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SMU Law Review

Volume 30 | Issue 4 Article 7

1976

The Constitution Does Not Protect an Individual from Being Labelled a Criminal

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Recommended Citation

Marc S. Culp, *The Constitution Does Not Protect an Individual from Being Labelled a Criminal*, 30 Sw L.J. 781 (1976)
https://scholar.smu.edu/smulr/vol30/iss4/7

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the opinion of Justice Holmes, delivered fifty years ago in *Buck v. Bell.* Until the Supreme Court again rules on such a law, the legal controversy surrounding compulsory sterilization will undoubtedly continue.

Storrow A. Moss

The Constitution Does Not Protect an Individual from Being Labelled a Criminal

Defendants, police chiefs in Louisville and Jefferson County, Kentucky, in a cooperative effort produced and delivered a flyer purporting to warn all local area merchants of "active shoplifters." Plaintiff's name and photograph appeared on the flyer as a result of his arrest approximately eighteen months earlier on a charge of shoplifting, which was dismissed shortly after the flyer was circulated. Plaintiff filed suit in federal district court under the civil rights statute[1] seeking damages as well as declaratory and injunctive relief. The district court dismissed the action, ruling that plaintiff had not been deprived of any right secured by the United States Constitution. The Sixth Circuit reversed and held that the plaintiff had alleged facts that constituted a denial of due process of law.[2] The Supreme Court granted certiorari. *Held, reversed*: Interest in reputation is neither "liberty" nor "property" under the fourteenth amendment and, therefore, is not protected from state deprivation. *Paul v. Davis*, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

I. Constitutional Rights Preserved Within the Concept of "Liberty" Under the Fourteenth Amendment

Consideration of the scope of "liberty" under the due process clause of the fourteenth amendment is paramount when determining the constitutional protections afforded an individual's good name and privacy in reference to his arrest record. The confines of "liberty" have been a constant controversy throughout American legal history. In *Allgeyer v. Louisiana*[3] and *Lochner v. New York*[4] the Supreme Court first expanded the scope of "liberty" beyond its common law meaning by broadly interpreting "liberty" in the fourteenth amendment to include the freedom of contract.[5] Expansion of the concept of

1. 42 U.S.C. § 1983 (1970). The statute, promulgated pursuant to the authority vested in Congress by U.S. CONST. amend. XIV, § 5, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of 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.

2. Davis v. Paul, 505 F.2d 1180 (6th Cir. 1974).
3. 165 U.S. 578 (1897).
4. 198 U.S. 45 (1905).
5. Many had advocated that "liberty" at common law meant only freedom from physical restraint. *See, e.g.*, Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

"liberty" was further developed in *Gitlow v. New York*,[6] in which the Court determined that the freedoms of speech and press were protected by the fourteenth amendment. This expansion was dependent upon the willingness of the Court to establish protections not explicitly stated within the text of the Constitution.[7]

Most of the early decisions defining the scope of "liberty" involved the incorporation controversy: whether the protections contained within the Bill of Rights are included within the concept of "liberty" under the fourteenth amendment.[8] Mr. Justice Black took the position that including within "liberty" any rights not explicitly mentioned in the Constitution would allow the judiciary to engage in practices beyond its power. Accordingly, he advocated that the due process clause of the fourteenth amendment was intended to apply all of the provisions of the Bill of Rights to the states.[9] On the other hand, Mr. Justice Frankfurter advocated that the due process clause of the fourteenth amendment should protect individuals in accordance with "canons of decency and fairness."[10] Under this theory the fourteenth amendment does not necessarily provide all protections of the Bill of Rights, nor limit protections to those included in the Bill of Rights. Mr. Justice Frankfurter's position was eventually accepted.[11] Thus, *Allgeyer* as the initiator and *Adamson* as the catalyst broadened the scope of "liberty" to include protections beyond those explicitly stated in the Constitution.

The fundamental fairness doctrine, which resulted in inconsistencies,[12] caused the Court to develop a selective incorporation approach.[13] Although the Court has followed the path of selective incorporation, it continues to use the fundamental fairness test to determine which clauses in the Bill of Rights are included under the due process clause of the fourteenth amendment. The most significant result of this approach has been the development of protected rights beyond those explicitly stated in the Bill of Rights. For example,

6. 268 U.S. 652 (1925).

7. Other broad readings of liberty include Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923).

8. In Barron v. Mayor & City Council, 32 U.S. (7 Pet.) 243 (1833), the Supreme Court held that the Bill of Rights was not applicable to the states. With the adoption of the fourteenth amendment the Supreme Court began incorporating many of the protections of the Bill of Rights into the due process clause of the fourteenth amendment, thereby making them applicable to the states.

9. *See* Adamson v. California, 332 U.S. 46 (1947).

10. 332 U.S. at 67. His position was similar to Mr. Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319 (1937), that the due process clause was designed to protect those interests "implicit in the concept of ordered liberty." *Id.* at 325.

11. *See, e.g.*, Bute v. Illinois, 333 U.S. 640, 660 (1948).

12. *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949). In *Wolf* the Court found the federal exclusionary rule which bars the use of evidence secured through an illegal search inapplicable to the states. *Id.* at 33. However, in Rochin v. California, 342 U.S. 165 (1952), the Court found the rule applicable when the evidence was secured as a result of pumping the defendant's stomach against his will. *Id.* at 173. Two years later in Irvine v. California, 347 U.S. 128 (1954), the Court distinguished *Wolf* from *Rochin*, stating that the exclusionary rule was only applicable when physical coercion was involved. *Id.* at 133. This distinction, however, proved insufficient since the Court in Breithaupt v. Abram, 352 U.S. 432 (1957), found that the exclusionary rule was not appropriate for all bodily invasions. *Id.* at 435-37. The Court's failure to provide a consistent guide resulted in the adoption of specific protections of the Bill of Rights. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

13. Some of the many clauses of the Bill of Rights which have been selectively incorporated into "liberty" within the fourteenth amendment include: the fourth, fifth, and sixth amendments. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment).

in *Roe v. Wade*[14] the Court's recognition of a constitutionally protected right without explicit justification in the text of the Bill of Rights was vividly illustrated.[15] Similarly, in *Griswold v. Connecticut*[16] the Court found a right of privacy of the marital bedroom, which although not specifically mentioned in the Bill of Rights, was penumbral to several rights which are mentioned. What additional rights are protected within the *Roe* and *Griswold* analysis remains uncertain.[17]

II. Reputation and Privacy as Protected by the Fourteenth Amendment

Early Supreme Court decisions did not consider whether interest in one's reputation was a fundamental right protected by the concept of liberty in the fourteenth amendment.[18] In *United States v. Lovett*,[19] however, the Supreme Court did recognize that stigmatizing an individual may have a serious impact. The Court again considered the ramifications of harm to reputation in *Joint Anti-Fascist Refugee Committee v. McGrath*.[20] Of the six Justices who reached the constitutional issue only Mr. Justice Frankfurter and Mr. Justice Douglas intimated that reputation alone should be afforded due process protection.[21] Mr. Justice Jackson determined that a member of an organization labelled "subversive" may claim a deprivation of constitutional rights on the grounds that he is ineligible to obtain a government job.[22] The dissenting Justices clearly felt that harm to one's reputation was not sufficient to invoke due process protections.[23]

The issue of whether reputation alone is to be afforded due process protections was left open in *McGrath*. In a series of cases following *McGrath* the Court apparently accepted the idea that harm to one's reputation alone would not invoke due process protections, although never directly confronting this issue with an unambiguous decision.[24] Against this background the Supreme

14. 410 U.S. 113 (1973).

15. *See* note 32 *infra* and accompanying text. Other cases have recognized constitutionally protected rights without explicit justification in the text of the Constitution. *See, e.g.*, Aptheker v. Secretary of State, 378 U.S. 500 (1964); Skinner v. Oklahoma, 316 U.S. 535 (1942).

16. 381 U.S. 479 (1965).

17. *See* notes 28-31 *infra* and accompanying text.

18. In most of these early cases the Court did not rule on this issue because more concrete losses were involved, such as the loss of a job, which were sufficient alone to invoke the due process clause.

19. 328 U.S. 303 (1946). In *Lovett* congressional legislation attempted permanently to bar plaintiffs from governmental service, based upon a finding that they were disloyal, without granting sufficient procedural protections.

20. 341 U.S. 123 (1951). The Attorney General, pursuant to authority given him by an executive order issued by the President, had labelled the complaining organizations "Communist" without granting a hearing or giving notice of such determination.

21. *Id.* at 164, 168 (Frankfurter, J., concurring); *id.* at 180 (Douglas, J., concurring).

22. *Id.* at 185 (Jackson, J., concurring).

23. *Id.* at 187 (Reed, J., dissenting).

24. In Wieman v. Updegraff, 344 U.S. 183 (1952), the Court did not reach the due process question, but seemed to indicate that labelling an individual disloyal would invoke due process protections. *Id.* at 192. Ten years later, in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), the Court apparently rejected the dictum in *Wieman*. In *McElroy* the Court denied due process protections when an employee had been labelled a security risk at the naval installation where she worked, thus being deprived of her job. Although the decision indicates that bestowing a badge of infamy does not infringe on any constitutional right, it could be interpreted to mean only that the governmental interest of maintaining high security protection outweighed the constitutional interest in protecting one's good name. Most recently, in Jenkins v. McKeithen, 395 U.S. 411

Court decided *Wisconsin v. Constantineau*,[25] a case involving a Wisconsin statute[26] which permitted posting the names of certain individuals to prohibit them from buying liquor. In striking down the statute for depriving an individual of due process, the Court emphasized that the constitutional right being protected was the individual's interest in his good name.[27]

Recognition of privacy as a fundamental right protected within the concept of liberty in the fourteenth amendment was first introduced in *Griswold v. Connecticut*.[28] In *Griswold* Mr. Justice Douglas found justification for this constitutionally protected right to privacy in the penumbras of the Bill of Rights.[29] Five concurring Justices, however, did not feel bound by the confines of the Bill of Rights.[30] Rather, they found constitutional protection of a zone of privacy on the basis of the fundamental fairness doctrine.[31] Eight years later, in *Roe v. Wade*,[32] the Court recognized a zone of privacy surrounding one's personal autonomy. Relying on the fundamental fairness scope of liberty as advocated by the five concurring Justices in *Griswold*, the Court defined this new protection without explicit justification in the penumbras of the Bill of Rights.

Because the limitations of the zone of privacy protection were left uncertain by these cases, many lower courts found a right of privacy surrounding arrest records. Dissemination of arrest records as infringing on an individual's right of privacy was first discussed in *Menard v. Mitchell*.[33] The existence of a constitutionally protected interest in an individual's arrest record was recently acknowledged again in *Menard v. Saxbe*.[34] Most recently, in *Utz v. Cullinane*,[35] the court recognized the serious constitutional questions raised when the government disseminates records of arrests not culminating in convictions.[36] Although it did not decide this constitutional issue, the court in

(1969), the Court again avoided reliance upon reputation alone as the interest being afforded due process protections. Rather, the Court emphasized that due process protections were applicable since the commission's findings would be used as evidence against the plaintiff in a court of law. Thus, although this line of cases illustrates a reluctance by the Court to invoke due process protection on the ground that one's reputation has been injured, the cases do not clearly rule that an interest in one's good name is not constitutionally protected.

25. 400 U.S. 433 (1971).

26. WIS. STAT. § 176.26 (1967).

27. 400 U.S. at 437.

28. 381 U.S. 479 (1965). The Court held unconstitutional a Connecticut statute imposing criminal sanctions on any person giving medical advice regarding contraceptives.

29. *Id.* at 484, 485.

30. *See id.* at 486 (Goldberg, J., concurring); *id.* at 499 (Harlan, J., concurring); *id.* at 502 (White, J., concurring).

31. *See* notes 8-13 *supra* and accompanying text.

32. 410 U.S. 113 (1973). In *Roe* the Court held unconstitutional the Texas abortion law which imposed criminal sanctions for procuring an abortion for any purpose other than saving the life of the mother.

33. 430 F.2d 486 (D.C. Cir. 1970). In *Menard* the court reversed summary judgment based on the theory that the established facts were inadequate for proper resolution of the issue of the FBI's authority to maintain an individual's arrest records after the charges have been dismissed. The court recognized that the extent to which the records were disseminated plays a large role in determining how accurate those records must be. *Id.* at 492. Because the district court did not consider this fact, the court of appeals remanded the case for trial. *Id.* at 495. By discussing the different variables to determine if the court could order the FBI to expunge the appellant's arrest record, the court impliedly recognized that the individual had a protected interest in those records. In fact, the court argued that there could be no constitutional justification for maintenance of appellant's file if the arrest was made without probable cause. *Id.* at 492.

34. 498 F.2d 1017, 1025 (D.C. Cir. 1974). In *Saxbe* the court held that the FBI had no authority to retain plaintiff's arrest record once the encounter was established not to be an arrest.

35. 520 F.2d 467 (D.C. Cir. 1975).

36. *Id.* at 482.

Utz was convinced that the individual should be constitutionally protected in such situations.[37] The three previously mentioned cases were all decided in the District of Columbia Circuit, and the Third Circuit has also concluded that dissemination of police records invades an individual's constitutionally protected right of privacy.[38] Although the Eighth Circuit has refused to impose a burden upon the FBI to insure the accuracy of arrest reports disseminated by local law enforcement authorities,[39] the court has accepted the principle that individuals have a constitutionally protected interest sufficient to require that local law enforcement authorities expunge arrest records under certain circumstances.[40]

III. PAUL V. DAVIS

The Supreme Court in *Paul* concluded that the interest in one's good name is not a right protected within the scope of liberty under the fourteenth amendment, and, therefore, is not entitled to due process protections.[41] This determination was based entirely on the examination of precedent.[42] The Court additionally found that the zones of personal privacy discussed in *Griswold* and *Roe* did not protect an individual from government publication of arrest records.[43] The Court reasoned that publication of official acts did not violate guarantees which were "fundamental" or "implicit in the concept of ordered liberty."[44] As a result of these findings, the plaintiff failed to show a deprivation of a constitutional right, and, consequently, his action under the civil rights statute[45] failed.[46]

The decision in *Constantineau* was a formidable barrier to the Court's finding that harm to reputation would not invoke due process protections. In *Constantineau* the Court found due process protections applicable where the right being protected was the individual's interest in his good name.[47] The Court in *Paul* interpreted the language in *Constantineau* to mean that due process protections were invoked because of a denial of a right to buy liquor and not because of harm to the individual's reputation.[48] The Court justified

37. *Id.* at 482 n.41.

38. *See* Paton v. La Prade, 524 F.2d 862, 868 (3d Cir. 1975), in which the court denied the expungement of FBI records concerning the investigation of certain allegations which proved to be false. The court recognized the plaintiff's constitutional interest in those files, but denied expungement on the ground that insufficient evidence was established to outweigh the important governmental interest in maintaining the records.

39. *See* Crow v. Kelley, 512 F.2d 752 (8th Cir. 1975).

40. *Id.* at 754.

41. 96 S. Ct. at 1166, 47 L. Ed. 2d at 420.

42. *Id.* at 1161, 47 L. Ed. 2d at 414. The Court refused to consider if the interest in one's good name was a fundamental right protected by the concept of liberty. This decision demonstrates the Court's reluctance, since *Roe*, to recognize constitutional protections in the concept of liberty unless justified in explicit clauses of the Bill of Rights. *Id.* at 1160, 47 L. Ed. 2d at 413, 414. This trend is contrary to what had been the accepted scope of liberty. *See* notes 8-11 *supra* and accompanying text.

43. *Id.* at 1166, 47 L. Ed. 2d at 420, 421.

44. *Id.*

45. 42 U.S.C. § 1983 (1970).

46. In order for plaintiff's complaint to have been cognizable under § 1983 he must have alleged both a deprivation of a constitutional right and the effectuation of that deprivation under color of law. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). The Court assumed that the action taken by defendants which allegedly deprived plaintiff of constitutional rights was achieved under color of law. *See* 96 S. Ct. at 1158 n.2, 47 L. Ed. 2d at 411 n.2.

47. *See* notes 24-27 *supra* and accompanying text.

48. The right to buy liquor was recognized by state law. *See* 96 S. Ct. at 1164, 47 L. Ed. 2d at 418.

this interpretation by reasoning that the authority cited in *Constantineau* did not support a decision finding a protected interest in one's good name.[49] The Court further reasoned that *Board of Regents v. Roth*[50] supported this interpretation since that decision recognized that the range of interests protected by procedural due process was not infinite.[51]

The dissent raised two major objections to the majority's disposition of the case. First, the dissent, claiming that the decision is inconsistent with the relevant case law, relied heavily upon *Jenkins v. McKeithen*[52] in arguing for constitutional protection of one's good name. In *Jenkins*, however, it was the fact that the commission's findings could be used as evidence against the individual in court that invoked due process protections and not the harm to the reputation of the individual.[53] The dissent also emphasized the *Constantineau* decision as establishing a constitutional protection in one's good name, arguing that the Court in *Constantineau* did not find due process protections on the grounds that Constantineau was deprived of a right to buy liquor. Rather it was argued that the "label" given a person posted under the Wisconsin statute invoked due process protections. The dissent's interpretation of *Constantineau* provides the fairer interpretation of that case.[54]

Second, the dissent disputed the majority's failure to consider the fundamental nature of the right being deprived, and noted that "liberty" under the fourteenth amendment encompasses rights beyond those found explicitly within the Bill of Rights.[55] By pointing out the frightening consequences the majority's decision may produce,[56] the dissent implicitly advocated that the interest in one's good name must be a fundamental right, protected within the scope of liberty, irrespective of explicit justification within the text of the Bill of Rights.[57] Furthermore, the dissent argued that the majority decision would allow the states to impose punishment through criminal labelling without affording the accused safeguards preserved within the Bill of Rights.[58] The dissent correctly contends that state actions achieving such results should be prevented, at the very least, by the penumbras of the Bill of Rights consistent

49. *Id.* The Court interpreted the authority cited in *Constantineau* as holding that due process protections would only be invoked when the harm to one's reputation was coupled with loss of some more tangilbe interest such as the denial of employment.

50. 408 U.S. 564 (1972). In *Roth* the Court held that the plaintiff, an assistant professor at Wisconsin State University—Oshkosh, was not entitled to a due process hearing since the university's decision not to rehire the non-tenured professor did not seriously damage his good name.

51. *Id.* at 570.

52. 395 U.S. 411 (1969). In *Jenkins* the constitutionality of a Louisiana statute permitting the Labor-Management Commission of Inquiry to collect evidence and determine guilt of individuals without affording due process protections was challenged.

53. *Id.* at 427, 428.

54. The majority's interpretation of *Constantineau* depends solely upon its interpretation of authority there cited. *See* note 49 *supra* and accompanying text. The case law cited as authority in *Constantineau* is not as repugnant to the dissent's interpretation of *Constantineau* as the majority indicates in its opinion. *See* notes 20-24 *supra* and accompanying text. Furthermore, subsequent applications of *Constantineau* consistently reject the analysis applied by the majority. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Lake Mich. College Fed'n of Teachers v. Lake Mich. Community College, 518 F.2d 1091, 1096 (6th Cir. 1975); Menard v. Saxbe, 498 F.2d 1017, 1024 n.15 (D.C. Cir. 1974); Urban v. Breier, 401 F. Supp. 706 (E.D. Wis. 1975).

55. *See* notes 9, 10 *supra* and accompanying text.

56. *See* 96 S. Ct. at 1170 n.9, 1172 n.12, 1176 n.17, 47 L. Ed. 2d at 426 n.9, 428 n.12, 433 n.17.

57. *Id.* at 1171 n.10, 47 L. Ed. 2d at 428 n.10.

58. *Id.* at 1172, 47 L. Ed. 2d at 427, 428.

with the Court's ruling in *Griswold*. It is difficult, however, to challenge a finding determinative upon the "fundamental" nature of the interest. This decision illustrates that reliance upon vague tests, such as the fundamental fairness doctrine, to determine the scope of constitutional rights may limit protections as easily as they were extended in *Griswold* and *Roe*.

The second issue raised in *Paul* concerned the scope of the zone of privacy protections raised in *Roe* and *Griswold*.[59] The Court ruled that the plaintiff was not deprived of his right of privacy by the publication of his arrest record.[60] The Court emphasized that there could be no right of privacy in official acts of public record, making this determination without discussion of the case law which had developed in the lower federal courts recognizing right of privacy in similar situations.[61] The decision will likely alter established authority in this area.[62]

IV. CONCLUSION

The holding in *Paul v. Davis* denies an individual due process protection where the damages suffered by that individual are limited to harm to his reputation, unless some more tangible interest is involved. This holding is premised upon the assumption that interest in one's good name is neither "liberty" nor "property" within the due process clause, and remains applicable regardless of any governmental justification for its actions.[63] Throughout the opinion the Supreme Court assumes that harm to one's reputation is not such a significant harm as to be accorded constitutional protection. This assumption is made despite the recognition given by lower federal courts that the repercussions of being labelled an arrestee are significant.[64] Finally, the Court, almost as an afterthought, summarily dismissed the contention that the plaintiff had a constitutionally protected right of privacy concerning the publication of his arrest record. The effect of this arbitrary decision is to defeat the constitutional protections afforded the criminal by due process of law. An individual may now be labelled a criminal, thus inflicting significant punishment upon him, without providing him with those protections which are thought to be the very essence of democratic government.

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59. Although the dissent did not reach this issue, it characterized the majority's decision on this point as dictum since the lower court did not address the privacy claims and since the issue had been inadequately briefed by the parties. *Id.* at 1177 n.18, 47 L. Ed. 2d at 434 n.18.

60. The flyer stated that those men listed had been arrested during 1971 and 1972. *Id.* at 1158, 47 L. Ed. 2d at 410.

61. *See* notes 33-40 *supra* and accompanying text.

62. This decision brings into question part of the holding of the Texas court of civil appeals in Houston Chronicle Publishing Co. v. Houston, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), *noted in* 30 Sw. L.J. 514 (1976). In that case the court held that the constitutional right of the press and public to information should not include access to personal history and arrest records. *Id.* at 188. The court reasoned that the individual's right to privacy protected by the United States Constitution outweighed the media's need for background information. *Id.* Given that the Court in *Davis* found no constitutional right of privacy regarding arrest records, there is no longer the need to balance an individual's interest against the media's constitutional right of access to information concerning crime. Accordingly, the media's right of access to information concerning crime will also include access to the personal history and the arrest records of individuals.

63. Because the court rejects the notion that one's good name is a constitutionally protected right, no balancing of interests is necessary. *See* Board of Regents v. Roth, 408 U.S. 564, 570, 571 (1972).

64. *See, e.g.*, Menard v. Mitchell, 430 F.2d 486, 490 n.17, 491 n.24 (D.C. Cir. 1970).