Procedural Due Process and Reputational Harm: Liberty as Self-Invention

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The question addressed in this Article is whether state-imposed reputational harm, in itself, should be deemed a deprivation of liberty sufficient to trigger procedural due process protection. In a sense, this is an odd question to ask. The Supreme Court, more than thirty years ago, clearly responded in the negative, requiring that state-caused stigmatic harm be accompanied by some more tangible loss for a procedural due process claim to arise. Despite much critical commentary in the wake of that decision, the Court has since not only affirmed but extended its stigma-plus doctrine.

This Article suggests that the stigma-plus standard should be reconsidered for two reasons. First, the Court has been working with impoverished conceptions of reputation and liberty in constructing its stigmatic harm doctrine. This Article urges a closer connection between the values of reputation and liberty, suggesting that reputation be conceptualized as a critical site for autonomous identity formation. Liberty, in turn, here is characterized in intrinsic, as opposed to the Court's instrumental, terms as comprising individual self-invention. Properly conceptualized, we can see that state-imposed reputational harm, in itself, deprives affected persons of the freedom maximally to define individual self-concepts and social identities. Second, the stakes are higher now than they have been in decades. The cases that gave rise to the stigma-plus doctrine involved the government labeling individuals as shoplifters and drunkards. Today, under the stigma-plus standard, the state is free to stigmatize its citizens as potential terrorists, gang members, sex offenders, child abusers, and prostitution patrons, to list just a few, all

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without triggering due process analysis. The final section of this Article addresses these contemporary contexts, applying the theories of reputation and liberty developed in prior sections and suggesting the need for reform of the Court's reputational harm doctrine.

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INTRODUCTION

Since the Supreme Court's 1976 decision in *Paul v. Davis*, it has been black letter law that reputational harm, standing alone, is insufficient to trigger a constitutional right to procedural due process.[1] As a result, the state may act in a way that damages an individual's public standing without first offering the individual a hearing or other opportunity to contest the state's charge of wrongdoing. Only if some more tangible loss (e.g., concurrent loss of government employment) accompanies state-caused stigmatic harm does a constitutional right to procedural due process arise.[2] Critical commentary on the *Paul* decision, and the "stigma-plus" doctrine it spawned, was immediate, extensive, and scathing.[3] Yet the Supreme Court expressly affirmed its holding and extended the stigma-plus doctrine in a subsequent case, *Siegert v. Gilley*,[4] generating a second, if somewhat more detached, round of commentary.[5]

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[1] *See* Paul v. Davis, 424 U.S. 693, 712 (1976).

[2] *Id.* at 701.

[3] *See, e.g.*, Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 424 (1977) (characterizing *Paul* as "disturbing" and "wholly startling"); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1074 (1984) ("*Paul v. Davis* is one of the most peculiar opinions in due process jurisprudence."); David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 325-27 (1976) (describing aspects of *Paul* as "curious," "startling," and "foreboding"); Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of* Paul v. Davis, 30 STAN. L. REV. 191, 221 (1977) (characterizing *Paul* as "not very convincing"); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 100-01 (1976) (describing Court's departure from established principles in *Paul*).

[4] 500 U.S. 226 (1991).

[5] *See, e.g.*, Barbara Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 575 (1999) ("*Paul v. Davis* should be reconsidered, not only because the justification for the holding has been overtaken by subsequent cases . . . but because the injury to reputation at issue in *Paul* is exactly the kind of claim that ought to be governed by federal constitutional law . . . ."); Jack M. Beermann, *Symposium on Section 1983: Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 732-33 (1988) ("[T]he Court's effort in *Paul* to distinguish reputation from other personal interests that are protected from deprivation without due process was unsuccessful."); John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 277 (2000) (suggesting that *Paul* might serve as "an example of the 1983 tail wagging the constitutional dog"); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 893 (1999) (describing *Paul* as "difficult to justify as an interpretation of the due process right" and "motivated [instead] by concerns about the section 1983 remedy"). *But see* Rodney A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies:* Parratt v. Taylor *and* Logan v. Zimmerman Brush Co., 1982 U. ILL. L. REV. 831, 836-41 [hereinafter Smolla, *Displacement*] (suggesting that Court's decision in

Today, in this post-*Paul*, post-*Siegert*, and now post–September 11, 2001, era, the contexts in which government conduct may result in stigmatic injury, and in which the stigma-plus doctrine may function to preclude constitutional procedural protection, have multiplied. To list just a few, state-maintained registries of suspected terrorists, sex offenders, gang members, prostitution patrons, and perpetrators of domestic abuse are increasingly common, raising the risk of erroneous identification and resulting reputational injury. Moreover, beyond the sheer quantitative increase in the opportunity for state-created stigmatic harm, the qualitative depth of the resulting harm has increased as well. As we have moved from lists of suspected shoplifters, as in *Paul*, or alleged employment misconduct, as in *Siegert*, to assertions of involvement in terrorism, gang violence, sex offenses, child abuse, and prostitution, the reputational stakes have risen to levels not seen perhaps since the McCarthy era. Lastly, sustained reflection on the conceptions of "liberty" and "reputation" at work in the Supreme Court's current treatment of reputational harm under the Due Process Clause reveals impoverished constructions of these constitutional and social values — constructions that should be reconceptualized.

This Article argues that the time is ripe to reconsider the stigma-plus doctrine. In holding that reputational harm does not, in itself, affect liberty, the Court ignores a core sense in which constitutional liberty relates to individual autonomy and human self-invention. Further, consideration of the numerous contemporary contexts in which the stigma-plus doctrine may enfeeble this vital liberty interest demonstrates the moral, and at times extensively personal, loss involved in simply acquiescing to this portion of our ostensibly decided law. Indeed, a combined look at the most recent sites of state-caused reputational injury, together with a deeper conceptualization of liberty as individual self-invention, yields both cause for constitutional anxiety and a basis for due process reform.

Part I of this Article describes the current state of affairs in the application of constitutional procedural due process to reputational harm, with special attention to *Paul v. Davis* and the handful of cases that immediately preceded and succeeded it in charting the stigma-plus doctrine. Part II critiques the Supreme Court's stunted conception of reputation in the procedural due process cases as distant from liberty and, thus, undeserving of constitutional protection. This Part suggests instead that reputation be conceptualized as a critical site

Paul not to permit common law defamation action to sound as constitutional violation was appropriate).

for autonomous identity formation. Relying on recent sociolegal research in constitutive theory, Part II further explores the sense in which the denial of due process protection enables governmental institutions to construct aspects of human social identity in deleterious ways. Part III proposes an alternative conception of liberty to be applied in reputational harm cases, arguing that the Due Process Clause should be deemed triggered when state action impinges on individual self-invention. Part IV demonstrates the need for reform by applying this conception of liberty as self-invention to a number of contemporary settings — including gang databases, terrorist watch lists, sex offender community notification laws, child abuse registries, mandatory HIV partner notification, and public shaming of prostitution patrons — in which government institutions label or otherwise stigmatize individuals.

I. THE LAW: PROCEDURAL DUE PROCESS AND REPUTATIONAL HARM

A. Reputational Harm Doctrine Before 1976

At the time the Supreme Court decided *Paul v. Davis*, all indications suggested that state-created reputational harm would be deemed a sufficient threat to liberty to trigger a right to procedural due process. In *Wisconsin v. Constantineau*, decided just five years prior to *Paul*, the chief of police, acting under authority of a state statute, caused a notice to be posted in all local enterprises that sold liquor, prohibiting sales or gifts of liquor to certain persons, including Norma Grace Constantineau, for one year.[6] The state agency failed to provide notice of the posting to Constantineau, and neither did she have an opportunity to contest her inclusion.[7] Constantineau challenged the constitutionality of the government's conduct, claiming that the absence of notice and opportunity for a hearing prior to posting violated her constitutional right to procedural due process under the Fourteenth Amendment.[8] The district court agreed, stating:

> It would be naïve not to recognize that such "posting" or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasijudicial

[6] Wisconsin v. Constantineau, 400 U.S. 433, 435 (1971).

[7] *Id.*

[8] *See* Constantineau v. Grager, 302 F. Supp. 861, 864 (E.D. Wis. 1969).

> determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.[9]

And the Supreme Court affirmed, in even more explicit terms:

> 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. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one. Under the Wisconsin Act, a resident of Hartford is given no process at all. This appellee was not afforded a chance to defend herself. She may have been the victim of an official's caprice. Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.[10]

No member of the Court disagreed with this basic holding. The dissenters disagreed only as to whether it was imprudent for the federal judiciary to determine the constitutionality of a state statute when the question had not first been presented to a state court.[11] Indeed, Chief Justice Burger in dissent stated, "Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process."[12] And Justice Black, also in dissent, claimed it was "impossible . . . to believe that the Supreme Court of Wisconsin would uphold any such boundless power over the lives and liberties of its citizens."[13] There could be no clearer holding in favor of a constitutional right to procedural due process in the context of reputational harm than that pronounced by the Court in *Constantineau*.

Nor did *Constantineau* arise in a vacuum. Twenty years earlier, in *Joint Anti-Fascist Refugee Committee v. McGrath*, the United States Attorney General, operating under authority of an Executive Order issued at the height of the McCarthy era, had registered certain entities as "communist" organizations on a list provided to the Civil Service Commission.[14] The organizations included on the list had not been

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[9] *Id.*

[10] *Constantineau*, 400 U.S. at 437.

[11] *See id.* at 439-43 (Burger, C.J., dissenting); *id.* at 444-45 (Black, J., dissenting).

[12] *Id.* at 440 (Burger, C.J., dissenting).

[13] *Id.* at 444 (Black, J., dissenting).

[14] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 125 (1951).

afforded an opportunity to contest their inclusion.[15] The Supreme Court ruled in favor of the plaintiff organizations, though not on the ground of a deprivation of constitutional due process.[16] Instead, the Court held more narrowly that the Attorney General had failed to comply with the terms of the Executive Order.[17] Nonetheless, the seeds of a due process reputational harm doctrine were planted in several of the concurring opinions, including that of Justice Frankfurter, who wrote that government labeling of groups without prior notice or an opportunity to respond "is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment."[18]

Just two years prior to *Constantineau*, in *Jenkins v. McKeithen*, the Supreme Court took the opportunity to heed Frankfurter's guidance, holding that procedural due process would be triggered whenever an institution of government charges an individual with wrongdoing.[19] In *Jenkins*, the State of Louisiana had established a Commission of Inquiry to uncover labor law violations and to accuse specific persons of engaging in illegal behavior.[20] The Court held that, even absent a criminal indictment, public branding of an individual by a state agency as an unlawful actor must first satisfy the procedural demands of the Due Process Clause.[21]

Rounding out the Supreme Court's pre-*Paul* stigmatic harm doctrine, in *Board of Regents v. Roth*, the Court again suggested that reputational harm, in itself, should be deemed sufficient to implicate due process liberty.[22] Roth had been hired as a political science professor at the University of Wisconsin Oshkosh on a one-year fixed contract.[23] When the university informed Roth in a timely manner that he would not be rehired for a subsequent term, Roth challenged the university's decision to discontinue his employment without affording him a prior hearing.[24] The Court rejected Roth's claim, holding that the limited contractual relationship with the university provided Roth

[15] *Id.* at 126.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 161 (Frankfurter, J., concurring).
[19] Jenkins v. McKeithen, 395 U.S. 411, 429 (1969).
[20] *Id.* at 414.
[21] *Id.* at 429.
[22] Bd. of Regents v. Roth, 408 U.S. 564, 573-74 (1972).
[23] *Id.* at 566.
[24] *Id.* at 568.

no entitlement to a property interest in continued employment.[25] The Court further held that simply failing to rehire an individual, when that individual remains free to seek employment elsewhere, does not deprive the individual of liberty within the meaning of the Due Process Clause.[26] Critically, however, the Court in *Roth* made clear that had the university, in terminating Roth's employment, caused him reputational injury, the result surely would have been different:

> There might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated. But this is not such a case. The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. . . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that respondent's "good name, reputation, honor, or integrity" is at stake.[27]

Thus, when the Supreme Court sat in 1975 to hear arguments in *Paul v. Davis*, the law could not have been clearer: state-caused reputational injury, absent sufficient notice and an opportunity to be heard, unconstitutionally deprived the individual of the right to liberty without due process of law. Stigma alone clearly was sufficient to trigger procedural due process, the notion of an additional requirement of some more tangible loss being wholly absent from the doctrine.

B. Paul v. Davis *and the Stigma-Plus Standard*

1. The Facts of the Case

Edward Charles Davis III, employed as a newspaper photographer in Louisville, Kentucky, was arrested in September 1971 on a charge of shoplifting.[28] Davis pleaded not guilty to the charge, which was then

[25] *Id.* at 578.

[26] *Id.* at 573-75.

[27] *Id.* at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

[28] Paul v. Davis, 424 U.S. 693, 695 (1976).

filed away with leave to reinstate.[29] Ultimately, the charge was simply dismissed.[30] Meanwhile, as the Christmas shopping season approached the following year, Edgar Paul, the chief of police in Louisville, agreed to alert merchants to the identities of potential shoplifters in the area. In early December 1972, Paul distributed a flyer to approximately 800 merchants in the Louisville metropolitan area. A statement at the top of the flyer explained its purpose:

> The Chiefs . . . in an effort to keep their officers advised of shoplifting activity, have approved the attached alphabetically arranged flyer of subjects known to be active in this criminal field. This flyer is being distributed to you, the business man, so that you may inform your security personnel to watch for these subjects. These persons have been arrested during 1971 and 1972 or have been active in various criminal fields in high density shopping areas.[31]

The flyer then contained five pages of "mug shots" along with identifying information. Davis's photograph and name were included on the second page of the flyer, under the heading, "Active Shoplifters."[32]

Soon after the flyer had been distributed, two members of the staff of the *Louisville Courier Journal and Times*, the newspaper at which Davis was employed, saw the Active Shoplifters list and informed Davis's supervisor.[33] Davis's supervisor, after listening to Davis's account of the events leading up to his inclusion on the shoplifter list, determined not to fire Davis immediately but warned that any future arrest for any reason would result in termination of employment.[34] Davis's supervisor further informed him that the publication of the shoplifting flyer would harm Davis's ability to perform his job because the newspaper would not be able to send Davis on assignments that would bring him into contact with local retail stores.[35] According to Davis:

> Unfortunately it did not take long for everyone in the department to know that I was on an active shoplifters list, and at that time I was the only black working in the

[29] *Id.* at 695-96.

[30] *Id.* at 696.

[31] *Id.* at 695.

[32] *Id.*

[33] Edward Charles Davis III, *A "Keep Out" Sign on the Courthouse Doors?*, JURIS DOCTOR, July/Aug. 1976, at 31.

[34] *Id.*

[35] *Id.*

> department, which made it extremely difficult for me to function. I suffered humiliation and ridicule. After six or seven months the pressures of the job and strain on my nerves got to the point where I felt the only way out was for me to resign in order to regain my full sanity and keep what little self-respect I had left . . . . After finally leaving my place of employment, I found it difficult to find jobs in my expertise, because the newspaper that I was employed with was the only daily in town. Prospective employers in other lines of work were reluctant to hire me because of the publicity and implications of the police department's publication. Now, five years later, after trying to clear my name through this country's judicial system, I am broke, without employment, emotionally sick and in a state of anxiety.[36]

Davis attempted to clear his name by filing a § 1983 action in federal district court, alleging that the police chief's decision to include Davis on the flyer of active shoplifters without notice or an opportunity to contest his inclusion violated Davis's right to procedural due process under the Fourteenth Amendment.[37] The district court dismissed Davis's complaint.[38] Yet in light of the Supreme Court's unambiguous determination in *Constantineau* that government-caused reputational harm triggers the protections of procedural due process,[39] the Sixth Circuit Court of Appeals reversed, holding that Davis had set forth a valid § 1983 claim.[40]

2. Justice Rehnquist's Opinion

Justice Rehnquist's majority opinion in *Paul* reversing the Sixth Circuit's decision is among the most disingenuous opinions of the past few decades. Rehnquist first observed that Davis's reputational harm claim could have been brought as a classic state common law tort claim for defamation.[41] The complaint, he noted, only came within the

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[36] *Id.*

[37] *Paul*, 424 U.S. at 696-97; *see* 42 U.S.C. § 1983 (2006) ("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 any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

[38] *Paul*, 424 U.S. at 696.

[39] *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); *supra* Part I.A.

[40] *See Paul*, 424 U.S. at 697; Davis v. Paul, 505 F.2d 1180, 1184 (6th Cir. 1974).

[41] *Paul*, 424 U.S. at 697.

federal court system to the extent it was cognizable under § 1983, as a claim against a government official for constitutional injury.[42] Davis, of course, would have disputed none of this. It certainly is possible that Davis could have raised his complaint as a defamation suit in the Kentucky state court system. Yet in *Monroe v. Pape*, the modern watershed § 1983 case, the Court had made clear that the existence of a state cause of action was no bar to raising a § 1983 suit in federal court: "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."[43] And, given the facts, Davis had no trouble straightforwardly stating a § 1983 action. His claim was that the police chief's decision to circulate the flyer with Davis's name and photograph caused Davis stigmatic harm without due process of law — a constitutional violation under color of state law, precisely as required by § 1983.[44]

Moreover, even while raising the common law alternative route, Rehnquist's majority opinion failed to assess the extent to which Davis might have been successful in raising a libel suit under Kentucky law. Certainly the elements required to establish a defamation action, including particularly the police chief's state of mind with respect to the falsity of the posting, would have been radically different from those necessary for the establishment of a § 1983 violation. In addition, under Kentucky law the police chief likely would have been able to assert certain affirmative defenses, or qualified privileges, in support of his accusation that Davis belonged on the list of active shoplifters.[45] Yet Justice Rehnquist entirely neglected consideration of the alternative venue that he claimed existed. Rehnquist's real concern, as made plain in his majority opinion, was that too broad a construction of § 1983 in relation to the Due Process Clause would convert virtually any common law tort committed by a state actor into a federal cause of action for potentially extensive money damages.[46] "[S]uch a reading," the Justice famously suggested, "would make of

[42] *Id.* at 698.

[43] Monroe v. Pape, 365 U.S. 167, 183 (1961). After *Paul* and especially *Parratt v. Taylor*, 451 U.S. 527 (1981), however, the existence of state relief generally will preclude recovery under § 1983. *See* Smolla, *Displacement*, *supra* note 5, at 833-34.

[44] *Monroe*, 365 U.S. at 172; *see* 42 U.S.C. § 1983 (2006).

[45] *See* Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 317, 326 (1995); Smolla, *Displacement*, *supra* note 5, at 837-39 ("[T]he police chiefs would . . . have enjoyed certain litigation advantages in a libel suit brought by Davis.").

[46] *Paul*, 424 U.S. at 701.

the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[47]

This concern was and is potentially legitimate. Section 1983 originally arose as part of the Civil Rights Act of 1871, its purpose being to enable federal protection of former slaves in the face of state and local resistance.[48] In the absence of such resistance, it would make little sense to flood the federal court system with garden-variety negligence and other similar tort actions, and subject the federal government to the prospect of potentially colossal compensatory damages, simply because state officials committed the tortious conduct. But rather than saying this, and rather than focusing on the challenge presented by the convergence of the Fourteenth Amendment's Due Process Clause and § 1983, as *Monroe* had interpreted, the Court instead chose to narrow recovery by wholly excluding stigmatic harm from the ambit of constitutional protection. For an interest to merit procedural protection under the Fourteenth Amendment, the majority opinion reasoned, the interest must emanate either from state law or from a particular constitutional provision.[49] And, according to Rehnquist, an individual's interest in reputation is not guaranteed by state law: "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."[50] Nor is it guaranteed within the text of the Constitution itself: "The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law."[51] Under this analysis, then, standalone stigmatic harm simply does not qualify as constitutional injury.

3. A Doctrine Built on Fallacies

The first problem with Justice Rehnquist's analysis is not far to see. The notion that stigmatic harm is not an interest recognized and protected by state law is a facile and inaccurate distraction. Put simply, Kentucky law surely did recognize and protect an individual's reputational interest. Indeed, it did so in precisely the form mentioned

[47] *Id.*

[48] Armacost, *supra* note 5, at 579-80.

[49] *Paul*, 424 U.S. at 711.

[50] *Id.* at 711-12.

[51] *Id.* at 701.

by Rehnquist at the outset of his opinion as an alternative remedial route — a state common law defamation action.[52]

Second, with respect to the notion that an individual's interest in reputation falls outside the ambit of the Fourteenth Amendment, as we have seen, the Court held *precisely* the opposite just five years earlier in *Constantineau*.[53] In that case, there had been no question that state action injurious to "a person's good name, reputation, honor, or integrity" triggered the Due Process Clause.[54] Rather than overrule the Court's prior holding, however, Justice Rehnquist reinterpreted the case and, in the process, gave birth to the stigma-plus doctrine:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, 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.[55]

Rehnquist rationalized his mischaracterization of *Constantineau*, and distinguished it from the facts of *Paul*, by pointing out that the police chief's action in the prior case did not merely stigmatize Norma Grace Constantineau but also prevented her from purchasing liquor — hence, stigma *plus* a more tangible restriction on liberty.[56] But this reading of precedent is patently false. Commentators have characterized the majority's rationalization of *Constantineau* and *Roth* (Rehnquist largely ignores *Jenkins*)[57] as "astonishing," "puzzling," and

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[52] *See* Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 290 (1988) ("That the state law in *Paul* protected the plaintiff's reputation through a defamation action should have been enough to create a property or liberty interest."); Rubin, *supra* note 3, at 1075 ("The true peculiarity of the case, even accepting this state law based approach to property interests, is its notion that a tort cause of action does not qualify as a state law interest for due process purposes."); Smolla, *Displacement*, *supra* note 5, at 846-47 ("Justice Rehnquist stated on the one hand, that if property and liberty interests other than core Bill of Rights liberties are to have existence, they must be created by state law. At the same time, however, Rehnquist refused to acknowledge the significance of the one source of state law that has always been the primary source of such entitlements, the law of torts.").

[53] 400 U.S. 433, 437 (1971); *see supra* Part I.A.

[54] *Constantineau*, 400 U.S. at 437.

[55] *Paul*, 424 U.S. at 701.

[56] *Id.* at 708.

[57] Rehnquist actually does make a single reference to *Jenkins* in his majority

"perplexing";[58] "cavalier," "wholly startling," and "disturbing";[59] "odious";[60] "distressingly fast and loose," "disingenuous," and "ill-conceived";[61] an "affront[] [to] common sense";[62] "muddled and misleading";[63] "peculiar" and "baroque";[64] "incoherent";[65] and "Iago-like."[66] Any recognition in these cases of a secondary injury caused, or an additional right thwarted, beyond standalone reputational harm would merely have been incidental acknowledgment by the Court of the plaintiffs' particular circumstances in the aftermath of stigmatic injury; it certainly was not a conscious part of the Court's decided doctrine, if it was even mentioned at all.[67]

Indeed, we know that Rehnquist's ex-post account of *Constantineau*, and the reputational harm doctrine as it existed at the time the Court decided *Paul*, is false. The *Constantineau* Court itself answered that question: "The *only* issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious

opinion. But this reference to *Jenkins*, which focuses narrowly on an issue raised by Justice Harlan's dissent in that opinion rather than on the question of the majority opinion's obvious application to the issues presented in *Paul*, only adds to the deceptive, disingenuous nature of Rehnquist's majority opinion. *See id.* at 706 n.4; s*ee also id.* at 725 (Brennan, J., dissenting) ("Today's decision marks a clear retreat from *Jenkins v. McKeithen*, 395 U.S. 411 (1969), a case closely akin to the factual pattern of the instant case, and yet essentially ignored by the Court.").

[58] Armacost, *supra* note 5, at 576-79.

[59] Monaghan, *supra* note 3, at 424.

[60] Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 GEO. L.J. 555, 602 (1997). Krotoszynski, while characterizing Rehnquist's reinterpretation of precedent as "odious," nonetheless agrees with the Court's holding that Davis was not unconstitutionally deprived of a right to procedural due process. *Id.* at 602 n.312. Instead, the author maintains that reputation should be reconceptualized as a fundamental property interest, and on that basis, state-caused reputational injury should be deemed potentially violative of an individual's right to substantive due process. *Id.* at 604.

[61] Smolla, *Displacement*, *supra* note 5, at 840.

[62] *Id.* at 845.

[63] *Id.* at 846.

[64] Rubin, *supra* note 3, at 1074.

[65] Beermann, *supra* note 52, at 289.

[66] Rodney Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 15 n.84 (1983) [hereinafter Smolla, *Beware*].

[67] *See* Paul v. Davis, 424 U.S. 693, 733 (1976) (Brennan, J., dissenting) ("The obvious answer is that such references in those cases (when there even were such references) concerned the particular fact situations presented, and in nowise implied any limitation upon the application of the principles announced. Discussions of impact upon future employment opportunities were nothing more than recognition of the logical and natural consequences flowing from the stigma condemned." (internal citations omitted)).

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."[68] Prior to Justice Rehnquist's opinion in *Paul*, when a state actor caused an individual reputational harm, the existence of that stigmatic injury was the *only* question before the Court in determining whether the procedural requirements of the Due Process Clause needed to be satisfied. There was no plus.

Note, then, the profound sacrifice the majority made for fear of overextending the court system under § 1983 and the Fourteenth Amendment: the contraction of a substantive constitutional interest. The movement from what had been purely a doctrine of stigmatic injury to one requiring the creation of a stigma plus some additional, purportedly more tangible, harm represents a shift from an intrinsic to an instrumental conception of the relationship between reputation and liberty. The stigma-plus test places emphasis on the consequences of reputational harm; for example, on whether there was a coincident loss of employment or a concurrent alteration of some additional right or status, such as the ability to purchase alcohol.[69] The "stigma test" (though of course it had never actually been identified in those terms until after the Court determined that more than mere stigma would be required) took as its focus the stigmatic injury itself — reputational harm *qua* reputational harm — identifying such harm with the "legitimate expectations of every person to innate human dignity,"[70] and in that sense individual liberty. The shift from a stigma to a stigma-plus doctrine taken by the majority in *Paul* thus had the consequence of narrowing due process liberty itself. In more practical terms, as Justice Brennan pointed out in his *Paul* dissent, the shift to an additional requirement beyond mere stigma meant that Chief Paul might randomly take names from the Louisville telephone directory, criminally branding each an "active shoplifter," without triggering the liberty provision of the Due Process Clause.[71] "The potential of today's decision," Brennan noted, "is frightening for a free people."[72]

This sacrifice is particularly unfortunate, since it was unnecessary. First, candidly acknowledging that state-caused reputational injury constitutes a deprivation of liberty within the meaning of the Fourteenth Amendment merely initiates consideration of the necessity of affording procedural protection. The question of whether notice

[68] Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

[69] *See id.* at 434.

[70] *Paul*, 424 U.S. at 735 (Brennan, J., dissenting).

[71] *Id.* at 720 n.6.

[72] *Id.* at 721.

and an adjudicatory hearing actually is required, and thus in their absence whether a genuine constitutional violation occurred, is a wholly distinct inquiry.[73] A ruling on that issue involves a balance of the underlying interests of the state and individual affected, combined with an assessment of the extent of the harm that might result in the absence of procedural safeguards and the probable value of such safeguards in forestalling the feared injury.[74] In short, triggering the Due Process Clause is not equivalent to violating the provision, and appreciation of that distinction enables the preservation of a broader conception of constitutional liberty. Moreover, even where the balance of interests indicates that "some kind of hearing" is required in connection with state action, it need not constitute the sort of full adjudicatory hearing that puts stress on the court system. The extent of the process required is context dependent as well.[75]

Second, even assuming the Due Process Clause were not only triggered but also violated, there remained a number of options at the Court's disposal to ensure the integrity of the federal judiciary. Several scholars have emphasized the variance between Justice Rehnquist's expressed desire that § 1983 not render the Fourteenth Amendment's Due Process Clause a "font of tort law" and the Court's solution of narrowing the underlying constitutional liberty right.[76] If the problem was, as Rehnquist's majority opinion seemed to suggest, an excessive number of constitutional tort claims for money damages in federal court, a more sensible and less drastic resolution might have been to restrict the remedy available.[77] A plaintiff in Edward Davis's position,

[73] *See id.* at 721 n.8; Monaghan, *supra* note 3, at 427-28.

[74] *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[75] *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (stating that due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment" (quoting Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972))); Bd. of Regents v. Roth, 408 U.S. 564, 569-70 (1972) ("When protected interests are implicated, the right to some kind of prior hearing is paramount."); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that due process requires "notice and an opportunity for hearing appropriate to the nature of the case").

[76] *See, e.g.*, Armacost, *supra* note 5, at 582-83 (citing and commenting on literature on treatment of this remedial problem with substantive solution); Jeffries, *supra* note 5, at 276-78 (suggesting that remedies for constitutional injuries should be context dependent, corresponding to nature of injury involved).

[77] *See, e.g.*, Armacost, *supra* note 5, at 582 (noting that Court incongruously sought to "resolve the perceived remedial problem . . . with a substantive solution: limiting the scope of the underlying constitutional right"); Jeffries, *supra* note 5, at 276 ("[T]he Court's desire not to convert every officer error into a constitutional tort . . . could have been avoided by limiting the damages remedy rather than by gutting the underlying right.").

for instance, might be afforded the opportunity to seek to enjoin his inclusion by the state agency on a list of criminal wrongdoers.[78] Or § 1983 might have been interpreted more narrowly to permit due process protection of reputational harm, which, as argued below, is intrinsically tied to liberty, while at the same time suppressing the true font of tort law — garden-variety negligence actions resulting from careless conduct on the part of state actors.[79] Or the majority might have sought a solution through the vehicle of an affirmative defense; for instance, by raising the prospect of official immunities.[80] But the Court failed to consider any of these approaches, choosing instead bluntly and tactlessly to dilute the substantive content of constitutional liberty. According to one commentator, "The effect of [the Court's] ruling was not merely to preclude money damages, but to pretermit any federal constitutional scrutiny of official condemnation of identified individuals."[81]

A less drastic and more reasoned solution might also have been founded upon closer attention to the particular nature of the interference with Davis's reputation. Barbara Armacost, for instance, distinguishes stigmatic harm that arises in virtue of the attribution of criminality from that which arises in the employment context, suggesting that the former but not the latter circumstance affords due process protection.[82] Reputational injury in the public employment context, Armacost points out, is a nearly universal hazard, one for which there is a direct analogue in private employment.[83] The same form of harm in the criminal context, however, should be deemed to trigger the liberty provision of the Due Process Clause specifically because the investigation and prosecution of criminal wrongdoing are uniquely governmental functions. Police and prosecutorial decisions are commonly considered authentic avowals of wrongdoing by the state; as such, their stigmatic influence will be more substantial. According to Armacost, "An arrest or charge is a 'public act' that brands the subject as a criminal in the eyes of others; it has the potential to 'disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create

[78] *See* Jeffries, *supra* note 5, at 276.

[79] *See* Armacost, *supra* note 5, at 583; Monaghan, *supra* note 3, at 429.

[80] *See* Armacost, *supra* note 5, at 583 n.61; Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 743 (1979).

[81] *See* Jeffries, *supra* note 5, at 276.

[82] *See* Armacost, *supra* note 5, at 628.

[83] *Id.* at 627.

anxiety in him, his family, and his friends.' "[84] Hence, reputational injury in the criminal context should trigger due process protection because the stigma created as a result of a charge of criminal wrongdoing runs more deeply and has broader consequences than does the broadly shared risk of the same form of harm in the employment and other more generally universal contexts.

Like Armacost, Randolph Haines has suggested a more subtle way of constructing a jurisprudence of due process liberty while acknowledging the threat that an expansive reading of § 1983 would impose on the federal system.[85] Haines proposes that recovery under § 1983 be narrowed by imposing a standard based on the government official's state of mind: "[A] section 1983 action would lie only if the plaintiff could show that the state intended its characterization of the plaintiff to induce public reaction toward the plaintiff."[86] Such an "intent-to-stigmatize" approach would uphold the results in *McGrath*, *Jenkins*, and *Constantineau*.[87] In each of these cases, state actors intended to engender public reaction against the stigmatized groups or individuals, for instance, by warning the public or particular types of establishments of an apparent danger presented by the group or individual involved.[88] The intent-based standard would require a different result in *Paul*, however, since Davis's inclusion on the list of shoplifters similarly was designed to induce public reaction toward Davis; the listing was designed specifically to warn local merchants to be watchful for Davis and others on the list.[89]

Given my own emphasis on the intrinsic connection between reputation and liberty, I would not permit application of the Due Process Clause to turn on either of the distinctions proposed by Armacost or Haines. Instead, state-caused stigmatic harm should be associated with a deprivation of liberty on a consistent basis. Nonetheless, Armacost and Haines present sensible arguments, each of which sustain an approach preferable to that adopted by the majority in *Paul*.

Finally, the approach adopted in *Paul* failed even to achieve Justice Rehnquist's purported objective of stemming the tide of tort liability he anticipated would flow from the confluence of § 1983 and the Fourteenth Amendment. *Paul* merely eliminated from the scope of due

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[84] *Id.* at 622 (citing Albright v. Oliver, 510 U.S. 266, 296 (1994) (Stevens, J., dissenting) (quoting United States v. Marion, 404 U.S. 307, 320 (1971))).

[85] *See* Haines, *supra* note 3.

[86] *Id.* at 230.

[87] *Id.* at 236.

[88] *See* discussion of *McGrath*, *Jenkins*, and *Constantineau*, *supra* Part I.A.

[89] *See* Haines, *supra* note 3, at 236.

process liberty, and thus from the protections of the Fourteenth Amendment, the interests that groups and individuals have in their reputations. It took two later Supreme Court cases — *Parratt v. Taylor* and *Daniels v. Williams* — genuinely to insulate the federal court system from the range of garden-variety tort claims.[90]

In *Parratt*, an inmate brought a § 1983 damages claim in federal court to replace a twenty-three dollar hobby kit that had been misplaced by prison officials, alleging that the loss constituted a deprivation of property without due process of law.[91] Explicitly referencing his "font of tort law" concern from *Paul*, Rehnquist authored the majority opinion, holding that recovery under § 1983 and the Due Process Clause should be barred where tortious deprivation by a state actor did not result from established state procedures and an adequate state compensatory remedy is available.[92]

In *Daniels*, an inmate sued under § 1983 and the Due Process Clause, claiming that injuries he sustained had resulted from a prison official's negligence in leaving a pillow in a stairwell.[93] The Court in *Daniels*, again in a Rehnquist majority opinion, extended its holding in *Parratt*, excluding in blanket terms merely negligent conduct from the scope of the Due Process Clause.[94]

The breadth of, and the apparent need for, *Parratt* and *Daniels* demonstrate that *Paul* failed to solve the problem of § 1983 via the Fourteenth Amendment, opening the federal court system to extensive tort liability. Indeed, Armacost has argued that *Parratt* and *Daniels* have rendered *Paul* "constitutional dead wood."[95] Justice Rehnquist's majority opinions in *Paul*, *Parratt*, and *Daniels* evince his unwavering (some might say obsessive) devotion to the principle first announced in *Paul* that § 1983 not turn the Fourteenth Amendment into a common source for tort damages. At a minimum, however, it seems clear that the Court could revisit its decision to exclude stigmatic harm from the scope of due process liberty without subjecting the federal system to a flood of unwarranted suits and overly extensive tort liability.

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[90] *See* Daniels v. Williams, 474 U.S. 327, 332 (1986); Parratt v. Taylor, 451 U.S. 527, 552 (1981); Armacost, *supra* note 5, at 628.

[91] *Parratt*, 451 U.S. at 529.

[92] *Id.* at 543.

[93] *Daniels*, 474 U.S. at 328.

[94] *Id.* at 328 ("We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.").

[95] Armacost, *supra* note 5, at 628.

C. An Opportunity Squandered: Siegert *and the Extension of Stigma-Plus*

Given the obvious and extraordinary break with precedent in *Paul*, the outpouring of critical commentary hostile to the decision, and the Court's subsequent decisions in *Parratt* and *Daniels* rendering *Paul*'s specific holding obsolete, one might have expected the Court, when next presented with the opportunity, to shift away from its prior assessment that reputational injury is not in itself an abridgment of liberty. Yet when that opening came in the form of *Siegert v. Gilley*, fifteen years post-*Paul* and five years after *Daniels*, the Court inexplicably affirmed and extended the *Paul* doctrine on stigmatic harm.[96]

Fred Siegert was a clinical psychologist at a government hospital in Washington, D.C., from 1979 to 1985.[97] Melvyn Gilley took over as chair of the department in which Siegert worked at the hospital in January 1985.[98] Within a few months of Gilley's having taken over the department, Siegert was notified that his employment would be terminated, purportedly based on an excessive number of absences and failure to comply with directions from supervisors.[99] On the other hand, Siegert maintained that he had received exclusively exemplary performance reviews from the time he started at the hospital in 1979 until the time that Gilley took over the department.[100] He further suggested that disagreements between the two arose in light of Siegert's extended medical leave due to a head injury and differences of opinion over one of the hospital's programs.[101] Siegert then worked out an arrangement with hospital officials, according to which he would resign rather than be terminated in order to avoid injury to his reputation that might harm his future employment prospects.[102] After resigning, Siegert took a position as a clinical psychologist at a United States Army hospital in West Germany.[103] As part of the credentialing process, Siegert signed a form permitting his former employer to report on his prior job performance. As his most recent department chair, the hospital had Gilley fill out the form, in which Gilley informed the Army that he "could not recommend [Siegert] for privileges as a psychologist" and that he "consider[ed] Dr. Siegert to

[96] Siegert v. Gilley, 500 U.S. 226, 233-34 (1991).
[97] *Id.* at 227.
[98] *Id.* at 228.
[99] *Id.* at 228.
[100] *Id.* at 240 n.3 (Marshall, J., dissenting).
[101] *Id.*
[102] *Id.* at 228 (majority opinion).
[103] *Id.*

be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years at [the hospital]."[104] In receipt of Gilley's evaluation, the Army Credentials Committee rejected Siegert's application for credentials, indicating that its decision was based on unfavorable reports about him.[105] In consequence, another Army hospital declined to offer him a position on its staff, and, after an unsuccessful appeal of the Committee's decision, Siegert's provisional employment was eventually terminated.[106]

Siegert filed a *Bivens* suit in federal district court, alleging that Gilley's conduct in writing the letter had caused Siegert reputational injury, infringing his liberty interests in violation of the Fifth Amendment's Due Process Clause.[107] The Supreme Court, in yet a fourth majority opinion by Justice Rehnquist in this area, affirmed its holding from *Paul* that standalone reputational injury is not a deprivation of liberty within the meaning of the Due Process Clause.[108] Siegert, thus, had not established the foundational requirement in the prosecution of a *Bivens* cause of action, a constitutional violation.[109]

The Court went further, however. Siegert claimed that he had not merely suffered stigmatic injury but also more tangible harm: his employment had been terminated and he had been rendered ineligible for future government employment.[110] Siegert thus claimed that he had satisfied the stigma-plus test established in *Paul*, which seemed a reasonable conclusion given that he had suffered reputational harm and also the loss of his job. In his majority opinion, however, Justice Rehnquist extended the *Paul* doctrine in such a way as to further limit recovery in the government employment context. Rehnquist acknowledged that "[t]he statements contained in [Gilley's] letter would undoubtedly damage the reputation of one in [Siegert's] position, and impair his future employment prospects."[111] And yet

[104] *Id.*

[105] *Id.*

[106] *Id.* at 228-29.

[107] *Id.* Siegert could not bring a § 1983 action against Gilley since § 1983 suits are limited to conduct committed by state and local government officials. *See* 42 U.S.C. § 1983 (2006). In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and related cases, however, the Court has held that a federal government official's violation of a constitutional provision can impliedly give rise to a private cause of action against federal officials for monetary damages. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 363 n.17 (3d ed. 2006).

[108] *Siegert*, 500 U.S. at 233-34.

[109] *Id.* at 234.

[110] *Id.* at 229.

[111] *Id.* at 234.

Rehnquist reasoned that Siegert could not satisfy the stigma-plus standard because Gilley's harmful remarks were "not uttered incident to the termination of Siegert's employment by the hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later."[112] Hence, after the Court's ruling in *Siegert*, loss of current or prospective employment (i.e., loss of one's means of earning a livelihood) is an insufficient tangible loss to meet the plus aspect of the stigma-plus doctrine. Instead, in the government employment context, a plaintiff would need to show that the loss of employment was contemporaneous and coincided with the harm to the terminated employee's reputation; that is, the stigmatic injury must arise *as* the employee is being terminated.[113]

Thus, in the area of procedural due process and reputational harm, the Supreme Court, through a series of majority opinions written by Justice Rehnquist, ignored, disingenuously described, and directly contradicted established precedent.[114] The Court narrowed, and to that extent sacrificed, a critically important and foundational substantive constitutional interest in liberty. It unnecessarily excluded stigmatic injury from constitutional protection. And when faced with an opportunity to repair the unmistakable harm it caused and restore an essential constitutional value, it instead not only sustained the stigma-plus doctrine but enhanced that ill-conceived doctrine's requirements.

Obviously, the doctrinal shift that occurred between, on the one hand, *Joint Anti-Fascist Refugee Committee*, *Jenkins*, *Roth*, and *Constantineau*, and, on the other, *Paul* and *Siegert* was precipitous and far-reaching. Less obviously, this doctrinal shift was accompanied by a more subtle but at least equally compelling notional shift in the Court's conceptualization of reputation. Indeed, one searches *Paul* and *Siegert* in vain for any meaningful consideration of the nature and sources of reputation. In contrast, the earlier cases seemed at least implicitly to recognize that one's reputation is constitutive of who and what one is, and that legal and other governmental institutions play a role in the constitution of one's social identity.[115]

Appreciating the ongoing organic relationship between reputation and social identity, as well as the related role that social institutions play in the constitution of social identity, is crucial to comprehending the nature and extent of the moral loss in liberty initiated by the *Paul*

[112] *Id.*

[113] *Id.*

[114] *See supra* Part I.B.

[115] The constitutive influence of legal and other social institutions is discussed in greater detail in Part II.

and *Siegert* decisions. A fundamental principle of liberal theory, intrinsic to the idea of liberty itself, is the conviction that each individual should be free to the greatest extent possible to determine his or her own commitments and attachments; that is, to determine one's own identity. The harm that is caused when state actors, without due process of law, label and stigmatize individuals as wrongdoers thus runs more deeply than simply negatively impacting one's social standing. Unchallenged stigmatic injury also frustrates individual self-invention, and in that sense deprives the individual of liberty without due process of law. The relationship between reputation and liberty will be considered in greater detail in Part III. First, though, we shall consider more thoroughly the nature and sources of reputation.

II. REPUTATION AND IDENTITY

A. Reputation as Property, Honor, and Dignity

What is reputation and where does it come from? In answering the first part of that deceptively complicated question, Robert Post has offered among the most thoughtful conceptual treatments of reputation.[116] Post's investigation of the nature of reputation is not geared toward an appreciation of that value in the context of procedural due process; rather, Post's is an attempt to decipher the theoretical underpinnings of the protection of reputation within the common law of defamation. Nonetheless, one can draw upon much in Post's survey when seeking to understand the nature of reputation at work, as well as that which perhaps should be at work, in the due process cases. Post identifies three discrete conceptions (he calls them "concepts")[117] of reputation, each of which has played a role in the history and doctrinal development of defamation law. Taken in turn, Post assesses conceptions of reputation as property, as honor, and as dignity.[118]

Though he does not identify it as such, Post's first conception of reputation as property is essentially Lockean.[119] "From this

[116] Robert C. Post, *New Perspectives in the Law of Defamation: The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).

[117] On the difference between concepts and conceptions, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 135 (1977); ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION: GROUP-DIFFERENTIATED RIGHTS IN LIBERAL THEORY 118-20 (2006); JOHN RAWLS, POLITICAL LIBERALISM 14 n.15 (1993) [hereinafter RAWLS, POLITICAL].

[118] Post, *supra* note 116, at 693.

[119] *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27 (1690), *reprinted in* TWO TREATISES ON GOVERNMENT, at 287-88 (Peter Laslett ed., Cambridge 1988)

perspective," Post explains, "defamation law safeguards 'that repute which is slowly built up by integrity, honorable conduct, and right living. One's good name is . . . as truly the product of one's efforts as any physical possession.'"[120] The conception of reputation as property thus invites thoughts of atomized individuals, functioning in a market economy, seeking to protect a particular social vision of themselves which they have endeavored to construct.[121] The image is powerful and internally coherent. Even more, conceptualizing reputation as property would seem to yield an alternative basis upon which to rest a reputational-harm due process jurisprudence. That is, state-caused reputational injury that occurs in the absence of procedural safeguards might be deemed, on this reckoning, a deprivation of property without due process of law.[122] The Supreme Court in *Paul*, of course, precluded this treatment of reputational harm.[123] Under current doctrine, neither due process liberty nor property may serve as a constitutional home for reputational injury. But flawed doctrine to one side, a conception of reputation as property would sit quite congenially with the view of due process liberty accommodating reputational harm raised in this Article. The present argument is not that reputation should not be conceptualized as property; rather, it is that reputation should at least be conceptualized as part of individual liberty.

To that end, note that the depiction of reputation as property remains singularly focused on the consequence of the process of reputation building, to the exclusion of the process itself; on the "*product* of one's efforts"[124] rather than on the *capacity* to engage in such efforts; on the "labors of self-creation"[125] rather than self-

("Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

[120] Post, *supra* note 116, at 695 (quoting Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 33 (1904)).

[121] *Id.* at 694-96.

[122] For an argument that reputation should be considered "property" within the meaning of the Due Process Clause, see Krotoszynski, *supra* note 60, at 590-98.

[123] *See* Paul v. Davis, 424 U.S. 693, 701 (1976) ("The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law.").

[124] Post, *supra* note 116, at 695 (quoting Van Vechten Vedeer, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904)) (emphasis added).

[125] *Id.*

creation. In this sense, the Lockean conception of reputation as property may be distinguished from a conception of reputation grounded in liberty or autonomy, in the sense that John Stuart Mill's approach to individualism or John Rawls's liberal theory of the person might support.[126] Reputation conceptualized as property is a valuable way of understanding the impetus to monetize stigmatic injury through the vehicle of a common law defamation suit, but defamation law might also be conceptualized as designed to protect individual liberty in the form of one's capacity for self-invention. The same might be said of state-caused, standalone reputational injury. Where such harm arises in the absence of adequate procedural safeguards, individuals should, at a minimum, be deemed deprived of liberty without due process of law.

The conception of reputation as honor, as articulated by Post, "presupposes an image of society in which ascribed social roles are pervasive and well established."[127] Reputation as honor, then, is founded upon a strict, hierarchical view of social relations more common in ancient, feudal, and slave societies.[128] These are societies in which social status remains relatively static and primarily dependent on blood rather than labor — on lineage, caste, and race, rather than individual efforts in self-creation.[129] In an honor-based society, one's social position is generally fixed at birth, and defamation law would thus serve to protect the members of a privileged social class's claim to their reputation, or their "honor."[130] As with reputation conceptualized as property, reputation as honor is useful in understanding the history and early development of common law defamation. As a contemporary model for constitutional due process, however, it would be woefully misplaced. The notion of special legal privileges founded upon lineage or race obviously runs counter to the very idea of the rule of law operative within liberal democratic states.

For that very reason, however, the idea of reputation as honor is useful in another, quite different sense — a sense that may further our understanding not simply of what reputation is, but also of its sources, of where reputation comes from. Consider that in honor-based

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[126] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 119-40 (Gertrude Himmelfarb ed., 1974) (1859); RAWLS, POLITICAL, *supra* note 117, at 29-35; JOHN RAWLS, A THEORY OF JUSTICE 560-63 (1971) [hereinafter RAWLS, THEORY OF JUSTICE]. The theories of liberty put forth by Mill and Rawls are treated in greater detail below in Part III.

[127] Post, *supra* note 116, at 701.

[128] *See* Eric J. Mitnick, *Law, Cognition, and Identity*, 67 LA. L. REV. 823, 823 (2007).

[129] *Id.* at 823-24.

[130] Post, *supra* note 116, at 702.

societies, such as ancient Athens, feudal Europe, and even the pre–Civil War United States, law served to embed multiple privileged and subordinate social and political statuses, differentiated according to characteristics such as lineage, caste, and race.[131] As a result, one's status as citizen, serf, or slave served not only as a social but also as a legal position, grounded not merely in social relations but also entrenched in, and reinforced by, law itself. Thus, law may be seen to play a role in the constitution of reputation. I will have more to say on the content of due process liberty and the constitutive influence of legal institutions on reputation and social identity below. Note here, though, the insight provided by law's constitutive nature on the potential moral cost in individual autonomy imposed by the Supreme Court's stigma-plus doctrine. An interpretation of due process liberty that enables state agencies to cause reputational harm without procedural safeguards enhances law's constitutive influence to the detriment of individual self-invention. Of course, every individual's identity is in significant part the product of social forces.[132] Social construction of identity is real and inevitable. Yet liberty is also more likely to flourish within a society that seeks to constrain social forces constructive of identity and instead promotes conditions conducive to autonomous self-construction. Whenever individual identity is constituted from without, individual subjects are less free. Recognition of the genuine prospect of legal and other social construction of identity thus enhances the argument in favor of a more expansive interpretation of due process liberty.

Post's third and final conception of reputation — reputation as dignity — is based on the notion that reputational harm constitutes injury to basic human dignity.[133] In contrast to the essentially individualistic conception of reputation as property, the notion of reputation as dignity rests on a social and communal grounding.[134]

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[131] *See, e.g.*, ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 30-35 (1997) (demonstrating ways in which laws of citizenship and alienage have constructed differentiated social status); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (showing from critical perspective that law functions to constitute social status); Virginia Hunter, *Introduction: Status Distinctions in Athenian Law*, *in* LAW AND SOCIAL STATUS IN CLASSICAL ATHENS 1, 1-30 (Virginia Hunter & Jonathan Edmondson eds., 2000) (describing Athenian law as constructing social status by enshrining legal privileges for citizens and legal disabilities for metics and slaves).

[132] *See, e.g.*, Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25, 32 (Amy Gutmann ed., 1994) (describing identity as rooted in dialogical interaction).

[133] Post, *supra* note 116, at 707.

[134] *Id.* at 709.

"The law of defamation," Post suggests, "can be conceived as a method by which society polices breaches of its rules of deference and demeanor, thereby protecting the dignity of its members."[135] Because Post conceives of dignity largely in social terms, his theory of reputation as dignity is dependent on an essential constitutive relationship between social life and personal identity. "[D]ignity," he maintains, "is concerned with the aspects of personal identity that stem from membership in the general community."[136] Reputational injury, conceptualized in Post's terms as dignitary harm, constitutes communal harm in the sense that where rules of civility are breached, the value of communal membership is degraded.[137] The connection to individual dignity is premised on the notion that human identity is the product of social forces.[138] Post cites some of the historically more prominent members of the symbolic interactionist school of sociology, such as George Herbert Mead and Erving Goffman, for the proposition that individual identity has its sources in social life.[139] Once the gap between communal and personal identity is bridged, the law for Post may be seen as protecting individual dignity. The thought is that since reputational harm as a breach of civility degrades communal membership, and communal membership constitutes individual identity, then individual dignity suffers too in the event of reputational harm.[140] As Post notes, "The concept of reputation as dignity, then, creates two analytically and operationally distinct functions for defamation law: the rehabilitation of individual dignity and the maintenance of communal identity."[141]

This seems a long way around to the notion that reputational harm degrades individual human dignity. Partly the difference appears definitional. Insofar as dignity is conceptualized fundamentally as deriving from communal membership, a link between communal and personal dignity must necessarily be forged. But we might, consistent with liberal theory generally, suggest as well that individual human dignity is more immediately degraded whenever persons lack freedom

[135] *Id.* at 710.

[136] *Id.* at 715.

[137] *Id.* at 711.

[138] *Id.* at 708-09.

[139] *Id.*; *see* ERVING GOFFMAN, INTERACTION RITUAL 44-45, 91 (1967); GEORGE H. MEAD, MIND, SELF, & SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORIST 135-44, 156-59 (1934) (Charles W. Morris ed., 1967). Charles Taylor, writing after publication of Post's treatment of reputation, similarly has emphasized the impact of social perceptions on individual self understanding. *See* Taylor, *supra* note 132, at 32.

[140] Post, *supra* note 116, at 712-13.

[141] *Id.* at 715.

to construct their own identities consistent with their own freely formed values and attachments.[142] Again, this is not to say that human beings are not subject to processes of social construction; individual human identity surely is the product of a complex of social institutions as well as autonomous personal choices. But when individuals are defamed by private actors, or when state actors cause individuals stigmatic injury by labeling them as criminal wrongdoers without adequate procedural safeguards, it does not seem a great stretch to suggest that individual human dignity is directly at risk.

B. Reputation as Privacy and Individual Dignity

The conception of reputation as individual dignity is not distant from the Supreme Court's own conception of reputation in its defamation case law. After the Court first brought the Constitution to bear on the tort of defamation in the landmark case of *New York Times Co. v. Sullivan*, the Court's ensuing doctrine has evolved principally as a result of a balance between First Amendment values and reputational interests.[143] As Justice Brennan wrote in his majority opinion in *Rosenblatt v. Baer*, a case that arose soon after *New York Times* seeking to define the attributes of a "public official" defamation plaintiff:

> This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments.[144]

In the process of seeking an appropriate balance, the Court has of necessity explored and identified values it considers essential to the nature and meaning of reputation. In counterbalance to the freedoms of speech and the press raised on behalf of defamation defendants, the two interests most commonly identified by the Court as worthy of protection through defamation suits are privacy and individual dignity.

The constitutionalization of the tort of defamation is most pronounced in the establishment of a state of mind requirement with

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[142] *See, e.g.*, RAWLS, THEORY OF JUSTICE, *supra* note 126, at 560.

[143] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

[144] Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); *see also id.* at 92 (Stewart, J., concurring) ("It is a fallacy, however, to assume that the First Amendment is the only guidepost in the area of state defamation laws.").

respect to the falsity of defamatory information. The intensity of the state of mind requirement is directly correlated with the public or private character of the plaintiff pressing the defamation suit and of the nature of the speech involved. In a nutshell, public figure plaintiffs are required to demonstrate "actual malice" — an intentional state of mind, defined as knowledge of, or reckless disregard with respect to, the falsity of the defamatory information — on the part of defamation defendants.[145] Private plaintiffs, defamed with respect to a matter of public concern, need only demonstrate that the defendant acted negligently in not recognizing the falsity of the defamatory speech.[146] And where a private plaintiff is defamed regarding a matter of merely private concern, the Court has permitted states to continue the generally accepted approach of imposing no state of mind requirement.[147] The result is greater constitutional protection for speech defamatory of public plaintiffs and speech generally of public concern, and significantly less protection of speech in cases involving private plaintiffs and matters. Justice Brennan commented on the often determinative character of the question of privacy in defamation suits in *Rosenbloom v. Metromedia*:

> General references to the values protected by the law of libel conceal important distinctions. Traditional arguments suggest that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion, and second, a desire to preserve his public good name and reputation. The individual's interest in privacy — in preventing unwarranted intrusion upon the private aspects of his life — is not involved in this case, or even in the class of cases under consideration, since, by hypothesis, the individual is involved in matters of public or general concern.[148]

Doctrinally, then, defamation's loss of constitutional shielding in more private contexts is an immediate consequence of the substantial weight the Court has placed on reputational privacy.

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[145] *See N.Y. Times*, 376 U.S. at 279-80 (imposing "actual malice" standard on public official plaintiffs).

[146] *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 751 (1985) (clarifying rule in Gertz v. Welch, 418 U.S. 323 (1974), as applicable to private plaintiffs where defamatory speech is matter of public concern); Gertz v. Welch, 418 U.S. 323, 347 (1974) (holding that private plaintiffs are required to establish fault).

[147] *See Dun & Bradstreet*, 472 U.S. at 763 (holding that there is no state of mind requirement for private plaintiffs defamed regarding matters of private concern).

[148] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971).

Yet the impetus to protect the individual's interest in privacy arguably is grounded in an even more fundamental concern with individual dignity. Though he disagreed with the balance struck by the majority in *Gertz v. Welch* — the case in which the Supreme Court extended constitutional protection to defamation defendants even in some private plaintiff contexts — Justice White's remarks in dissent poignantly reveal the sense in which individual dignity underlies the doctrinal turn toward privacy. White commented:

> This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." From all that I have seen, the Court has miscal[c]ulated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise.[149]

Justice White, then, in seeking to protect individual dignity, would have placed additional weight on the protection of reputation. The majority instead deemed the defendant's First Amendment interest of greater concern. Critically, though, their struggle was not over the nature of the interests at stake but rather the weight accorded each. Indeed, seemingly all members of the Court acknowledged the essential notion that reputational injury degrades individual human dignity. One need only consider the frequency with which, in nearly every significant defamation case, all sides cite Justice Stewart's language in concurrence in *Rosenblatt* to see the judicially conceptualized grounding of reputation in personal dignity: "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 — a concept at the root of any decent system of ordered liberty."[150]

The conception of reputational injury as degrading individual dignity thus runs deeply through the Supreme Court's defamation jurisprudence. It is worth recognizing, however, that the more general connection Justice Stewart drew in his celebrated conceptualization of reputational harm, the connection to liberty, has been all but ignored.

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[149] *Gertz*, 418 U.S. at 400 (White, J., dissenting).

[150] Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); *see* Milkovich v. Lorain Journal, 497 U.S. 1, 22 (1990) (quoting *Rosenblatt*, 383 U.S. at 92); Philadelphia News, Inc. v. Hepps, 475 U.S. 767, 781 (1986) (Stevens, J., dissenting) (same); *Dun & Bradstreet*, 472 U.S. at 757-58 (same); Paul v. Davis, 424 U.S. 693, 723 (1976) (Brennan, J., dissenting) (same), *Gertz*, 418 U.S. at 341 (same); *id.* at 402 (White, J., dissenting) (same); *Rosenbloom*, 403 U.S. at 78 (Marshall, J., dissenting) (same).

The Court, like Post above, has viewed the balance, where reputation is at stake, as one between freedom for the defendant and privacy and dignity for the plaintiff. The notion that suffering reputational harm might also restrict plaintiffs' freedom seemingly has been lost, in part perhaps because freedom is so obviously at stake from the defamation defendants' First Amendment point of view. Yet little in constitutional litigation is more common than freedom pitched against freedom. Isaiah Berlin famously suggested that "total liberty for wolves is death to the lambs."[151] Similarly, total freedom for the press is death for reputation. In this sense, even ultimate values can clash, entailing the necessity of a choice among incommensurable ends. On one hand, in the defamation context, lie critical First Amendment values of free speech and press, and, on the other, reputational interests grounded in individual dignity and, ultimately, liberty as well. Part III of this Article will be devoted to mining in greater detail that understanding of liberty. For now, though, note that the Court itself has conceptualized reputational harm in terms of its impact on individuality and personal dignity. And where individualism and human dignity are at stake, freedom is rarely far behind.[152]

C. Reputation as Identity: Stigma and Social Labeling Theory

As conceptions of reputation, the ideas of property, honor, privacy, and dignity each helpfully elucidate different aspects of the history

[151] ISAIAH BERLIN, *The Pursuit of the Ideal*, *in* THE PROPER STUDY OF MANKIND 1, 10 (1997). Justice White made a similar comment in his dissent in *Gertz*: "Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to over-whelm the other." *Gertz*, 418 U.S. at 403 (White, J., dissenting).

[152] Rodney Smolla has remarked upon the inconsistent treatment given by the Supreme Court to reputational interests in the defamation and due process cases, somewhat facetiously suggesting a more functional conceptualization designed specifically to undermine constitutional liberties. *See* Smolla, *Beware*, *supra* note 66, at 15 n.84 ("The contrast between the treatment of the importance of reputation in the defamation cases and the due process cases accents the manipulative pliability of 'reputation.' On the Burger Court today reputation is a 'basic to our constitutional system' when measured against the competition of the First Amendment, but it is not 'a candidate for special protection' when it faces off with the Court's new judicial federalism. The Supreme Court freely manipulates reputational values, either enhancing or diminishing their importance as it sees fit. Perplexingly, the unifying principle appears to be that reputation will be given whatever level of importance is necessary to undermine other constitutional guarantees. The importance of reputation is built up by the Court when such a build-up helps decrease the coverage of the First Amendment's free speech guarantees; the importance of reputation is dismantled when the dismantling serves to constrict the scope of the Due Process Clause.").

and development of common law defamation. Each also might be called upon to inform our understanding of the nature of reputational harm in the procedural due process cases. The conception of reputation as property emphasizes the individualistic character of reputation, suggesting that one's social identity is partially the product of personal sacrifice and individual labor.[153] Reputation as honor rests on an essentially illiberal and inegalitarian social system, underscoring the extent to which legal institutions may constitute aspects of human social identity.[154] Reputation as privacy, which has served to delimit the constitutionalization of the tort of defamation, is grounded in the value placed on the integrity of private personality.[155] Finally, reputation as dignity is premised upon the social influence of reputation, stressing the relationship between communal norms and personal identity.[156] An essential commonality across the varied conceptions is the idea that an individual's identity is, at least partially, constituted by her reputation. More generally, then, reputation might most usefully be conceptualized as constitutive of social identity and individual self-concepts.[157]

This conception of reputation as identity coheres with the predominant conceptualization of stigma in the sociological and social psychological literatures. As indicated in the *Annual Review of Sociology*, "[S]tigmatized individuals possess (or are believed to possess) some attribute, or characteristic, that conveys a social identity that is devalued in a particular social context."[158] Thus, where reputation informs one's social identity and influences self-concepts in a broad (i.e., positive or negative) sense, stigma functions exclusively as a negative or devaluing social identity.[159] Accommodating or

[153] *See supra* Part II.A.

[154] *Id.*

[155] *See supra* Part II.B.

[156] *Id.*

[157] In essence, one's "self-concept" concerns how one perceives one's self. *See* Timothy J. Owens, *Self and Identity*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 205, 208 (John Delameter ed., 2003) ("Self-concept . . . may be defined as: the totality of an individual's thoughts and feelings about a particular object — namely, his or her self.").

[158] Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. OF SOC. 363, 365 (2001) (quoting J. Crocker, B. Major & C. Steele, *Social Stigma*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 505 (D.T. Gilbert et al. eds., 1998)). For a classic sociological treatment of stigma and its relationship to social identity, see ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2-3 (1963) (defining stigma as undesirable attribute that results in discrepancy between virtual and actual social identity).

[159] *See* Link & Phelan, *supra* note 158, at 505 ("[O]nly attributes that convey a negative social identity are stigmatiz[ing.]").

tolerating state-imposed stigmatic injury, in turn, should be viewed as enlarging the social sphere of identity construction, or enabling construction of the self from without, at the expense of the individual. In that sense, reputational harm stands as an obstacle to autonomous self-invention, and thus to liberty.

Even more so than the defamation cases, the pre-*Paul* due process cases seem closest to affirming a conception of reputation as identity. Indeed, the Court's conceptualization of the nature of reputation in *Constantineau* in many ways presages the theory of social identity currently prevalent within sociolegal research. Consider how the *Constantineau* Court framed the reputational harm issue:

> 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. . . . "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one.[160]

The majority in *Constantineau* recognized, in ways seemingly lost in the later due process cases, that legally constructed labels, stamped upon individuals, may serve as social markers constituting aspects of individuals' social identities. Along similar lines, legal and political theorists, writing with the benefit of advances from within social psychological, cultural, and identity studies, recently have emphasized the origins of social identity in the construction of social labels.

Along these lines, Anthony Appiah, in his recent book *The Ethics of Identity*, describes the structure of social identity by means of a three-part theory of social labeling.[161] According to Appiah's model, the first requirement in the development of a social identity type is a socially available and widely recognized social label that may be attached to some collective of persons.[162] The label typically develops around an external social consensus that those who fall within a particular class are alike in certain ways, either in terms of appearance, presumed behavior, or other socially detectable tendencies. An example, drawn from *Constantineau* itself, would be the social category of drunkards.[163]

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[160] Wisconsin v. Constantineau, 400 U.S. 433, 436-37 (1971).

[161] KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 65-71 (2005). I examine Appiah's model of social identity in greater detail in Mitnick, *supra* note 128, at 857-63.

[162] APPIAH, *supra* note 161, at 66-67.

[163] *Contantineau*, 400 U.S. at 434.

There exists a social conception of drunkards, in consequence of certain human behavioral patterns. A social label thus develops in response to the social conception, and, because the label is widely available, a social identity type evolves.

Appiah's second element in the construction of a social identity type "is the internalization of those labels as parts of the individual identities of at least some of those who bear the label."[164] As an individual to whom a social label has been attached internalizes the label, it becomes for her a part of who she is, an element of her identity that can influence numerous other aspects of her life. With the internalization of a social label comes self-identification as labeled, and this self-identification shapes one's place in the world and even partially defines one's self-concept. That social perceptions influence self-understanding is now well accepted across most disciplines that seek to understand the nature of human identity.[165] As Isaiah Berlin rather colorfully put forward:

> When I ask myself what I am, and answer: an Englishman, a Chinese, a merchant, a man of no importance, a millionaire, a convict — I find upon analysis that to possess these attributes entails being recognized as belonging to a particular group or class by other persons in my society, and that this recognition is part of the meaning of most of the terms that denote some of my most personal and permanent characteristics.[166]

In a similar fashion, being legally, and thus socially, labeled a drunkard or shoplifter (or terrorist, sex offender, child abuser, etc.) influences not just social perceptions of stigmatized individuals but also those labeled individuals' internal self-perceptions and self-concepts.

"The final element of a social identity," Appiah suggests, "is the existence of patterns of behavior toward Ls [where L stands for labeled

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[164] APPIAH, *supra* note 161, at 68.

[165] *See, e.g.*, ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 155 (1969) [hereinafter BERLIN, *Two Concepts*] ("[S]ome, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of [my] social network . . . ."); JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY 11-12 (1980) (stating that powerless internalize their conditions as aspects of their identities, or who and what they are); JOSEPH RAZ, VALUE, RESPECT, AND ATTACHMENT 33-34 (2001) (stating that personal identity and meaning is partially dependent on social identification); Judith A. Howard, *Social Psychology of Identities*, 26 ANN. REV. OF SOC. 367, 368-69 (2000) (stating that social identity derives from social attachments); Taylor, *supra* note 132, at 25 (stating that social identity is fundamentally informed by social perceptions).

[166] BERLIN, *Two Concepts*, *supra* note 165, at 155.

persons], such that Ls are sometimes *treated as Ls*."[167] Whereas the internalization of a social label reflects one's self-identification as labeled, the treatment-as element focuses upon the external social response to, and reinforcement of, that label. The notion of being treated as labeled likely brings immediately to mind discriminatory social practices associated with a person's race, gender, sexual orientation, nationality, etc. Indeed, many such external social responses toward classes of persons are grounded ultimately in nothing more than stereotypes, which may be inaccurate and tremendously injurious.[168] As an example of the way in which social labels construct aspects of human identities, consider the social category of gay persons, or the existence of a homosexual type. Sexual conduct among persons of the same gender has existed throughout recorded history, yet the consensus within gay and lesbian studies is that homosexuality as a social identity, or "type of person," came into existence only within the last century or so, once persons involved in same-gender sexual conduct began to be labeled as such.[169] The construction of the social label surely resulted in part from social forces, including extreme prejudice, as well as genuine distinctions in sociosexual interaction.[170] Nonetheless, the construction of the social label and category led to the creation of a new social identity aspect.

Consider too the social identity of being Native American. The diverse peoples and nations that inhabited North America at the time of early European contact certainly did not consider themselves Native American. As Joane Nagel has suggested, "The aboriginal inhabitants of North America encountered by European travelers spoke myriad languages; possessed a wide variety of cultures; displayed a broad diversity of social, economic and political organization; and had no conception of themselves as a single 'race,' group, or people."[171] The very concept of being Native American is dependent on external social forces, such as the broad continental emigration and colonization patterns of earlier centuries.[172] But the social identity of being Native American itself arose only in virtue of the social, including legal,

[167] APPIAH, *supra* note 161, at 68.

[168] *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 171-72 (1979).

[169] *See* Ian Hacking, *Making Up People*, *in* FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 69, 74-75 (Edward Stein ed., 1992). See also the essays collected in THE MAKING OF THE MODERN HOMOSEXUAL (Kenneth Plummer ed., 1981).

[170] *See* Hacking, *supra* note 169, at 74-75.

[171] JOANE NAGEL, AMERICAN INDIAN ETHNIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE 3 (1996).

[172] *See id.*

classifications and related labels that resulted from these encounters.[173] In the legislative arena, for instance, there exists a distinct volume of the U.S. Code regarding federal Indian law; judicial decisions concerning particular tribes typically serve as precedent for other Native American tribes; there is within the U.S. government a single administrative agency, the Bureau of Indian Affairs, assigned responsibility for relations with Native Americans; and even within the U.S. Constitution, Native Americans are accorded a distinct and undifferentiated status.[174] In this way, a genuinely ethnically, geographically, linguistically, and politically diverse population of aboriginal inhabitants came to be labeled and identified through a single, narrow social lens.[175]

In light of contemporary sociolegal research on labeling theory, the extent to which the pre-*Paul* due process cases seem to acknowledge and comprehend the impact of social labels on human identity is remarkable. Equally remarkable is how suddenly and completely this insight disappears in the *Paul* majority decision and its progeny. The *Constantineau* Court recognized that the creation on the part of the state of a list of persons to whom alcohol could not be sold had served as "an official branding of a person . . . the pinning of an unsavory label on a person."[176] In *Wieman v. Updegraff*, the Court acknowledged "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."[177] And the Court in *Board of Regents v. Roth* similarly noted that state conduct in the form of termination of a government employee could "impose[] on him a stigma," which "might seriously damage his standing and associations in his community."[178] Indeed, when the New Jersey Supreme Court was faced with the question of whether, in interpreting its own state constitution, to follow the Supreme Court's lead in *Paul* and deny individuals who suffer state-imposed reputational harm due process protection, it chose instead to follow the Court's prior approach from *Constantineau*.[179] And it did so specifically in light of the impact it found in state-created labels on a person's social identity.

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[173] *See id.*

[174] *See* U.S. CONST. art. I, § 2, cl. 3; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1, 115-17, 403-10 (Nell Jessup Newton ed., 2005); NAGEL, *supra* note 171, at 8.

[175] *See* NAGEL, *supra* note 171, at 8.

[176] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

[177] Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952).

[178] Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972).

[179] *See* Doe v. Poritz, 662 A.2d 367, 418-19 (N.J. 1995).

Government classification of an individual as a sex offender, the court indicated, "would expose plaintiff to public opprobrium, not only identifying him as a sex offender but also labeling him as potentially currently dangerous, and thereby undermining his reputation and standing in the community."[180]

Justice Brennan, alone among the justices deciding the *Paul* case (though joined in whole or in part by Justices Marshall and White), and writing in dissent, continued to acknowledge the impact of state-instituted social labels on individual identity. State condemnation of "individuals as criminals," Brennan noted, in effect "brand[s] them with one of the most stigmatizing and debilitating labels in our society."[181] The same, Brennan suggested, would be true of other social labels describing categories of persons, such as "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."[182]

Just as in the pre-*Paul* reputational harm decisions, Brennan's depiction reveals the constitutive influence that social labels, imposed in consequence of government action, have on the formation of affected individuals' social identities. In the majority decision in *Paul*, and in the entirety of *Siegert v. Gilley*, recognition of the existence of stigmatic injury as a result of state conduct remains, but the constitutive relationship between state-imposed social labels and individual social identity seems simply to have vanished. Indeed, one searches these later decisions in vain for any deeper conception of reputational injury. Hence, the shift seen in *Paul* and *Siegert* is arguably not simply a modification in the Court's treatment of reputational harm; rather, the ensuing neglect of identity appears to represent an ill-advised and unjustified shift in the Court's conceptualization of reputation itself. Once the constitutive impact that a government created social label can have on a person's identity is conceptually revived and reinstated, the potential for the deprivation of individual liberty is not far to see. Obtaining that perspective, however, will require a deeper understanding of what it means genuinely to be free.

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[180] *Id.*

[181] Paul v. Davis, 424 U.S. 693, 714 (1976) (Brennan, J., dissenting).

[182] *Id.* at 721.

III. LIBERTY AS SELF-INVENTION

Is state imposed reputational harm, without more, a deprivation of liberty? As we have seen, the doctrinal answer post-*Paul* clearly is no.[183] Reputational harm *qua* reputational harm is insufficient to trigger the Due Process Clause; instead, something more than mere stigmatic injury — that is, stigma-*plus* — is required for due process protection to apply.[184] This conclusion is erroneous because a critical component of its premise is faulty. Liberty, at its core, is not simply a question of freedom from physical restraint, as the notion of stigma-plus would seem to entail. It was not, for instance, primarily the physical inability to purchase alcohol that served to restrict Norma Grace Constantineau's freedom in the *Constantineau* case. Indeed, beyond its mere inclusion in the Court's recitation of the facts, there was virtually no mention made of that physical restriction in the Court's decision whatsoever. More centrally, Constantineau's liberty was deemed to have been restricted in virtue of her having been publicly branded by the chief of police as a drunkard.[185] Further, in accordance with the theory of social labeling described in the prior section, a government agency labeled Constantineau a drunkard, thereby constituting an aspect of her social identity.[186] This state-instituted social labeling, in light of its constitutive impact on an individual's identity, serves even more deeply to restrict the labeled individual's liberty to define herself. The challenge of this Part is to explore the nature of that deprivation of individual liberty.

A. An Intrinsic Conception of Liberty

The stigma-plus test, with its emphasis on the consequences of reputational harm — on whether a job has been lost directly incident to reputational harm, or some other tangible alteration has occurred in a person's life, such as a prohibition on one's ability to purchase alcohol — implicates a distinctly instrumental conception of liberty. Reading the Court's articulation of the stigma-plus doctrine, one would think that freedom itself could only be sensed in tangible terms.[187] But freedom, we know, must run more deeply than this. One need only think of widely acknowledged rights associated with intangible interests such as privacy, political ideology, freedom of

[183] *See supra* Part I.B.

[184] *Paul*, 424 U.S. at 701.

[185] Wisconsin v. Constantineau, 400 U.S. 433, 435-36 (1971).

[186] *See supra* Part II.C.

[187] *See Paul*, 424 U.S. at 710-12.

association, and religious and other cultural beliefs to notice the inadequacy of an exclusively instrumental view of liberty.[188]

In contrast with the Court's instrumental stance, an intrinsic conception of liberty — what might in this doctrinal context be termed, simply, a stigma test — would affirm the idea that stigmatic injury *qua* stigmatic injury violates an individual's liberty by sanctioning state construction of a critical aspect of that individual's identity. On the intrinsic view, liberty extends beyond the stunted position represented by the stigma-plus doctrine. A meaningful conception of liberty must include the freedom to identify in accordance with one's own rationally and independently chosen sense of what is good and valuable in life. In this sense, protecting individual liberty entails securing to the greatest possible extent the free construction of the self and one's identity. As John Rawls has said, "[F]ree persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters."[189] It is this sense of liberty, this conception of liberty as self-invention, with which I want to work here.

In *Paul* itself, the Court was, to characterize its perspective generously, insolently dismissive of the very idea of liberty. "Respondent's due process claim," the Court suggested, "is grounded upon his assertion that the flyer, and in particular the phrase 'Active Shoplifters' appearing at the head of the page upon which his name and photograph appear, impermissibly deprived him of *some* 'liberty' protected by the Fourteenth Amendment."[190] The Court then almost wholly failed to discuss what liberty might encompass. Indeed, the only other references to the nature of due process liberty in the Court's decision were tendentious and misleading. In the portion of its opinion in which the Court mischaracterized its prior decision in *Constantineau* and adopted instead the stigma-plus doctrine,[191] the Court indicated, "The words 'liberty' and 'property' as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law."[192] The obvious implication of this statement is that the

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[188] *The Supreme Court, 1975 Term*, *supra* note 3, at 94. Moreover, injury to one's reputation has been considered tangible enough to be compensable in civil damages throughout the country. *Id.*

[189] JOHN RAWLS, REPLY TO ALEXANDER AND MUSGRAVE (1974), *reprinted in* JOHN RAWLS: COLLECTED PAPERS 232, 240 (Samuel Freedman ed., 1999).

[190] *Paul*, 424 U.S. at 697 (emphasis added).

[191] *See supra* Part I.B.

[192] *Paul*, 424 U.S. at 701.

Court no longer viewed the concept of liberty itself broadly enough to encompass reputational interests. The much more odd implication is the idea that interests protected by state law, but not mentioned explicitly in the Fourteenth Amendment — as if any were mentioned — necessarily fall outside the ambit of due process.

This implication is especially odd given that further in the opinion the Court seemingly adopted a more receptive stance toward certain types of rights based in state law:

> 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 . . . .[193]

Reputation fails here, not because one's interest in reputation is undifferentiated from the more general corpus of state protected interests, but because state law has not created a prior entitlement to one's interest in one's reputation. And yet the *Roth* Court's reconceptualization of due process protection in entitlement terms, to which Rehnquist undoubtedly referred in this passage, concerned only the application of the Due Process Clause in the context of a deprivation of a *property*, not a liberty, interest.[194] However, put to one side the nonsensical nature of the reference to state law interests explicitly mentioned in the Fourteenth Amendment, of which there are zero. Put to one side the misapplication of entitlement theory to liberty. And ignore, for the moment, the Court's failure to acknowledge that even if a deprivation of liberty needed to be grounded in a state law violation, reputational harm would seem nonetheless to meet that standard given the existence of state common law defamation actions.[195] The critical point here is the *Paul* Court's willingness to dismiss the idea that standalone stigmatic harm could constitute deprivation of liberty without ever attempting to define, or even consider more deeply, the nature of liberty.[196]

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[193] *Id.* at 710.

[194] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[195] *See supra* Part I.B.

[196] In contrast, Justice Brennan's dissent in *Paul* focuses extensively on the meaning of liberty. *See Paul*, 424 U.S. at 722-23 (Brennan, J., dissenting) ("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

In strong contrast, in certain of the decisions leading up to *Paul*, and in a portion of the academic commentary critical of the doctrine, the nature of liberty in the debate over reputational harm and procedural due process takes center stage. The model of liberty articulated in these contexts at times helpfully (even tantalizingly) approaches, though it never quite reaches, a conception of liberty that would encompass the notion of self-invention. For instance, just less than four years before the Supreme Court excluded reputation from the ambit of liberty, the same Court in *Roth* suggested: " 'Liberty' and 'property' are broad and majestic terms. They are among the 'great [constitutional] concepts . . . purposely left to gather meaning from experience . . . . They relate to the whole domain of social and economic fact . . . .' "[197] And further, with reference to *Meyer v. Nebraska* and what is likely the most famous judicial statement on the meaning of due process liberty:

> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.[198]

Given the supposed breadth of due process liberty, that security of reputation might be considered a "privilege long recognized . . . as essential to the orderly pursuit of happiness by free men" seems apparent even simply in the abstract. For in the absence of a sound reputation, much else that one might legitimately desire to accomplish could prove impracticable.[199] Moreover, there is ample evidence that

as falling within the concept of personal 'liberty.' ").

[197] *Roth*, 408 U.S. at 571 (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

[198] *Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

[199] *See* Monaghan, *supra* note 3, at 426 ("[W]ithout one's reputation 'it is impossible to have the perfect enjoyment of any other advantage or right.' " (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *134)).

reputation has, in fact, long been considered among those interests deemed essential by free persons. Blackstone, for instance, considered the "right of personal security" one of the "absolute rights of every Englishman," and that right he defined as "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation."[200]

B. Due Process and Self-Invention

Henry Paul Monaghan has noted that the Blackstonian conception of liberty itself was more narrow, limited essentially to freedom from personal restraint.[201] Monaghan then traced the evolution of interpretations of due process liberty from this more limited conception, which prevailed in U.S. jurisprudence from the founding through much of the nineteenth century, to the broader conception of liberty articulated in *Meyer*, which endured through most of the twentieth century, at least through *Roth*.[202] Monaghan wrote:

> So viewed, the "liberty" of the due process clause had been transformed over time from a specific freedom from interference with locomotion to a general right of private autonomy. In that process the language and theory of the opinions seemed to absorb at the very least all the Blackstonian rights of personal security, including reputation.[203]

Monaghan's now classic depiction of the nature and evolution of due process liberty is today widely viewed as the authoritative descriptive treatment of the subject, and justifiably so. Unfortunately, the Supreme Court has not returned to Monaghan's normative conception of liberty, grounded as it is in personal autonomy and an ever respectful stance toward individual human dignity — the sort of conception articulated in *Meyer* and both ignored and discarded in *Paul*. But the portion of Monaghan's paper that is of greatest interest here is as brief as it is remarkable:

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[200] 1 WILLIAM BLACKSTONE, COMMENTARIES *128-29, *134; *see also* Doe v. Poritz, 662 A.2d 367, 420 n.27 (N.J. 1995) (noting that Blackstone's notion of right of personal security included reputational interests); Monaghan, *supra* note 3, at 412 (same); *The Supreme Court, 1975 Term*, *supra* note 3, at 93-94 n.50 (stating that security of reputational interests was deemed essential to individual freedom in early colonial law, Blackstone, and contemporary international declarations of rights).

[201] *See* Monaghan, *supra* note 3, at 411-12.

[202] *See id.* at 412-14.

[203] *Id.* at 414.

> [T]he Court's reasoning [in *Paul*] ignores the social nature of human personality. For, as Isaiah Berlin observed in a famous essay on the meaning of "liberty," "am I not what I am, to some degree, in virtue of what others think and feel me to be?" Finally, and most importantly, the Court's theory ignores the spiritual character of human personality. Defamation is a serious assault upon an individual's sense of "self-identity," and has from ancient times been viewed as "psychic mayhem."[204]

Monaghan's article has been cited in more than a hundred law journal articles and dozens of judicial opinions.[205] And yet this insightful morsel, as far as I can tell, has never been noted. In linking reputational harm to the "social" and "spiritual character of human personality," Monaghan bridges due process liberty and individual identity in an unprecedented manner. With his prime focus on the importance of preserving individual autonomy and human dignity, and his recognition (via Berlin) of the influence of social institutions on self-identity, Monaghan comes tantalizingly close to a conception of liberty that would encompass the value of autonomous construction of the self. It is but one step from conceptualizing liberty as self-invention.

The juristic alienation of due process liberty from a conception of individual freedom grounded in self-invention is made even more extraordinary by the extensive political theoretical literature on the subject. In *A Theory of Justice*, John Rawls famously revived examination of the essential human capacity for the free and rational invention and revision of one's ends and attachments. Rawls maintained that "the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities."[206] To be free, in this sense, is to engage in sustained rational exploration of one's self and one's relationship to social life. A free person is, thus, a maximally self-defined person, at liberty to the greatest possible extent to constitute one's self and one's life path in virtue of one's own beliefs regarding appropriate sources of value. "Autonomy," Joseph Raz has suggested, "is an ideal of self-creation."[207] Similarly, George Kateb maintained that "to be a self-defined self is an end in itself."[208] Indeed, John Stuart Mill claimed that the absence of

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[204] *Id.* at 426-27.

[205] At the time of writing, a LexisNexis search resulted in 171 articles and 32 court decisions citing Monaghan's article.

[206] RAWLS, THEORY OF JUSTICE, *supra* note 126, at 560.

[207] JOSEPH RAZ, THE MORALITY OF FREEDOM 370 (1986).

[208] George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION 35, 48 (Amy

this sort of freedom would render individuals something less than human:

> [I]t is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way . . . to conform to custom merely *as* custom does not educate or develop in him any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference are exercised only in making a choice . . . . He who lets the world, or his own portion of it, choose his plan of life for him has no need of any other faculty than the ape-like one of imitation.[209]

In this sense, individual self-invention is essential to the fulfillment of basic human dignity. Exercising constitutive autonomy is what it means to be free, to be human.[210]

Of course, one can never truly constitute oneself entirely free of social forces. "The completely autonomous person is," as Raz has also said, "an impossibility."[211] Human beings are constrained and constructed in ways beyond our choosing, and this condition is inescapable. We may neither choose to live our lives harming others, nor know entirely when our choices are our own and when they are the product of social forces. We may no sooner change the color of our skin, nor the social meanings ascribed to that characteristic, than we may alter the course of the seas. Nor can we turn back the clock and adjust the circumstances of our births, including our parents' religious affiliation (or lack thereof), socioeconomic class, and so on. In a similar vein, Kateb suggested, "The mere fact that we are not born as adults makes the subject elusive, probably forever."[212] Yet, we may, as we mature, determine that it is necessary to strive against social conceptions that depend upon characteristics such as skin color. We may critically assess and, though it might not come easily, revise our religious and other cultural affiliations. Over the course of life, old attachments are severed, new attachments established, and, along the way, we may change aspects of who we are and see our lives take on

Gutmann ed., 1998).

[209] MILL, *supra* note 126, at 122-23.

[210] For a more detailed depiction of liberty as self-invention, see MITNICK, *supra* note 117, at 132-48.

[211] RAZ, *supra* note 207, at 155.

[212] GEORGE KATEB, THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE 18 (1992).

different meanings. "No end," Will Kymlicka concluded, "is immune from such potential revision."[213] In this way, individuals revise their perceptions of the good, their relationships with others, and, in the process, aspects of their social identities and self-concepts. Most critically, the ranges of social and individual construction of the self are not fixed absolutes. They are, in part, subject to the broader public culture, as well as the form and reach of social institutions, within which individuals interact and coexist. All things equal, human self-invention will flourish within a society that seeks to constrain social forces constructive of the self and, instead, promotes conditions conducive to individual constitutive autonomy.

While the conception of liberty as self-invention remains estranged from the procedural due process cases, the Court in other contexts has invoked the idea, albeit infrequently. For instance, in *Roberts v. United States Jaycees*, in the associational freedom context, Justice Brennan described associative liberty as "safeguard[ing] the ability independently to define one's identity that is central to any concept of liberty."[214] In *Bowers v. Hardwick*, Justice Blackmun, writing in dissent, suggested that "individuals define themselves" through their freely chosen relationships.[215] Nearly two decades later, when the Court overruled *Bowers* in *Lawrence v. Texas*, Justice Kennedy was able to harmonize with Blackmun, maintaining that a substantive commitment to liberty "should counsel against attempts by the State, or a court, to define the meaning of [a] relationship or to set its boundaries . . . ."[216] Finally, in *Planned Parenthood v. Casey*, Kennedy, along with Justices O'Connor and Souter, famously (or infamously) portrayed "the heart of liberty" as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[217] Liberty in the associational freedom and substantive due process contexts has thus been deemed sufficiently broad to encompass the value of human self-invention. Given the influence that state-imposed reputational harm may have on an individual's self-concept and social identity, there is no justification for a more narrow conception of liberty in the procedural due process context.[218] And

[213] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 91 (1995).

[214] Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

[215] Bowers v. Hardwick, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting).

[216] Lawrence v. Texas, 539 U.S. 558, 567 (2003).

[217] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

[218] *See* Armacost, *supra* note 5, at 620-21 ("[I]t is too late in the day (as the majority surely realized) to credit the argument that the words 'liberty' or 'property'

this becomes especially clear when one considers the degree of harm that may be caused by the erroneous application of social labels today.

IV. CONTEMPORARY APPLICATIONS

The government branded Norma Grace Constantineau a "drunkard" and Edward Charles Davis III a "suspected shoplifter."[219] Certainly, neither moniker is exactly flattering, but each pales in comparison to the sorts of state-instituted classifications being issued today — for example, "sex offender," "gang member," "child abuser," and "terrorist." Of course, the extent of the damage inflicted by an erroneously applied social label would seem directly proportional to the danger posed to society by those genuinely deserving the label. That is, greater reputational harm is in part a function of the very real social dangers we face. The argument here assuredly is not that government programs designed to thwart dangerous felons should be hindered from accomplishing their vitally important tasks. Rather, the point is that in situations where classifying persons in these ways will result in stigmatic harm, we cannot say, with *Paul*, that the Due Process Clause is not at least triggered because liberty is not at stake.

Reputational injury is a deprivation of liberty. Yet triggering the Due Process Clause is not equivalent to violating the provision.[220] Simply because due process is activated does not mean that the government must afford the labeled individual a full adjudicatory (or even any) hearing prior to acting to safeguard society. Candidly acknowledging that liberty is at stake, and so concluding that due process is triggered, merely involves a commitment to ascertain whether the government's interest in hurriedly moving forward with its program outweighs the potential harm to the individual suspected of wrongdoing.[221] In certain types of cases, public safety may trump personal liberty, at least temporarily. But, especially in light of the degree of stigmatic risk posed by these government programs, we should not hide behind the fallacy that liberty is not at stake. The following is a nonexhaustive catalogue of contemporary contexts in which state-imposed stigmatic harm might give rise to a procedural due process challenge.

are insufficiently broad to encompass a reputational interest.").

[219] *See* Paul v. Davis, 424 U.S. 693, 697 (1976); Wisconsin v. Constantineau, 400 U.S. 433, 435 (1971).

[220] *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

[221] *Id.*

A. Gang Databases

Over the past decade, law enforcement agencies have increasingly turned to the use of databases of suspected gang members in order to combat gang-related criminal activity. For instance, "Calgang," California's gang database system, was initiated into service on December 31, 1997.[222] Other examples include Orange County's Gang Incident Tracking System ("GITS"), Illinois's Law Enforcement Agencies' Data System ("LEADS"), Las Vegas's Gang/Narcotics Relational Intelligence Program ("GRIP"), and Albuquerque's Gang Reporting Evaluation and Tracking System ("GREAT").[223] The legal consequences of presence on a gang database can be severe, including longer criminal sentences, increased probability of conviction, possible preclusion of plea bargains, and injunctions against associating with other suspected gang members, wearing gang-related colors, or engaging in certain types of activities.[224] Despite these potentially severe consequences and an alarmingly high error rate, individuals are routinely posted on gang databases without notice, hearing, or even the most basic opportunity to contest the accuracy of their inclusion.[225]

Individuals suspected of gang-related activity are included in the gang databases through a process known as "documentation."[226] Suspected gang members are sometimes documented as a result of a particular arrest or a criminal investigation already underway. More commonly, however, documentation results from ostensibly consensual field interviews and generally aggressive inner-city policing. As Joshua Wright has noted:

> Officers frequently make contact with known gang members or individuals suspected to be gang members based on their race, ethnicity, gender, age, and clothing. Officers interview these individuals, frequently asking questions regarding gang membership, monikers, and tattoos. Officers then record this information on the [Field Interview] card, along with details regarding where the stop took place, the identity of any

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[222] Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115, 119 (2005).

[223] *Id.* at 117 n.7.

[224] *Id.* at 117.

[225] *Id.* at 118 ("[E]vidence suggests that those operating the databases are not capable of ensuring that non-gang members do not find themselves documented and trapped in the database system."); *id.* at 120 (finding systemic errors).

[226] *Id.* at 115.

> associates, vehicles involved, schools attended, and home addresses.[227]

Importantly, these are not probable cause stops, nor is there notice to the individual questioned regarding the use to which the information collected will be put. And yet the stops may be carried out in the most aggressive manner possible, complete with multiple squad cars, hands on guns, searches of suspected gang members, disrobement for physical inspections of tattoos, placement in the prone position, and questioning, all in public view.[228]

Theoretically, in virtually all gang database programs, quality control measures have been instituted to facilitate the accuracy and reliability of the information gathered prior to inclusion in the database. In reality, however, the evidence is overwhelming that the control measures currently in place regularly fail, either due to lack of resources, skill, or because they are simply neglected.[229] Indeed, the sheer number of individuals documented as gang members in certain jurisdictions would seem to substantiate the programs' high error rates. For instance, in San Diego alone, almost 7,000 field interviews were completed in 1999, dwarfing the number of personnel assigned to review the information collected for accuracy.[230] In light of this mismatch between the amount of alleged gang information received and the nominal personnel available to screen inaccurate information, Wright reports that "all the officers indicated that their reports were never questioned or returned by sergeants."[231]

In Denver, more than 66 percent of all black males between the ages of 12 and 24 had been included in that city's gang database; similarly, the Los Angeles police department classified nearly half of all young black males in the city as gang members.[232] Beyond the lack of resources assigned to ensure accuracy, this overinclusiveness results also from law enforcement's excessive focus on clothing, tattoos, and music purportedly associated with gangs. Field officers also too readily

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[227] *Id.* at 121.

[228] CHARLES M. KATZ & VINCENT WEBB, POLICING GANGS IN AMERICA 211-13 (Cambridge Univ. Press 2006) (1985).

[229] *See* Wright, *supra* note 222, at 122 ("[T]he majority of individuals in the database are documented as a result of [field interviews] filled out by patrol officers without gang experience and without review for accuracy.").

[230] *Id.*

[231] *Id.* (citing Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 494 (2003)).

[232] *Id.* at 125.

rely on youthful self-reporting of membership, despite knowledge that young people frequently assert false connections to groups that command respect but to which they have no genuine affiliation.[233] Moreover, there obviously will be movement in gang membership over time. The gang database programs, thus, call for database information to be updated regularly and names to be purged when gang activity ceases for a reasonable period of time. And yet, as one civilian administrator commented, "It's just hit and miss if a file gets updated . . . . We do not have time to constantly update every file, so we only do it if something comes up."[234] Hence, in reality, once documented, individuals frequently remain in the gang databases indefinitely. "In sum," as Wright concludes, "gang databases appear to be riddled with factual inaccuracies, administrative errors, lack of compliance with departmental guidelines, and lack of oversight."[235] And yet in the absence of any process prior to inclusion on a gang database, individuals suspected of gang-related activity have no opportunity to contest the accuracy of their documentation. Indeed, without notice, individuals erroneously posted to gang databases generally do not even realize that there is anything to contest.

Courts have not yet ruled on the specific question, but it seems clear that under the Supreme Court's current stigma-plus doctrine, the Due Process Clause would be held inapplicable to an individual's posting on a gang database.[236] Of course, the plus aspect of the stigma-plus doctrine would activate procedural protection in the event that a criminal sentence is enhanced due to one's inclusion in such a database, or where an individual's associations or activities are curtailed. In such an event, it is not merely stigmatic injury that is at stake, but also physical restraint, which even the *Paul* Court would characterize as a deprivation of liberty. At the point of documentation, however, there is no such restraint or other more tangible restriction on the named individual's liberty. But there is the prospect of extensive reputational injury. Gang database information is made available to potential employers, both public and private, sometimes without employers even requesting the information.[237] The

[233] *Id.* at 127 (citing IRA REINER, OFFICE OF THE DIST. ATT'Y OF LOS ANGELES, GANGS, CRIMES, AND VIOLENCE IN LOS ANGELES 100 (1992)).

[234] *Id.* at 123.

[235] *Id.* at 129.

[236] Antigang injunctions have been upheld against vagueness and overbreadth challenges. *See, e.g.*, People *ex rel.* Gallo v. Acuna, 929 P.2d 596 (Cal. 1997) (upholding lower court order declaring gang activities public nuisance). Procedural due process issues were not raised in that challenge.

[237] *See* KATZ & WEBB, *supra* note 228, at 224. Recall too that after *Siegert*, loss of

information may also be shared with educational institutions.[238] Also, as a practical matter, an individual regularly stopped in public, and aggressively interviewed by police officers as part of an ongoing documentation process, is likely to face reputational consequences within his or her community.[239]

To be clear, the point here is not to minimize the threat of gang violence, nor even to advocate for the elimination of the use of gang databases. Criminal activity by gang members is a serious, potentially debilitating social problem, and law enforcement personnel critically need tools at their disposal to combat gang violence. The point here is that we should not hide behind the fallacy that liberty is not at stake in such programs. The state, through the documentation and gang database system, is able to label an individual a "gang member," thereby influencing how members of her community perceive that individual.[240] In effect, the state has further constituted an aspect of the affected individual's social identity, reducing the extent to which individuals are at liberty to define themselves. Yet under the stigma-plus doctrine, individuals need not be notified nor afforded an opportunity to contest the construction prior to being posted to the database, nor may they seek compensation through a § 1983 action after the fact.[241] This seems manifestly unjustifiable. Procedural due process need not unduly tie law enforcement's hands, but the very purpose of the Due Process Clause is to ensure fair and judicious treatment when individual liberty is at stake. Moreover, it is important to remember that forthrightly acknowledging that a government program impinges upon a liberty interest — in this case, the stigmatic harm that arises from the posting of an individual's identity to a gang database — would not necessarily result in finding a due process violation. That determination, again, would turn on a balance of the individual's and the government's interests.[242] But pretending, in the face of state construction of an individual's social identity, that liberty is simply not at stake is indefensible.

employment will not qualify as tangible harm sufficient to satisfy the stigma-plus standard, unless the reputational harm and loss of employment occur simultaneously, or directly incident to one another. *See supra* Part I.C.

238 Wright, *supra* note 222, at 133 n.81.

239 *Id.* at 134.

240 *See supra* Part II.C.

241 *See supra* Part I.B.

242 *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

B. Terrorist Watch Lists

As of September 11, 2001, the No-Fly List maintained by the U.S. government included sixteen names.[243] By 2003, the National Counterterrorism Center ("NCTC") had compiled a watch list of 75,000 suspected terrorists.[244] By early 2006, the NCTC list contained 325,000 names,[245] and as of April 2007, the central watch list maintained by the FBI's Terrorist Screening Center ("TSC") had grown to more than 720,000 names.[246] The NCTC and TSC lists have included information from as many as twenty-six other watch lists maintained by different government agencies, and the information is shared with a variety of public and private entities, ranging from the Transportation Security Administration ("TSA") to a Toyota dealership in Glen Burnie, Maryland.[247] Given the full extent of the list, and the speed with which it has been compiled, it is no wonder that even Senator Ted Kennedy was stopped and questioned trying to board flights on five different occasions in a single month in 2004.[248]

The secrecy that surrounds the watch lists makes it difficult to determine precisely how the lists are compiled. One thing that appears certain, however, is that a number of individuals have been erroneously included.[249] TSA reported that as of the end of 2005, nearly 30,000 airline passengers had requested that their names be removed from watch lists.[250] And in October 2006, journalists on the television show *60 Minutes* obtained copies of the No-Fly and Selectee Lists as they existed in March of that year and reported the presence on the lists of the names of a significant number of deceased individuals, including most of the September 11 hijackers.[251]

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[243] Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2153 (2006).

[244] Walter Pincus & Dan Eggen, *325,000 Names on Terrorism List*, WASH. POST, Feb. 15, 2006, at A1.

[245] *Id.*

[246] Ellen Nakashima, *Reports Cite Lack of Uniform Policy for Terrorist Watch List*, WASH. POST, Mar. 18, 2008, at A2.

[247] *Id.* (indentifying Toyota dealer); Pincus & Eggen, *supra* note 244, at A1 (providing 26 different agency lists).

[248] Sara Kehaulani Goo, *Sen. Kennedy Flagged by No-Fly List*, WASH. POST, Aug. 20, 2004, at A1.

[249] *See* Florence, *supra* note 243, at 2151.

[250] Audrey Hudson, *30,000 Fliers Seek Watch-List Removal*, WASH. TIMES, Dec. 8, 2005, at A11.

[251] Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804, 817 (2007) (citing *60 Minutes: Unlikely Terrorists on No Fly List* (CBS television broadcast Oct. 8, 2006) (transcript)).

Individuals who find themselves on watch lists, or who are falsely identified due to the similarity of their names to others included on the lists, may have their travel privileges revoked or be precluded from participating in various commercial transactions.[252] Inclusion on the Selectee List, a less stringent alternative to the No-Fly List, renders identified individuals subject to an additional level of screening, though there is no blanket restriction on air travel.[253]

Insofar as inclusion on a terrorist watch list prevents an individual from traveling or engaging in a commercial transaction, application of the Due Process Clause and the stigma-plus doctrine would seem fairly straightforward. The limit on one's freedom to travel or contract would appear to provide the more tangible restriction on liberty mandated by the stigma-plus test.[254] As of this writing, however, the only court to be presented with the issue held precisely the opposite. In *Green v. Transportation Security Administration*, a federal district court in Washington State held that inclusion on a No-Fly List, even once the named individual is precluded from flying, does not implicate a tangible liberty interest in the sense required by the stigma-plus doctrine.[255] Even if that seemingly mistaken conclusion ultimately is discarded, however, the question would likely resurface for individuals placed on the Selectee List, since persons who discover their names on that list are permitted to fly and must merely subject themselves to additional screening.

In the application of the stigma-plus doctrine to terrorist watch lists, the plus aspect may remain uncertain, but the stigma felt by those erroneously included certainly is not. While government agencies convey the information contained on terrorist watch lists to other public and some private entities, the agencies do not post the information for public consideration.[256] Nonetheless, airport personnel may identify and segregate listed passengers in full public view.[257] In the complaint filed in the *Green* case, for instance, the plaintiffs indicated: "[Prospective] passengers . . . are sometimes informed, in full view of other passengers waiting in line, that their names are on a

[252] Ellen Nakashima, *A Good Name Dragged Down: Consumers Get Tangled in Terrorist Watchlist*, WASH. POST, Mar. 19, 2008, at D1.

[253] Shane, *supra* note 251, at 812.

[254] *See supra* Part I.B.

[255] *See* Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (holding that preclusion of one mode of travel does not satisfy stigma-plus or otherwise implicate due process liberty interest).

[256] Shane, *supra* note 251, at 808-09 (describing "secret watch lists").

[257] Soumya Panda, *The Procedural Due Process Requirements for No-Fly Lists*, 4 PIERCE L. REV. 121, 131-32 (2005).

federal security list. This results in significant embarrassment and humiliation to the passenger, as fellow passengers and the traveling public subsequently regard the innocent passenger with suspicion or fear."[258] Listed individuals may then be questioned by uniformed law enforcement or security personnel, often in an aggressive manner, and again in public view.[259] Erroneously identified individuals have also been threatened with arrest or physically escorted through airports for further interrogation.[260] To appreciate the gravity of the reputational harm apparent in such situations, one need only imagine a scene such as this taking place in a public airport terminal, as an erroneously listed prospective passenger is identified and treated as a suspected terrorist, immediately in front of other passengers and possibly with friends, family members, and coworkers looking on. Even if the listed individual is fortunate enough to be cleared in time to join her flight, doubts and anxiety among fellow passengers and coworkers would linger. As one commentator suggested, "The stigma attached to an individual who is thought of as a potential terrorist is, needless to say, extremely high."[261] Indeed, to be mistakenly identified as a suspected terrorist would be a nightmare of extraordinary proportions.

Of course, the dangers presented by genuine terrorists are also extremely high, and thorough and responsible maintenance of watch lists may be a vital instrument in combating the indisputable menace and profound fear terrorists perpetrate. In fact, had our current system of maintaining extensive terrorist watch lists been in place prior to September 11, 2001, some have suggested the tragic events of that day might have been prevented.[262] Ultimately, whether additional procedural protections are warranted would depend on the weight accorded the individual's interest in avoiding the stigmatic injury associated with such a state-imposed social label, balanced against the government's obviously compelling interest in safeguarding the public from terrorism.[263] But there should be no question that an individual wrongfully branded a terrorist by a state agency in this way has suffered a deprivation of liberty. As Peter Shane has suggested,

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[258] Complaint at 6, Green v. Transp. Sec. Admin., 351 F. Supp. 2d 1119 (W.D. Wash. 2005) (No. C04-763Z), *available at* http://news.findlaw.com/cnn/docs/aclu/greenvtsa40604cmp.pdf.

[259] *Id.*

[260] *Id.*

[261] Florence, *supra* note 243, at 2164; *see also* Shane, *supra* note 251, at 808 (noting inclusion on watch list as cause of "serious reputational damage").

[262] Florence, *supra* note 243, at 2152.

[263] *See* Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

erroneously listed individuals face the horror "of being labeled suspected terrorists or supporters of terrorism."[264] To claim procedural due process categorically inapplicable because liberty is not at stake in such situations is willfully to blind oneself to reality. Such a potent externally-produced identity marker cannot but impede an individual's own efforts in self-invention. The more extensively the state constructs individuals, the less individuals are at liberty to shape their own identities. Terrorist watch lists may be of critical social value, but we do ourselves a great disservice when we cloak an obvious deprivation of liberty behind an incoherent legal doctrine.[265]

C. Sex Offender Community Notification Laws

A third critical contemporary context in which reputational harm may result from state action, potentially giving rise to a procedural due process or § 1983 challenge, involves sex offender registration and community notification laws. There have been efforts made to regulate sex offenders, postcustody, since at least the 1930s.[266] California in 1947 became the first American jurisdiction to require convicted sex offenders to register with public authorities upon release from state custody.[267] However, it was the highly publicized legislative reaction in the early 1990s to the brutal kidnapping, sexual assault, and murder of seven-year-old Megan Kanka in New Jersey that truly spurred a nationwide movement toward the development of sex offender registration and community notification laws, commonly known as "Megan's Laws."[268]

In 1994, the community notification movement went national, when Congress passed the Jacob Wetterling Act, which required states, at the risk of losing federal funding for state law enforcement, to pass sex offender registration legislation.[269] Currently, all fifty states, the federal government, and the District of Columbia mandate that all persons

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[264] Shane, *supra* note 251, at 808.

[265] *See id.* at 809-10 ("It ought to be viewed as intolerable in a democratic society for large numbers of innocent people to be stigmatized by the government under a largely secret program, even if such cases can be 'redressed' through postinclusion individual review.").

[266] Wayne A. Logan, *Criminal Law: Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172 n.25 (1999).

[267] *Id.* at 1172.

[268] *Id.; see* Sex Offender Registration Act ("Megan's Law"), N.J. STAT. ANN. § 2C:7-1 (West 1995).

[269] *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2006).

convicted of a crime against a minor, or convicted of a sexually violent crime, register with local or state agencies.[270] Federal law requires such registration to include at least the listed individual's name, address, fingerprints and photograph, and the registration must be maintained and updated for a minimum of ten years post-release.[271] In addition to requiring individuals to register with authorities, federal legislation calls for registry information to be made publicly available.[272] Today, a clear majority of states have not only made their registries publicly available but also easily accessible and searchable over the Internet.[273]

The Supreme Court weighed in on the question of the application of procedural due process to registration and community notification laws in the 2003 case of *Connecticut Department of Public Safety v. Doe*, but it did so in a narrow sense that leaves many of the most important questions unanswered.[274] In this case, an individual included on Connecticut's sex offender registry challenged his inclusion on procedural due process grounds, claiming a deprivation of liberty and the need for a hearing to determine whether he remained a danger to the public.[275] The district court agreed, and the Second Circuit affirmed, holding that the listed individual satisfied the stigma-plus doctrine: "[T]he Connecticut law implicated a 'liberty interest' because of: (1) the law's stigmatization of respondent by 'implying' that he is 'currently dangerous,' and (2) its imposition of 'extensive and onerous' registration obligations on respondent."[276] The Second Circuit concluded that a due process hearing was necessary "to determine whether or not [persons listed] are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry."[277] However, the Supreme Court put the entire question of whether liberty was at stake to one side, holding that the procedural due process claim failed in this case in light of the unique nature of the Connecticut legislation.[278] The Connecticut provision

[270] *Id.* § 14071(a)(1)(A) (2006). For a more detailed description of the state and federal legislation adopted in the wake of New Jersey's Megan's Law, see Kimberly B. Wilkins, Comment, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1246-50 (2003).

[271] 42 U.S.C. §§ 14071(b)(1)(A)(iii)-(iv), 14071(b)(6)(A) (2006).

[272] *Id.* § 14071(e).

[273] Wilkins, *supra* note 270, at 1245.

[274] Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003).

[275] *Id.* at 6.

[276] *Id.*

[277] Doe v. Dep't of Pub. Safety, 271 F.3d 38, 62 (2d Cir. 2001).

[278] *Conn. Dep't of Pub. Safety*, 538 U.S. at 7 ("We find it unnecessary to reach this question, however, because even assuming, *arguendo*, that respondent has been

required all convicted sex offenders to register based on the sole fact of having been convicted of a relevant crime.[279] As such, the Court reasoned, there was no implication of continued dangerousness from mere inclusion on the registry, rendering the question of continued dangerousness moot and a due process hearing unnecessary.[280]

The Supreme Court's reasoning in *Connecticut Department of Public Safety* is problematic on at least two grounds. First, there can be little genuine question whether a sex offender registry implies that those included present a continuing danger to society. The notion that those listed remain dangerous would seem the entire point of the registration and notification provision. Indeed, it is hard to imagine any basis other than continuing dangerousness upon which the state could possibly justify, post-release, the provision to the public of information specifically identifying the listed individuals, along with the crimes they committed and their current addresses and photographs. The Court itself seemed to acknowledge as much:

> [T]he victims of sex assault are most often juveniles, and when convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault. Connecticut, like every other State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders.[281]

Second, it remains possible that an individual could be erroneously listed, having never been convicted of a sexual offense, in which case there certainly would be facts to be disputed at a hearing.

Regardless of the wisdom of the Court's approach in *Connecticut Department of Public Safety*, the issue will of necessity resurface, at a minimum in future cases in jurisdictions with statutory schemes that do consider current dangerousness a relevant criterion.[282] In essence,

deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute.").

[279] *Id.*

[280] *Id.* ("In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders — currently dangerous or not — must be publicly disclosed.").

[281] *Id.* at 4 (quoting McKune v. Lile, 536 U.S. 24, 32-33 (2002) (internal citations and quotation marks omitted)).

[282] *See* Gabriel Baldwin, Connecticut Department of Public Safety v. Doe: *The Supreme Court's Clarification of Whether Sex Offender Registration and Notification Laws Violate Convicted Sex Offenders' Right to Procedural Due Process*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 383, 401 (2004) (stating that "court's holding is a narrow one that

the broader legal question, under current doctrine, is whether inclusion on a publicly available sex offender registry, without additional process, deprives a listed individual of liberty under the stigma-plus doctrine. Unsurprisingly, there is general agreement across jurisdictions that community notification negatively impacts reputation.[283] However, lower courts have been split on the plus aspect of the stigma-plus doctrine, with most concluding that the additional burden of registration and the consequences of community notification satisfy that aspect of the test.[284] A few jurisdictions have held the opposite, however, concluding that registrants do not suffer loss to sufficiently tangible interests beyond mere reputational harm.[285] Further, state constitutions often provide an alternative basis for challenging the lack of procedural protections in the registration and notification context.[286] In *Doe v. Poritz*, for example, the New Jersey Supreme Court determined that the stigmatic injury resulting from registration and notification laws was sufficient, in itself, to demonstrate a due process violation.[287] Hence, the question of the impact of registration and notification laws on a listed individual's liberty and right to procedural due process persists in a number of important venues.

As with the horrific and unrelenting specters of terrorism and gang violence, the social danger presented by unreformed sex offenders is both horrifying and very real. It is, indeed, the very extraordinary and harrowing nature of these acts of criminal violence that renders wrongfully labeled individuals so susceptible to stigmatic harm. We are no longer speaking of persons being labeled "active shoplifters," as in *Paul*, or "alcoholics," as in *Constantineau*; indeed, with terrorism, gang violence, and sex offenses, the stakes have been raised considerably.[288] And while individuals convicted of sex offenses have

only explicitly applies to statutes resembling Connecticut's").

[283] *See, e.g.*, Logan, *supra* note 266, at 1193 (stating that "all courts applying the 'stigma-plus' test readily conclude that notification has negative effects on reputation").

[284] *See* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 364-65 (2006) (collecting cases).

[285] *See, e.g.*, Creekman v. Att'y Gen. of Tex., 341 F. Supp. 2d 648, 655 (E.D. Tex. 2004) (finding that stigma-plus test was not met because of no tangible loss beyond reputation); Boutin v. LaFleur, 591 N.W.2d 711, 718 (Minn. 1999) (same).

[286] *See* Logan, *supra* note 266, at 1228-29 (collecting state constitutional provisions directly protecting reputational interests).

[287] *See* Doe v. Poritz, 662 A.2d 367, 420 (N.J. 1995).

[288] *See* Logan, *supra* note 266, at 1202-03 (stating that label such as "shoplifter" or "alcoholic" "pales in comparison, given society's acute disdain for sex offenders, as manifest in the repeated acts of vigilantism experienced by registrants subject to

already suffered harm to their reputations as a result of their convictions, the stigmatic injury created by community notification laws is often sharper and more permanent. According to Wayne Logan, "Offenders are consciously labeled by the government such things as 'repetitive' and 'compulsive' criminals with an especially 'high risk' of re-offending, and, depending on applicable law, can suffer this public ignominy well past the end of their prison sentence, and, indeed, for the rest of their lives."[289]

As registered individuals are branded by the state as persons to be feared and avoided, the extent to which registrants are at liberty to construct their own social identities will of necessity diminish. In at least some, perhaps even most, cases, we might be tempted to say, the post-release social branding and resultant constraint on free self-invention is well deserved, a small price to pay for the harm caused during the original crime. However, we should not delude ourselves into thinking that there is no additional harm suffered as a result of community notification laws, as the Court seemingly did in *Connecticut Department of Public Safety*, nor that liberty is simply absent in such situations. Whenever the state imposes a derogatory social label upon a subset of its citizens, individual constitutive autonomy is sacrificed.[290] It is conceivable that the due process balance of values might permit the broader social interest in registration and community notification of convicted sex offenders to take precedence over the individual's liberty interest in autonomous self-invention and freedom from government stigmatization. But the *existence* of a liberty interest in such cases cannot be made to disappear simply by pretending it is not there.

D. Child Abuse Registries, HIV Partner Notification, and Publication of Prostitution Patrons

There are a number of other contemporary contexts in which, under the stigma-plus doctrine first articulated in *Paul*, the state may cause considerable reputational harm without triggering procedural due process analysis. Here, for illustration purposes, I briefly describe three additional such contexts and note the existence of a few others.

community notification").

[289] *Id.* at 1193-94; *see also* Wilkins, *supra* note 270, at 1258 ("While sex offenders have already suffered reputational harm when prosecuted and convicted of a sex offense, the harm sustained from notification laws may cause greater damage because the harm sustained is of a longer duration and involves the government deliberately labeling one as an outcast to society.")

[290] *See supra* Part III.B.

The first, registration and community notification of individuals suspected of child abuse, raises many of the same issues considered above in the context of sex offender notification laws.[291] The vast majority of states today maintain registries of persons administratively determined to have been involved in child abuse.[292] A number of courts have held that when childcare workers are placed on a state's abuse registry, the stigma-plus test will be met, and procedural due process triggered, so long as the worker is able to demonstrate likely foreclosure of future employment prospects in the childcare field.[293] It is unclear how that result comports with the rule from *Siegert* that the reputational harm suffered must coincide with the loss of employment in order to satisfy the stigma-plus standard.[294] In any event, where the registrant is a family member rather than a childcare worker, and so the employment disability is ostensibly removed, courts have determined that the stigma-plus doctrine will not be met.

For example, in *Glasford v. New York State Department of Social Services*, the plaintiff, Elridge Glasford, was included on New York State's central register of suspected child abusers as a result of a case worker's report indicating that he had abused his children.[295] The court held that the effect of the registry on the plaintiff's reputation, without more, failed to amount to a constitutionally protected liberty interest.[296] Similarly, in *Howard v. Malac*, a federal district court in Massachusetts held "that no protected liberty interest was implicated by [parents] Neil

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[291] *See* Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 4 (2001) (stating that "critics of registries argue that the minimal procedural protections afforded to suspected perpetrators of child abuse and neglect violate Fourteenth Amendment due process principles").

[292] *See* Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2079 n.87 (1995) (citing 42 jurisdictions in which statutes authorize or require maintenance of central registries of child maltreatment reports).

[293] *See, e.g.*, Valmonte v. Bane, 18 F.3d 992, 1002 (2d Cir. 1994) (deeming inability to pursue employment in child care field constitutionally protected liberty interest); Dupuy v. McDonald, 141 F. Supp. 2d 1090, 1134 (D. Ill. 2001) (holding that including child care worker on child abuse registry denied procedural due process because "pursuit of work in one's chosen profession constitutes a recognizable and protected liberty interest"); Cavarretta v. Dep't of Children & Family Servs., 660 N.E.2d 250, 255 (Ill. App. Ct. 1996) (deeming inability to pursue employment in child care field constitutionally protected liberty interest); *In re* Preisendorfer, 719 A.2d 590, 592 (N.H. 1998) (same); *In re* Lee TT v. Bane, 664 N.E.2d 1243, 1250 (N.Y. 1996) (same).

[294] *See* Siegert v. Gilley, 500 U.S. 226, 234 (1991).

[295] Glasford v. N.Y. Dep't of Soc. Servs., 787 F. Supp. 384, 385 (S.D.N.Y. 1992).

[296] *Id.* at 388.

and Heidi's placement on the Registry, particularly given the absence of any allegation that Neil and Heidi's placement on that list imposed a tangible injury, other than stigma, upon them."[297] In the context of child abuse registries, then, the state currently is free to stigmatize certain classes of individuals without triggering due process.

Second, when an individual is diagnosed as HIV-positive, there are a number of well-developed programs designed to assist the individual in voluntarily notifying sex or needle-sharing partners of the possibility of exposure to the virus.[298] Most states have not moved beyond voluntary programs, but within the past decade there has been momentum in the direction of mandatory partner notification laws.[299] In light of the obvious public and private health hazards associated with HIV, there is widespread agreement on the value of voluntary partner notification systems. Among the most persuasive arguments against requiring notification, AIDS advocates have suggested that mandatory notification would lead some potentially HIV-positive individuals to avoid getting tested in the first place, resulting in a loss of critical social services and medical treatment.[300] In part, avoidance of testing in the face of mandatory partner notification might result from fear of domestic violence or other physical abuse.[301] More generally, a breach of confidentiality regarding HIV status can lead to stigmatic harm associated with sexual or drug-related conduct.

Courts have yet to rule on the application of procedural due process to mandatory partner notification laws, but one commentator has

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[297] Howard v. Malac, 270 F. Supp. 2d 132, 141 (D. Mass. 2003). Individuals placed on government-maintained domestic violence registries have received similar treatment. *See, e.g.*, Vaccaro v. Vaccaro, 425 N.E.2d 153, 161 (Mass. 1997) (stating that liberty interest is not at stake where plaintiff is included on domestic violence registry).

[298] *See* Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. ON C.L. & C.R. 107, 109 (1999).

[299] *Id.* at 108 ("Recently a push for wide spread adoption of mandatory HIV partner notification has surfaced. Puerto Rico, New York and the federal government have all recently introduced bills or initiatives that, if passed, would require the notification of sexual and needle sharing partners of all persons testing HIV positive that they had been exposed to the virus."); *see also* Rahul Rajkumar, *A Human Rights Approach to Routine Provider-Initiated HIV Testing*, 7 YALE J. HEALTH POL'Y L. & ETHICS 319, 363 (2007) ("Thirty-two states have adopted laws that specifically protect the confidentiality of HIV test results. Of these states, only six permit disclosure to a test subject's spouse without consent. Three additional states permit disclosure to a spouse, a sexual partner, or needle-sharing partners, with two of these three requiring that the test subject be notified first.").

[300] *See* Carmody, *supra* note 298, at 107-08.

[301] *See* Rajkumar, *supra* note 299, at 364 ("[I]nvoluntary partner notification can put individuals in physical danger.").

suggested that a due process challenge would satisfy the stigma-plus test: "Being publicly labeled as HIV positive cannot only damage a person's character through association with certain sexual and drug-using practices, but it also can lead to the deprivation of major or fundamental interests, such as employment, housing, and familial rights."[302] The commentator's conclusion that mandatory notification would satisfy the stigma-plus test seems clearly wrong since, as we have seen, the Court in *Siegert* deemed loss of a prospective interest in employment an insufficiently tangible loss to meet the plus aspect of the stigma-plus doctrine.[303] As indicated above, in accordance with *Siegert*, for the stigma-plus test to be met, the stigmatic injury must arise contemporaneously with the loss of some more tangible interest.[304] The fact that reputational harm may lead to the deprivation of other more tangible interests is immaterial. Hence, under current doctrine the state may cause reputational harm to persons diagnosed as HIV-positive without affording them procedural protections.

In yet another context, as part of a broader attempt to curtail the demand side of prostitution-related crimes, state and local governments across the country have sought to deter prospective prostitution patrons by publicizing the names of individuals convicted of soliciting prostitutes in local newspapers, on billboards, and on cable television shows.[305] In addition to this sort of public shaming, Kansas City, along with several other municipal governments, notifies family members of an individual's conviction by letter.[306] Even more surprising, a number of jurisdictions "shame upon arrest," not even waiting for conviction prior to publicizing the identities of suspected "johns."[307] This latter approach is especially cost-effective, since it serves as a deterrent without the necessity or cost of a conviction.[308] The stigma-plus doctrine adopted by the Court in *Paul* forecloses a constitutional challenge, grounded in the deprivation of liberty without due process of law, to these methods of combating

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[302] *See* Carmody, *supra* note 298, at 131.

[303] *See supra* Part I.C.

[304] Siegert v. Gilley, 500 U.S. 226, 234 (1991) (holding that stigma-plus test was not met because harmful remarks were "not uttered incident to the termination of Siegert's employment by the hospital").

[305] *See* Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficacy, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1536 (1996).

[306] *Id.* at 1537.

[307] *Id.* at 1555.

[308] *Id.* (noting also potential Sixth Amendment problem with punishment arising prior to trial).

prostitution.[309] Liberty is said to be absent in such situations, despite the obvious impact such shaming has on the affected individuals' social and personal identities. As in the previously identified contexts, the state thus remains free to stigmatize its citizens without affording them the protections associated with due process.

Similar analyses would apply in other contexts as well. State maintenance of domestic violence registries present many of the same issues as child abuse or sex offender registries.[310] When public employees suffer reputational harm in the course of having their employment terminated, *Paul* and *Siegert* suggest that the stigma-plus test may be satisfied and due process triggered.[311] Yet lower courts have held that common disciplinary action short of outright termination (e.g., transfer, missed promotion, suspension, demotion, reprimand), which seemingly has the potential for causing reputational harm nearly as severe as termination, will not meet the stigma-plus test.[312] Disciplined but not terminated public employees are thus rendered helpless in the face of state-imposed stigmatic injury. But whether it be gang databases, terrorist watch lists, sex offender notification systems, child abuse registries, HIV partner notification requirements, publication of prostitution patrons, domestic violence registries, or public employee disciplinary actions short of termination, the point remains the same. Current Supreme Court doctrine permits the state to attach a derogatory social label to an individual, thereby constructing an aspect of the individual's social identity. The constitutive influence of the state diminishes the extent to which the individual is free to construct his or her own identity. As

[309] *Id.* at 1556 ("Curiously, however, the Supreme Court has short-circuited the possibility of suspected johns making [a due process] argument by holding that reputation does not constitute a life, liberty, or property interest for purposes of procedural due process.").

[310] *See* Vaccaro v. Vaccaro, 680 N.E.2d 55, 60-61 (Mass. 1997) (holding that individual placed on statewide domestic violence registry was unable to satisfy stigma-plus doctrine).

[311] *See supra* Part I.A-B.

[312] *See* Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1303 (11th Cir. 2001) ("[I]n this circuit, a 'discharge or more' is required in order to satisfy the 'plus' element of the stigma-plus test. A transfer or a missed promotion is not enough."); Nat Stern, *Defamed by Retained Public Employees: Addressing a Gap in Due Process Jurisprudence*, 31 HOFSTRA L. REV. 795, 801 (2003) ("On the question of whether disciplinary action short of termination can qualify as 'stigma-plus,' however, courts seem to have received a clear signal from the high court. Even courts of appeal that adopt a more expansive view of what constitutes publication of defamatory statements apparently assume the requisite of the employee's dismissal.").

such, persons in a wide variety of critical contexts are currently being deprived of liberty without due process of law.

CONCLUSION

The question addressed in this Article is whether state-imposed reputational harm, in itself, should be deemed a deprivation of liberty, sufficient to trigger procedural due process analysis. The Supreme Court, in *Paul v. Davis*, turned its back on decades of precedent, holding that stigmatic injury must be accompanied by the loss of some more tangible interest to constitute a deprivation of liberty. In *Siegert v. Gilley*, the Court, presented with an opportunity to revive due process liberty, instead chose to confirm and extend the stigma-plus doctrine. The doctrine was unsound from the outset; today, its ill effects are multiplying at a startling pace.

Liberty, at its core, entails individual self-invention. A meaningful conception of liberty will embrace the human need to identify in accordance with one's own rationally and independently chosen sense of what is good and valuable in life. A free person is, in this sense, a maximally self-defined person, at liberty to the greatest possible extent to constitute one's own self-concept and one's own social identity in virtue of one's beliefs regarding appropriate sources of value. When, instead, the state labels its citizens in a derogatory manner, branding an individual as a potential shoplifter or drunkard, the harm the individual suffers runs more deeply than merely negatively impacting the individual's social standing. For reputation is constitutive of identity, and so the state in labeling an individual also constitutes an aspect of that individual's social identity and self-concept. Having defined, without procedural protection, who and what a person is, the state limits the extent to which the individual remains free to self-define. Of course, genuine self-invention remains an aspiration; no human being can ever truly constitute his or her identity fully free of social and cultural forces. Yet human self-invention is more likely to flourish when the constitutive impact of social institutions is restrained and social conditions conducive to individual constitutive autonomy are instead promoted. Abandoning the stigma-plus doctrine, and reconceptualizing due process liberty as inclusive of self-invention, would serve this vital purpose.

Moreover, the stakes are higher now than they have been in decades. We are no longer merely witnessing the state branding persons as shoplifters and drunkards without the procedural protections of the Due Process Clause, though those instances are regrettable as well. Today, as we have seen, the state is free to

stigmatize its citizens as potential terrorists, gang members, sex offenders, child abusers, and prostitution patrons, to name just a few, all without triggering due process analysis. Certain of the state programs that result in stigmatization serve socially useful, even critically important, public purposes. Yet one vital purpose of the Due Process Clause is to ensure that the government sacrifices individual interests only after affording suspected persons essential procedural safeguards. Government stigmatization of individuals is thriving under the stigma-plus doctrine. The doctrine should be discarded, for liberty as self-invention is essential to the fulfillment of basic human dignity. Exercising self-invention is what it means to be free, to be human. In the wake of *Paul* and *Siegert*, we are less so.