PJ/gg 11-3-75

MEMORANDUM

TO: Justice Powell

FROM: Phil Jordan DATE: November 3, 1975

No. 74-891 Paul v. Davis

This short memorandum will set out the "theory" that I mentioned to you on Saturday. As I told you then, this is the only theory I have been able to develop that would remove ordinary defamation actions from the ambit of § 1983.

First, one must focus on the precise problem that has evolved. This problem is that the concept of "liberty" has come to be viewed to include a person's interest in his "good name" or his "reputation." Three cases have done it.

The first case was Wisconsin v. Constantineau, 400 U.S. 433, (1971), in which the Court held that "posting" a person who has shown a tendency to excessive drink deprived that person of "liberty." "Posting" was the placing of a written notice in all retail liquor outlets (by the chief of police) that sales or gifts of liquors to the named excessive drinker were forbidden for one year. (Sale or gift of liquor to a "posted" person was a misdemeanor.) Justice Douglas stated the issue as follows:

> 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.

Justice Douglas quoted a couple of phrases from previous cases - "a badge of infamy" and "suffer grievous loss" - and then moved directly to this holding:

> "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 . . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented.

The second case is Board of Regents v. Roth, 408 U.S. 564, (1972). There the Court found that a university professor's liberty had not been infringed by his dismissal. But Justice Stewart explained that it "would be a different case" if the university in refusing to rehire him had made a "charge against him that might seriously damage his standing and associations in his community." As examples, Justice Stewart cited charges of dishonesty or immorality, and then quoted the language from Constantineau about "good name, reputation, etc." In a footnote, Justice Stewart wrote that such a charge would give a person a right to a hearing solely for the purpose of refuting the charge; once the person had cleared his name at such a hearing, the university would be free to deny him employment for reasons unrelated to the charge that besmirched his name.

In the following paragraph, Justice Stewart seems to have added another situation that could have constituted a denial of liberty. He suggested that it "would be a different case" if the university had "imposed on [the professor] a stigma or disability that foreclosed his freedom to take advantage of other

employment opportunities." He gave as an example of such a disability the invocation of some regulation that barred the professor from future employment in all state universities (and cited, as illumination of his meaning, cases involving the branding of a person as a subversive or a Communist, which branding would result in his being ineligible by law for certain positions).

The final case is Goss v. Lopez, decided January 22, 1975. There Justice White determined that suspended students are deprived of both property and liberty. On the liberty point, Justice White first cited the "good name, reputation, etc." language from Constantineau. Then he noted that the charge underlying the suspension in Goss - misconduct - "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." The student therefore had to be given an opportunity to contest the charges.

Given the language of those three cases, our case is almost a fortiori for a finding of a cause of action. The respondent in our case was branded an "active shoplifter," a term which implies that he was in fact a shoplifter, before he had been tried for shoplifting. The trial would have been his "hearing" for the purpose of disproving the charge, but he was

effectively denied the "hearing" by the circulation of the flyers. Branding one as a criminal is certainly "worse" in the sense of the damage done to one's "good name, reputation, etc." than a branding as an excessive drinker as in Constantineau. It is at least as "bad" as the hypothetical branding as an immoral or dishonest person mentioned in Roth. And it is immeasurably "worse" than a charge of "misconduct" against a school child as in Goss. In short, if attention is paid to the language of the previous cases, respondent has a § 1983 cause of action for deprivation of liberty without due process.

The only argument against such a holding would be that there was some overriding necessity for getting the information out to the retailers even before respondent had been convicted. Such an argument would be based on the recognized exception from the "prior hearing" requirement for cases in which some sort of emergency required quick action. It could be argued that retailers need to know who is suspected of being a shoplifter, so that they could at least keep an out for him. But this argument breaks down, at least in my mind, when one notes that respondent was branded as an active shoplifter, and not as a suspected one. I just cannot justify such a gratuitous accusation on any kind of necessity theory.

Nor is it possible to bring this case within what I perceive to be an exception from § 1983 coverage for actions taken by an official outside his official duties. It seems to me that there may be such an exception for actions that an official does as an

individual rather than as an official. An example would be the hypothetical you used on Saturday - the traffic policeman who defames a person during a heated argument in the middle of the street with onlookers present. In the present case, however, the Louisville police chief was performing one of his official duties, namely informing merchants of persons dangerous to their businesses in order to help prevent crime. The problem is that in doing so he "defamed" respondent - or, in the language of this Court's previous opinions, he deprived respondent of his liberty without due process by impugning his good name and reputation with no opportunity for respondent to contest the charges.

This brings me to the "theory" that I mentioned on Saturday. Briefly stated, that "theory" is that there is no deprivation of liberty until some more or less concrete harm has occurred as a result of the impugning of one's good name. This theory cannot be reconciled with the statements in Constantineau, Roth, and Goss, for those statements indicate that the deprivation of liberty occurs at the moment the impugning takes place. It is enough, under the language of those cases, that the cloud cast upon one's good name carries the potential for interfering with one's personal relationships or job opportunities. But it may be possible, by looking solely to what was going on in those cases, to reconcile them with my "theory."

Constantineau is the easiest case to reconcile. The statute

pursuant to which "posting" occurred provided that no one could sell or give liquor to a "posted" person. Posting thus worked an immediate and automatic deprivation beyond the loss of good name or reputation - it took away the posted person's opportunity to purchase liquor. The right to purchase liquor may not be one of our great civil liberties (although I consider it one!), but it is a "liberty" in the sense that every adult enjoys it. Loss of that right is a "concrete deprivation."

Roth and Goss are more difficult to fit into the theory. In neither case did the Court indicate that any "concrete" deprivation flowed automatically from the impugning of the person's good name.* In each, it was enough that the aspersions cast upon one's reputation might cause employment or social problems in the future. The instant case certainly would fit into that mold - the

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* It is important to distinguish the two parts of Justice Stewart's discussion of liberty in Roth. In the text above, I am referring only to the first part, where Justice Stewart followed Constantineau and spoke of the impugning of one's good name and reputation. In the second part of his discussion, he was talking about a situation in which the aspersions cast on a person did work an immediate futher deprivation of a more tangible liberty than just one's good name. In that second part he appears to have had in mind a case in which the reason given for a discharge automatically invoked some regulation or statute that deprived the person of the right to work in jobs other than the one from which he was being dismissed. An example would be dismissal on the ground that a person was a Communist, in a state with a law barring Communists from all public jobs. (In my example, I am of course disregarding any constitutional problems arising from the state law itself.)

accusation that respondent was an active shoplifter might cause him problems in the future.

Still, this case does differ in one respect from both Roth and Goss. In each of those cases, the accusations accompanied a very tangible deprivation of some sort - in Roth, the deprivation of a job, and in Goss the deprivation (for ten days) of the right to attend school. In this case, the accusation that respondent was an active shoplifter was made independently of any other action: he was neither fired from his job nor deprived automatically of any right to shop in the retail stores. Having stated this distinction between this case and those two, however, I am now at a loss to say why it is a relevant distinction. The important point about those two cases, and the way in which they are like this case, is that in them no immediate and additional deprivation flowed from the accusations themselves.

The only way to get around Roth and Goss, therefore, is to disregard the import of their language because that language was dictum. In Roth, Justice Stewart made his statements while discussing hypothetical situations not before the Court. In Goss, Justice White had already found a property interest before mentioning the students' "liberty" interest in their good names and reputations, so that due process would have been required even had he never mentioned liberty at all. So it is possible to say the Court has only focused upon the issue of deprivation of liberty through "defamation" once, in Constantineau. And, as noted above, Constantineau is distinguishable from this case

because of the automatic loss of a civil right (right to buy liquor) occasioned by the defamation.

As I said, this is the only "theory" that I can think of that makes a frontal attack on the Constantineau-Roth-Goss development of defamation as a constitutional tort. (I note here that I Shepardized Constantineau and found no circuit court opinion that made any effort to cabin in that development at all, although I did find lots of uneasiness with it.) If you are inclined to pursue it, I believe this record is a good one on which to do so. Respondent has shown no actual deprivation occurring as a result of the police chief's circulation of his flyer. The only witness who spoke of its effect was respondent's employer at the newspaper, who testified that he had told respondent not to get into similar trouble again, and that he might have to restrict respondent's work assignments as a result of the flyer. But the employer also stated that he had not judged respondent's guilt or innocence on the basis of the flyer, and that he had not actually restricted respondent in any way. Appendix at 32-35. The allegations of respondent's complaint really are no more concrete, speaking primarily of undefined impairment of respondent's ability to perform as a photographer, inhibition of respondent from freely entering commercial establishments, and undefined impairment of his employment opportunities and earning capacity. See ¶¶ 8-10 of Complaint, Appendix at 3-4.

Phil