himself against such defamations although they may cause him irreparable personal harm.

Needed protection for individual reputation may be provided, however, if "reputation" is recognized as "property." The due process clause could, thus, be invoked when the government's conduct operates to wrongfully "deprive" someone of his good name. Under this construction of the Constitution the controlling factors would be the nature of the *interest* at stake and gravity of the harm incurred. Such an interpretation of the due process clause is consistent with the Court's definition of "property" as recently developed in *Goldberg, Roth, and Goss*.

Hence, there exists a sound basis in reason and law to consider one's "reputation" as a "property" interest. It is hoped that federal courts will consider this notion when confronted with an official defamation of serious magnitude, though not involving the loss of some other benefit conferred by the state or federal government.

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