# Note

# Dangers of the Digital Stockade: Modernizing Constitutional Protection for Individuals Subjected to State-Imposed Reputational Harm on Social Media

*Kelsey Stein**

## Abstract

*The explosion of social media has altered the dissemination of information about the criminal justice system, as well as public conversations about individuals accused of crimes. Law enforcement agencies, seeking to supplant traditional news media, have expanded their social media presence from issuing basic public information to highlighting and commenting on bizarre crime news. Many agencies use their official social media accounts in ways that threaten the rights and reputations of individuals who—though arrested or charged with an offense—have not been convicted. The constant proliferation and potentially global reach of a single social media post make this practice especially concerning and constitutionally problematic.*

*As public discourse evolves, the Supreme Court should review a case involving law enforcement social media use that stigmatizes an accused individual. That would necessitate revisiting the prevailing constitutional test regarding state-imposed reputational harm, which was established in 1976 and*

* J.D. 2019, The George Washington University Law School; B.A., Journalism and Spanish, 2011, The University of Alabama. I am grateful to Mark D. Taticchi and Komal Shah, whose suggestions helped transform this Note in its rough early stages, and to the staff of *The George Washington Law Review* for their diligence throughout the editorial process. I want to thank my family and Brendan for their fierce, unquestioning love and support and for always encouraging me to act in the face of injustice.

**July 2019 Vol. 87 No. 4**

*does not account for modern technology. Either of two approaches could protect individuals from harm stemming from social media stigmatization—overturning that test to recognize that reputational harm alone triggers due process protections or reinterpreting the law to determine that an online posting satisfies the existing test. In the meantime, law enforcement agencies should revise their ethical and professional guidelines to accommodate the rapidly changing social media landscape.*

## Table of Contents

Introduction .......... 998
I. The Constitution and Reputational Harm .......... 1002
A. Wisconsin v. Constantineau*: Reputational Harm Recognized* .......... 1002
B. Paul v. Davis*: The Court's Hasty Retreat on Reputational Harm* .......... 1004
C. *Analyzing Reputational Harm Claims After* Paul*: The Stigma-Plus Test* .......... 1006
II. The Transformation of Public Discourse in the Social Media Age .......... 1009
A. *Social Media as the New Public Square* .......... 1010
B. *Law Enforcement Agencies' Divergent Philosophies on Social Media* .......... 1011
1. Promoting Community Engagement, Public Safety, and Crime-Solving .......... 1012
2. Ensuring Objectivity by Directly Disseminating Information .......... 1014
3. Providing Traditionally Public Information Through a New Platform .......... 1015
4. Sharing Individual Cautionary Tales as Either Deterrence or Overt Shaming .......... 1016
III. *Paul* Is Insufficient Protection from Online Stigmatization Because It Predates the Internet and Social Media Exacerbates Reputational Harm .......... 1018
IV. Solutions: Overturn *Paul* or Include Social Media Within Its Framework .......... 1023
A. *Overturn* Paul *and Return to the* Constantineau *Approach that Recognizes Reputational Harm as Sufficient to Trigger Due Process* .......... 1024
B. *Allow* Paul *to Stand and Instead Determine that an Online Public Posting Constitutes a Plus Factor Under the Existing Test* .......... 1025

C. *In the Meantime, Law Enforcement Agencies Should Enact Social Media Guidelines Focused on Exercising Reasonable Restraint* ..................... 1027
CONCLUSION ..................................................... 1029

*Reputation, reputation, reputation! O, I have lost my reputation! I have lost the immortal part of myself, and what remains is bestial.*

—William Shakespeare, Othello[1]

*It is not difficult to conceive of a police department, dissatisfied with what it perceives to be the dilatory nature or lack of efficacy of the judicial system in dealing with criminal defendants, publishing periodic lists of "active rapists," "active larcenists," or other "known criminals." The hardships resulting from this official stigmatization—loss of employment and educational opportunities, creation of impediments to professional licensing, and the imposition of general obstacles to the right of all free men to the pursuit of happiness—will often be as severe as actual incarceration.*

—Justice William Brennan, 1976[2]

## INTRODUCTION

In December 2016, California police officers took to Facebook to announce an arrest: "Twas the night before Christmas in Benicia's Solano Square . . . . A burglar was prowling, and with reckless care."[3] The poem included additional rhyming lines of verse poking fun at 39-year-old Brian Dodson, who was arrested when police found him eating ice cream inside a Rite Aid with the door pried open.[4] Mr. Dodson admitted to officers that he broke into the store; the city then charged him with burglary and possession of burglary tools.[5]

In the days before social media, Mr. Dodson's arrest may have warranted a paragraph in the local newspaper or even passed with no fanfare whatsoever. Instead, the Benicia Police Department's poetic

1 WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act 2, sc. 3, ll. 263–65 (Laurie Skiba ed., EMC/Paradigm Pub. 2005) (1623).

2 Paul v. Davis, 424 U.S. 693, 721 n.9 (1976) (22 Brennan, J., dissenting).

3 Katy St. Clair, *Benicia Police Poem on Social Media About Arrest Sparks Rebuke*, VALLEJO TIMES-HERALD (Jan. 2, 2018, 12:00 AM), http://www.timesheraldonline.com/general-news/20180102/benicia-police-poem-on-social-media-about-arrest-sparks-rebuke [https://perma.cc/AX5A-EVGH].

4 *Id.*

5 *See* George Johnston, *Police Department Faces Backlash over Facebook Post*, BENICIA HERALD (Jan. 4, 2018), http://beniciaheraldonline.com/police-department-faces-backlash-over-facebook-post/ [https://perma.cc/8JHA-HKF2].

Facebook post sparked nearly 300 comments, an online petition protesting the practice, and heated public debate.[6] People who knew Mr. Dodson described it as insensitive bullying of a man struggling with mental illness.[7] One childhood friend, who described him as "a decent and kind person" and "a really great and loving father," launched the petition to denounce the police department's mocking treatment of his arrest.[8] Several days later, the department edited the post to resemble a standard news release, and the police chief issued a public apology, along with a promise to be more thoughtful about future social media posts.[9]

The Benicia Police Department is far from alone in adopting a casual or mocking tone on social media, though few departments respond so contritely when faced with backlash. In Bridgeville, Pennsylvania, a police chief's Facebook post included a photo of a suspect arrested for misdemeanor bicycle theft with the hashtags #beencaughtstealin and #nachocheesedonttakeit.[10] When a reporter questioned the post's professionalism, the chief countered that he doubted it would embarrass the man and added, "those hashtags just help get people's attention."[11] A longtime friend of the suspect disagreed, describing the post as childish and unprofessional.[12]

The Jefferson County Sheriff's Office in Alabama occasionally shares a "Creep of the Week,"[13] labeling individuals as "creeps" for charges ranging from distribution of a controlled substance[14] and failure to appear to murder.[15] The chief deputy decided to revive the feature, previously a "very successful" radio segment, because "[l]et's face it, most of them or their crimes are creepy."[16] In Santa Fe, New Mexico, a man with several arrests, but no convictions, was released

---

6 *Id.*

7 *Id.*

8 St. Clair, *supra* note 3.

9 *Id.*

10 Beau Berman, *Is Local Police Department's Facebook Post Public Information or Public Shaming?*, WTAE Action News 4 (July 13, 2017, 11:22 PM), http://www.wtae.com/article/critics-slam-bridgeville-police-department-for-facebook-shaming-suspect/10305464 [https://perma.cc/TVD7-WECZ].

11 *Id.*

12 *Id.*

13 *See* Carol Robinson, *Creep of the Week Comes to Facebook Page of Jefferson County Sheriff*, AL.com (Feb. 18, 2011, 9:30 AM), http://blog.al.com/spotnews/2011/02/creep_of_the_week_comes_to_fac.html [https://perma.cc/3CJM-MUUY].

14 *Id.*

15 *See* Jefferson Cty. Sheriff's Office, Facebook, https://www.facebook.com/pg/jeffcosheriffal/photos/?tab=album&album_id=10151763447408576 [https://perma.cc/ADV6-MLTD].

16 *See* Robinson, *supra* note 13.

from jail when a prosecutor failed to appear for a hearing.[17] Nevertheless, local police sought the public's help to track his movements, characterizing him as a fugitive and a "frequent flier for law enforcement."[18] Public debate persists—within the comments on each social media post, in the press, and among civil liberties advocates—regarding whether these posts by police departments are playful and harmless, or unkind, unprofessional, and potentially unconstitutional.[19]

Colonial America erected stockades in town squares—humiliating and public, but finite. Modern society has the infinite and pervasive internet. A single post or photo can create boundless negative consequences for an individual, thanks to the internet's global reach and indefinite duration.[20] As social media use continues to expand rapidly, so, too, do potential harms to individuals who are publicly branded by authorities as criminals or given other derogatory labels. The danger of social media is that it is "amplified, uncontained and permanently accessible. It is loud, and there are no borders, no perimeters around how many people can observe it once and put you in a public stockade."[21] Given the official status and typically high public regard for law enforcement agencies, their posts and comments have "a whole other imprimatur of credibility."[22] That authority lends

---

17 Marissa Lucero, *ACLU Calls Police Department's Facebook Post 'Alarming*,*'* KRQE (Jan. 11, 2018, 9:57 PM), http://krqe.com/2018/01/11/aclu-calls-police-departments-facebook-post-alarming/ [https://perma.cc/Q4H7-BCEU].

18 *Id.*

19 *See, e.g.*, Denise Lavoie, *Should Police Be Allowed to Shame Suspects on Facebook?*, Associated Press (July 14, 2017), https://apnews.com/ca79ccc2adfe41679e72e91b9e910915 [https://perma.cc/8C6D-YVWZ]; Eric Posner, *A Terrible Shame*, Slate (Apr. 9, 2015, 11:14 AM), https://slate.com/news-and-politics/2015/04/internet-shaming-the-legal-history-of-shame-and-its-costs-and-benefits.html [https://perma.cc/C3EH-NJ86] ("The law has always had an ambivalent relationship with shame. On the one hand, shaming is the very antithesis of the law. The basic principle of due process holds that a person has a right to contest charges or claims against him to an impartial tribunal before the government may inflict a sanction on him. By contrast, shaming occurs in the absence of due process.").

20 *See generally* Sarah E. Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 Punishment & Soc'y 113 (2018) (analyzing two studies to determine that digital stigma is becoming increasingly difficult to escape); Todd Leopold, *The Price of Public Shaming in the Internet Age*, CNN (Apr. 16, 2015, 12:37 PM), https://www.cnn.com/2015/04/16/living/feat-public-shaming-ronson/index.html [https://perma.cc/EW96-J282] (detailing stories of several people whose public shaming led to ongoing issues with holding employment and maintaining relationships).

21 *See* David Griner, *Here's the Full Text of Monica Lewinsky's Powerful Anti-Shaming Speech in Cannes*, ADWEEK (June 26, 2015), http://www.adweek.com/digital/heres-full-text-monica-lewinskys-powerful-anti-shaming-speech-cannes-165571/ [https://perma.cc/Z62F-TFKA].

22 *See* Suzy Khimm, *The Shame Game*, New Republic (Mar. 9, 2016), https://newrepublic.com/article/130803/shame-game [https://perma.cc/EE9N-V9AN].

credence to their posts and encourages media outlets and citizens, in turn, to embrace shaming in the name of public safety.[23]

Civil rights advocates view these posts with reproach, saying a mugshot accompanied by snide or belittling remarks about the person or the alleged offense amounts to unacceptable and illegal public shaming.[24] The practice is especially concerning when the accused person has been arrested or charged but not convicted of a crime. An attorney with the New Mexico chapter of the American Civil Liberties Union described such posts as "irresponsible and alarming."[25] National ACLU attorney Lee Rowland went a step further, in the context of making mugshots eternally available online: "We're uncomfortable with law enforcement using shame tactics before people receive due process in a court of law."[26]

This Note argues that an individual's reputation constitutes a liberty interest that, when threatened by state action, triggers due process protections; specifically, law enforcement agencies' social media posts can cause unconstitutional reputational harm in light of the internet's potential for extensive, ongoing personal consequences. Part I examines the U.S. Supreme Court's inconsistent jurisprudence regarding state-imposed reputational harm as a constitutionally recognized liberty interest. Part II presents an overview of society's transition from public discourse via personal interactions and news media consumption to more interactive online discourse via social media. Part II also addresses how law enforcement agencies use social media for purposes that range from productive and community-oriented to unconstitutional.

Part III argues that the broad reach and protracted lifespan of online posts exacerbates reputational harm and renders the current constitutional framework ineffectual, a concern that the pre-internet Court could not have anticipated. Part IV argues that the Court should reevaluate its reputational harm test to determine that many agencies' stigmatizing social media posts should trigger enhanced protection. Part IV also demonstrates that law enforcement agencies can strike a realistic balance by limiting their disclosures to the public record using a reasonableness standard.

---

23 *See id.*

24 *See* Jess Bidgood, *After Arrests, Quandary for Police on Posting Booking Photos*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html [https://perma.cc/N4PT-CZKT]; *supra* note 19 and accompanying text.

25 Lucero, *supra* note 17.

26 *See* Bidgood, *supra* note 24.

## I. The Constitution and Reputational Harm

The Fourteenth Amendment prevents states from depriving an individual of life, liberty, or property without due process of law.[27] Proper procedures are required before the government can deprive someone of a protected interest.[28] A person can seek redress through a constitutional claim only if the state provided insufficient procedural safeguards.[29]

A court's evaluation of a procedural due process claim begins with the threshold question of whether the interest at stake is sufficiently important to warrant procedural safeguards.[30] Even if an interest is protected and triggers due process, that does not lead to a per se determination that protections were violated.[31] A court then turns to the question of whether the procedures in place were constitutionally sufficient.[32]

The Supreme Court has recognized a variety of protected liberty interests but has wavered in its evaluation of whether reputational harm should be counted among them.[33] Under the prevailing interpretation, analysis of such claims typically ends at the threshold question—reputational harm alone does not trigger due process protections.[34] This is problematic because, in our increasingly technological society, negative information posted online about an accused individual can have long-lasting and inescapable consequences.

### *A.* Wisconsin v. Constantineau*: Reputational Harm Recognized*

In 1969, a Wisconsin police chief posted notices in every one of a city's liquor stores imposing a one-year ban on the sale or gift of alcohol to several individuals, including a woman named Norma Grace Constantineau.[35] The police did not provide Ms. Constantineau with

---

27 U.S. Const. amend. XIV, § 1.

28 *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70, 570 n.7 (1972).

29 *Id.* at 569–70.

30 *See id.* at 570–71.

31 *See id.*

32 *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). The Supreme Court established a three-factor balancing test for determining whether process is constitutionally sufficient under the circumstances. The factors are (1) the individual's private interest, (2) whether additional safeguards would reduce the risk of erroneous deprivation, and (3) the government's interest in cost and efficiency. *Id.*

33 *Compare* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (liberty interest in reputational harm alone), *with* Paul v. Davis, 424 U.S. 693, 694 (1976) (no liberty interest in reputational harm alone).

34 *See infra* Section I.B.

35 *Constantineau*, 400 U.S. at 435.

either notice or a hearing before disseminating the posting, which labeled her as an excessive drinker.[36] She challenged the police chief's actions as a violation of her right to procedural due process.[37]

The Supreme Court found that "[t]he only issue . . . [was] whether the label or characterization given a person by 'posting[]' . . . is to others such a stigma or badge of disgrace" that it triggers procedural due process.[38] It characterized the posting as a state-imposed "badge of infamy" and a degrading, unsavory label that harmed Ms. Constantineau's reputation in the community.[39] Though the Court did not provide a detailed account of potential harms, it echoed the lower court's assertion that a city official's posting is a "quasi-judicial determination" that leads to "public embarrassment and ridicule" for the targeted individual.[40]

A six-Justice majority issued an opinion in 1971 holding that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[41] Notably, the Court recognized that coming to the opposite conclusion would open the door to derogatory labels based on nothing more than an official's whim.[42] When a state actor seeks to post a stigmatizing notice, due process protections must apply to prevent government oppression.[43]

The two dissenting opinions were based on jurisdictional disagreements rather than the majority's reputational harm conclusion.[44] In fact, Chief Justice Burger noted that the Court's holding was correct because the Wisconsin statute requiring posting was "in conflict with accepted concepts of due process."[45] At least eight Justices therefore appeared to agree that reputational harm was a protected liberty interest that triggered procedural due process protections without the need to demonstrate additional harm.

---

36 *Id.* at 434–35.

37 *Id.*

38 *Id.* at 436.

39 *Id.* at 437 (quoting Wieman v. Updegraff, 344 U.S. 183, 191 (1952)).

40 *Id.* at 436 (quoting Constantineau v. Grager, 302 F. Supp. 861, 864 (E.D. Wis. 1969)).

41 *Id.* at 437. Justice William O. Douglas wrote the majority opinion, in which Justices Harlan, Brennan, Stewart, White, and Marshall joined. *Id.* at 433.

42 *Id.* at 437.

43 *Id.*

44 *Id.* at 439-44 (Burger, C.J., dissenting); *id.* at 444–45 (Black, J., dissenting) (writing separate dissents and joining each other's).

45 *Id.* at 440 (Burger, C.J., dissenting).

### *B.* Paul v. Davis*: The Court's Hasty Retreat on Reputational Harm*

Just five years later, in *Paul v. Davis*,[46] the Court analyzed a similar case but overhauled its reputational harm interpretation by creating a new test that diluted constitutional protections. In 1972, city and county police officials in Louisville, Kentucky, collaborated to create a flyer featuring photos of various individuals underneath the heading "ACTIVE SHOPLIFTERS."[47] These officials distributed the flyer to roughly 800 local merchants as a resource for in-store security personnel during the busy Christmas shopping season.[48] The flyer included only names and photographs, and the police noted that anyone seeking additional information must request it in writing.[49] Edward Charles Davis III appeared on the flyer based on a 1971 shoplifting charge, which was dismissed about a week after police disseminated the flyers.[50] Though Mr. Davis remained employed as a photographer at the *Louisville Courier-Journal and Times*, he received a stern warning from his supervisor.[51]

Mr. Davis filed a civil suit against the two police departments, claiming that he suffered reputational harm and was deprived of a Fourteenth Amendment liberty interest without due process.[52] When the case reached the Supreme Court, a five-Justice majority rejected Mr. Davis's claim because he did not specify a constitutional or statutory guarantee protecting the asserted invasion of his individual rights or interests.[53] It held that state-imposed reputational harm alone does not trigger procedural due process protections.[54] The decision was a surprising turnaround in the Court's existing reputational harm jurisprudence, outlined just five years earlier in *Wisconsin v. Constantineau*.[55] The Court sought to resolve this apparent inconsistency by asserting that Ms. Constantineau's claim would survive under *Paul* because the posting affected not only her reputation but also her right under state law to purchase alcohol.[56] The *Paul* decision created a

46 424 U.S. 693 (1976).

47 *Id.* at 694–95.

48 *Id.*

49 *Id.* at 695.

50 *Id.* at 695–96.

51 *Id.* at 696.

52 *Id.* at 697.

53 *Id.* at 700–01.

54 *Id.*

55 400 U.S. 433 (1971); *see supra* Section I.A.

56 *See Paul*, 424 U.S. at 708–09.

standard for evaluating reputational harm known as the stigma-plus test, which remains the controlling analysis to this day.[57]

In a scathing dissent, Justice William Brennan castigated the Court for a holding that was "demonstrably inconsistent" with its reputational harm precedent.[58] He also denounced the new latitude granted to police officials and resulting abridgment of due process protections, writing:

> The Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional restraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *ex parte* punishment by those primarily charged with fair enforcement of the law.[59]

His concerns echoed the lower court's assertion that reputational harm is especially likely when "the branding has been done by law enforcement officials with the full power, prestige and authority of their positions."[60]

Justice Brennan argued that the Court misinterpreted its own precedent by rejecting reputation as a protected liberty interest.[61] He asserted that reputational harm and procedural protections are intertwined because reputation is the very thing criminal process aims to insulate.[62] He maintained that the law enforcement agencies in *Paul* overstepped their enforcement role: "It goes without saying that the

---

57 *See infra* Section I.C.

58 *See Paul*, 424 U.S. at 714 (Brennan, J., dissenting). The decision also hindered important criminal procedure safeguards, such as the presumption of innocence, the beyond-a-reasonable-doubt standard of proof required for a conviction, and the proscription on state-imposed punishments unless that standard is met. *See id.* at 719 n.6.

59 *Id.* at 714.

60 *See* Davis v. Paul, 505 F.2d 1180, 1183 (6th Cir. 1974), *rev'd*, 424 U.S. 693 (1976).

61 *See Paul*, 424 U.S. at 724–25 (Brennan, J., dissenting). For other cases establishing the Court's precedent on reputational harm see Jenkins v. McKeithen, 395 U.S. 411, 424 (1969); Wieman v. Updegraff, 344 U.S. 183, 191 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 140–41 (1951); United States v. Lovett, 328 U.S. 303, 316–17 (1946).

62 *See Paul*, 424 U.S. at 724 (Brennan, J., dissenting) ("[B]ecause of the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction . . . a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." (quoting *In re* Winship, 397 U.S. 358, 363–64 (1970))).

Police Chiefs cannot determine the guilt or innocence of an accused in an administrative proceeding."[63] Justice Brennan also noted that if the police created the same flyer using a random sampling of names culled from the local population, the Court's interpretation of reputational harm would provide those individuals no constitutional recourse.[64]

Justice Brennan was not alone in expressing outrage about the decision. *Paul* sparked an immediate critical backlash over what many commentators saw as a startling departure, based on disingenuous arguments, from established doctrine.[65] One critic argues that, even allowing for the broadest interpretation possible, the *Constantineau* holding "had virtually nothing to do with a deprivation of the right to buy alcohol and everything to do with injury to a free-standing interest in reputation."[66] Nevertheless, the Court doubled down in subsequent decisions, most notably *Siegert v. Gilley*.[67] In that 1991 ruling, the Court reaffirmed *Paul*, holding that "[d]efamation, by itself, is . . . not a constitutional deprivation."[68]

### C. *Analyzing Reputational Harm Claims After* Paul*: The Stigma-Plus Test*

Although the Court in *Paul* acknowledged that stigmatization by the government can have disastrous consequences for an individual, it asserted that reputational harm must be accompanied by harm to some other tangible interest to trigger procedural safeguards.[69] This interpretation led to a new method of analyzing claims involving state-imposed reputational harm: the "stigma-plus" test.[70] A claimant must allege reputational harm—stigma—as well as infringement of a constitutionally recognized liberty or property interest that fulfills the plus factor.[71]

The body of acceptable plus factors remains ill-defined, although certain explicitly granted interests fall within its bounds. The *Paul* majority would bestow protection for reputational harms that infringe

---

63 *Id.* at 733 n.17 (quoting *Davis*, 505 F.2d at 1183).

64 *Id.* at 719 n.6.

65 *See* Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. Davis L. Rev. 79, 81 n.3 (2009) (providing overview of commentators' generally negative responses to the *Paul* holding and its ramifications).

66 Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 Va. L. Rev. 569, 576 (1999).

67 500 U.S. 226 (1991).

68 *Id.* at 233.

69 *See Paul*, 424 U.S. at 701.

70 *Id.*

71 *Id.*

upon a right already recognized and protected by state law or a constitutional right incorporated to the states via the Fourteenth Amendment.[72] It also acknowledged a right to attend school and a right to pursue employment in a chosen profession without governmental interference as acceptable plus factors.[73]

While the right to pursue employment appears to provide solid grounding for an individual seeking to prove reputational harm under the stigma-plus test, narrow judicial interpretations have rendered that exceedingly difficult to do. For example, the Seventh Circuit recently held that the government has only infringed upon a cognizable liberty interest in pursuing an occupation "[i]f the state actor casts doubt on the individual's reputation or character in such a manner that it becomes virtually impossible for that person to find employment in his chosen field."[74] The decision constricted an already narrow Seventh Circuit case, which held that "mere defamation by the government" does not trigger due process "even when it causes serious impairment of one's future employment."[75]

Similarly, the First Circuit has held that for job loss to suffice as a plus factor, a state actor's defamatory words "must be uttered incident to the termination"[76] and the alleged harm must be "directly attributable to the challenged governmental action."[77] The First Circuit also rejected an argument regarding diminished future job prospects, analogizing with *Siegert* to support the proposition that such an intangible claim is not a valid constitutional deprivation.[78]

Even the Second Circuit's more generous stigma-plus interpretation in the employment context leaves little hope of success for most claimants. In *Valmonte v. Bane*,[79] the court found that a liberty interest was infringed when a woman was unable to obtain employment in the childcare field.[80] The woman was included on a central registry of

---

72 *Id.* at 710–11.

73 *See id.* at 709–10; *see also* Goss v. Lopez, 419 U.S. 565, 567–68 (1975) (involving charges of misconduct against public school students when state law gave all children the right to attend school); Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 568–69 (1972) (involving alleged government defamation when refusing to renew individual's employment contract).

74 O'Gorman v. City of Chicago, 777 F.3d 885, 891 (7th Cir. 2015).

75 *Id.* (quoting Dupuy v. Samuels, 397 F.3d 493, 503 (7th Cir. 2005)).

76 *See* Mead v. Indep. Ass'n, 684 F.3d 226, 233 (1st Cir. 2012) (quoting Pendleton v. City of Haverhill, 156 F.3d 57, 63 (1st Cir. 1998)).

77 *See id.* at 234 (quoting URI Student Senate v. Town of Narragansett, 631 F.3d 1, 10 (1st Cir. 2011)).

78 *See id.* at 235.

79 18 F.3d 992 (2d Cir. 1994).

80 *Id.* at 1002.

alleged child abusers that all childcare providers were statutorily required to consult when vetting potential employees.[81] Notably, the court also reiterated a previous case in stating that "it is not entirely clear what the 'plus' is" despite repeated attempts to resolve *Paul*'s ambiguity.[82] Over time, the Second Circuit has determined that "the deleterious effects which flow directly from a sullied reputation would normally also be insufficient" as plus factors, closing the door to challenges based on lost friendships, failed romantic endeavors, or decreased self-esteem.[83]

Over the years, attempts to redefine or abrogate the stigma-plus standard have not succeeded. For example, in 2014, Tramaine E. Martin filed a pro se complaint against the Cleveland Heights Police Department in Ohio alleging violations of his due process rights.[84] Mr. Martin, who was arrested for petty theft the previous year, said the department posted his name, booking photo, address, date of birth, and charges upon arrest on its Facebook page and another affiliated website and also shared information in mass text message alerts and emails.[85] He claimed that the posts "caused his eviction, tarnished his reputation, tainted the jury pool and determined his guilty [sic]" in violation of his right to due process.[86]

The District Court for the Northern District of Ohio found that Mr. Martin's due process rights were not triggered, let alone violated.[87] The court said his injuries did not rise to the level of stigma-plus because the only state-imposed harm was reputational, and the alleged plus factors were inflicted by private actors.[88] Furthermore, procedural due process was satisfied by the opportunity to clear his name through the criminal trial process.[89]

*Paul*'s staying power in the face of ongoing legal and ethical critiques, as well as confusion among courts as to what constitutes a sufficient plus factor, has led one commentator to observe that "[g]overnment stigmatization of individuals is thriving under the

81 *Id.* at 994, 1002.

82 *Id.* at 1000 (quoting Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir. 1989)).

83 *Id.* at 1001.

84 *See* Martin v. Cleveland Heights Police Dep't, No. 1:13 CV 1750, 2014 U.S. Dist. LEXIS 8246, at *1 (N.D. Ohio Jan. 23, 2014).

85 *Id.* at *1–2.

86 *Id.* at *2.

87 *Id.* at *13–14.

88 *Id.* at *8–9 (noting that landlord threatened eviction and neighbors harassed girlfriend).

89 *Id.* at *9–10.

stigma-plus doctrine."[90] That stigmatization is then amplified in the current social media landscape, particularly as law enforcement agencies continue to expand their online presence.

## II. The Transformation of Public Discourse in the Social Media Age

For decades, legal scholars and criminal justice advocates have expressed concerns about potential harm to the accused caused by extrajudicial comments and the release of extensive personal information within an evolving media landscape.[91] These concerns first reached a fever pitch in the 1960s, when the media's ever-expanding reach allowed the press "to blanket not merely a community but the whole nation."[92] Press publication of information about alleged crimes and arrests is part of a far more complex problem. Because "almost all the news that plagues trials has originated in disclosures by policemen, prosecutors, wardens, bailiffs, coroners, or even judges,"[93] protections will only suffice if they include the gatekeepers of information about crime: law enforcement.[94]

In 1964, a committee of judges and attorneys, led by Justice Paul C. Reardon of the Supreme Judicial Court of Massachusetts, conducted a twenty-month study of the causes of and possible remedies for the regular flow of prejudicial information from officials to the public in criminal cases.[95] The study culminated in a series of proposals called the Reardon Report, which placed much of the onus on law enforcement to stem the flow of information about accused individuals to the public.[96] The committee proposed limiting pretrial disclosures to the identity of the accused, a limited description of the offense, the circumstances surrounding the arrest, and, when applicable, the evidence seized.[97] Critics of the proposal cited the potential

---

[90] *See* Mitnick, *supra* note 65, at 142.

[91] *See, e.g.*, Alfred Friendly & Ronald L. Goldfarb, Crime and Publicity 9–11, 247–48 (Vintage Books 1968) (1967) (describing effect of pervasive, fast-paced, and sensationalist radio and television news on due process rights).

[92] *Id.* at 10.

[93] *Id.* at 247.

[94] *Id.* at 244 (advocating for reform stemming from the justice system as "the institution whose primary duty is the assurance of fair trials"); *see also* J. Thomas McCarthy, *Fair Trial and Prejudicial Publicity: A Need for Reform*, 17 Hastings L.J. 79, 96 (1965) ("In view of the inseparable three-way linkage of news media, law enforcement agencies and the judiciary, improvement in the quality of justice can hardly be realized without reforms on all sides.").

[95] *See* Friendly & Goldfarb, *supra* note 91, at 131.

[96] *See id.* at 131–32.

[97] *Id.* at 133.

for abuse—the press feared that law enforcement agencies would withhold information altogether—but did not take issue with its basic premise: that law enforcement discretion struck at the heart of the problem.[98] A comprehensive review of the issue determined that "[t]he major problem, calling for the most extensive and drastic remedial action, is obviously in the police stations."[99]

### *A. Social Media as the New Public Square*

Historically, cases that generate the most public fascination often have involved celebrities,[100] crimes against children,[101] or bizarre and gruesome charges.[102] Today, the internet allows local arrests and news stories to become sensationalized almost instantaneously and with an international reach.[103] As part of this trend, law enforcement agencies that previously issued news releases to media outlets now often release information directly to the public.[104]

Americans are getting news less frequently from print newspapers and television; instead, they are turning to online sources like news websites, mobile apps, and social media.[105] An August 2017 study found that two-thirds of adults in the U.S. use Facebook, and a

---

98 *See id.* at 133–38.

99 *Id.* at 246.

100 *See generally* Douglas O. Linder, FAMOUS TRIALS, https://www.famous-trials.com [https://perma.cc/M7SG-F93M].

101 *See, e.g.*, *The Latest: Judge Excuses 13 Jurors in Hot-Car Death Trial*, ASSOCIATED PRESS (Sept. 12, 2016), https://apnews.com/adaa7fde1e764d8abaa8b718594b57bb/latest-dozens-show-jury-duty-hot-car-death-case [https://perma.cc/YJ3H-KZ9S] (describing difficulties seating impartial jury because of extensive media coverage, even after trial venue moved 275 miles away).

102 *See, e.g.*, Linda Deutsch, *'This Is Crazy': Former AP Reporter Remembers Manson Trial*, ASSOCIATED PRESS (Nov. 20, 2017), https://apnews.com/241c4ea7873e4e8ab3284250faf6533a [https://perma.cc/JNY4-LDTZ] (describing trial of cult leader Charles Manson as a "surreal spectacle").

103 *See, e.g.*, Alex Horton, *Child Porn Went Viral on Facebook, and Police Say Its Creator Has Been Charged*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/news/true-crime/wp/2018/02/06/child-porn-went-viral-on-facebook-and-police-say-its-creator-has-been-charged/?utm_term=.4f07ec500545 [https://perma.cc/SY5J-5Z5G] (video of alleged sexual abuse shared worldwide in a week, leading Facebook and law enforcement to warn against further sharing).

104 *See infra* Section II.B.2.

105 *See* Kristen Bialik & Katerina Eva Matsa, *Key Trends in Social and Digital News Media*, PEW RES. CTR. (Oct. 4, 2017), http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/ [https://perma.cc/HT9N-E623]. The study shows that Facebook is the preferred social media platform for news consumption among U.S. adults (45% of all U.S. adults), followed by YouTube (18% of all U.S. adults) and Twitter (11% of all U.S. adults). ELISA SHEARER & JEFFREY GOTTFRIED, PEW RES. CTR., NEWS USE ACROSS SOCIAL MEDIA PLATFORMS 2017, at 6 (2017).

majority of those users got some or all of their news from the platform.[106] The largest increases in social media news consumption from 2016 to 2017 occurred among older, less educated, and nonwhite respondents.[107] These statistics demonstrate that social media, and public reliance upon it as a source of news, is pervasive regardless of age, race, and economic status.

The dramatic rise of social media as a conduit of communication, news, and opinions allows a bizarre mugshot or a local crime story to go viral. While that occasionally enables a dramatically positive turnaround,[108] it leads more frequently to the long-term consequences of appearing in online search results or being subjected to venomous comments about an individual's record, reputation, and even likelihood of guilt.[109]

### *B. Law Enforcement Agencies' Divergent Philosophies on Social Media*

Over the past decade, as members of the general public rapidly expanded their social media use, law enforcement agencies followed suit.[110] Many early adopters began establishing their online presence "with little awareness or consideration of the potential legal, operational and managerial implications of social media engagement."[111] In the mid-2000s, agencies focused on investigating offenses that occurred on the street, addressing new online crimes like cyberstalking and identity theft, and cultivating a passive online presence.[112] Over time—and coinciding with the public's shifting preference from pas-

106 *See* SHEARER & GOTTFRIED, *supra* note 105, at 6.

107 *Id.* at 2.

108 *See, e.g.*, Colette Bennett, *'Hot Felon' Jeremy Meeks Is Free, and Getting into Modeling*, CNN (Mar. 10, 2016, 8:55 PM), http://www.cnn.com/2016/03/10/us/hot-felon-jeremy-meeks-free/index.html [https://perma.cc/87HQ-F66S] (detailing post-incarceration success of Meeks, dubbed the "hot felon" after his mugshot went viral, who landed a modeling deal and is dating a billionaire heiress after serving two years in federal prison).

109 *See, e.g.*, Don Eno, *Comments Force Police Department to Remove Facebook Post*, FIDDLEHEAD FOCUS (Aug. 17, 2017), https://fiddleheadfocus.com/2017/08/17/news/despite-concern-over-public-shaming-madawaska-police-post-info-about-sex-offender/ [https://perma.cc/3RWG-65VT] (police department removed Facebook post about registered sex offender in community after it garnered "unproductive and inappropriate" comments); City of Utica, NY Police Department, FACEBOOK (Dec. 31, 2014), https://www.facebook.com/175041395841678/photos/a.659348934077586107374195 5.175041395841678/920485864630557/ [https://perma.cc/KC27-2TK8] (post about fleeing suspect accompanied by police chief's opinion that the suspect's reckless actions could have led to his death garnered comments that deadly force saves tax dollars and that the suspect was a "dirt bag" who needed to be locked up).

110 *See* CHRISTOPHER J. SCHNEIDER, POLICING AND SOCIAL MEDIA 33–53 (2016).

111 MURRAY LEE & ALYCE MCGOVERN, POLICING AND MEDIA 115 (2014).

112 *See* SCHNEIDER, *supra* note 110, at 39–40, 45.

sive (e.g., MySpace) to more interactive (e.g., Facebook) online presence—agencies have taken a more active role on social media.[113] While the breadth of legal, ethical, and societal ramifications remains unclear, the difficulty of demonstrating a plus factor under *Paul* essentially allows agencies to experiment with online commentary and social media shaming with few repercussions.[114]

In recent years, law enforcement agencies have enthusiastically embraced social media as a way to disseminate information quickly, cheaply, and directly to the public.[115] Different agencies offer varying motivations for this shift: engaging with communities to further their mission, ensuring objectivity through direct communication, providing traditionally public information via the new platform of social media, and highlighting accounts of individual suspects as a deterrent for future offenders.[116]

The first justification is a responsible and productive use of social media to solve crimes and cultivate a positive relationship with the public. As explained more fully below, the remaining justifications present potentially serious threats to individual rights in the context of reputational harm and its rippling consequences. The second justification ignores important safeguards—inherent in determinations of newsworthiness—that protect individuals from unfounded or overblown reputational harm. The third blurs the line of what constitutes public information and sometimes stretches that definition to include inappropriate commentary, largely depending on who manages an agency's account. The fourth opens the door for agencies to dispose with the deterrence façade altogether and even assert that overtly threatening reputational harm through social media shaming serves a legitimate law enforcement purpose.

### *1. Promoting Community Engagement, Public Safety, and Crime-Solving*

A 2016 self-reporting survey of more than 500 agencies in 48 states and the District of Columbia indicates that, although agencies differ in frequency of use, tone, and account management, these agencies share common goals for using social media.[117] In the survey, the

---

113 *Id.* at 46.

114 *See supra* Section I.C.

115 *See* SCHNEIDER, *supra* note 110, at 22–23.

116 *See id.* at 13–18, 22–23, 47–49.

117 KIDEUK KIM ET AL., URBAN INST., 2016 LAW ENFORCEMENT USE OF SOCIAL MEDIA SURVEY, at v, 1 (2017).

most popular agency-reported purpose, at 91%, is to notify the community about public safety concerns, followed closely by community outreach and engagement at 89%, public relations at 86%, and updates on noncrime issues such as traffic at 86%.[118] Agencies would most like to receive training in effectively engaging the community, improving the use of social media generally, and protecting their agencies from liability issues created by the use of social media.[119]

The reality may not match the reporting. Law enforcement agencies sometimes use social media, as self-reported, to communicate urgent safety concerns, such as notifying the public about a fugitive, school lockdown, or missing person.[120] But a 2013 study found that police departments post on Facebook much more frequently to address crimes in progress or recent arrests than to solicit public assistance in solving or preventing crimes.[121] Most agencies' posts served as an online memorialization of criminal incidents rather than an engagement tool used to enhance community policing efforts or solve crimes.[122] These findings clash with the results of the 2016 survey based on law enforcement agencies' self-reported uses of social media.[123]

The study's authors found the tendency toward online criminal news tickers "disconcerting" in light of the documented negative effects that occur when public exposure to crime reports outweighs the actual risk of victimization.[124] When fear of crime is overblown, individuals tend to isolate themselves and withdraw from their communities, while neighborhoods can lose a sense of kinship and become less socially engaging.[125]

The reported emphasis on outreach and public safety via social media coincides with the national movement toward community polic-

---

118 *Id.* at 3.

119 *Id.* at 12.

120 *See* Joel D. Lieberman et al., *Police Departments' Use of Facebook: Patterns and Policy Issues*, 16 POL'Y Q. 438, 455–56 (2013).

121 *Id.* at 450.

122 *See, e.g.*, *id.* at 455–56; Sara DiNatale, *This Florida Sheriff Keeps Shaming the Accused on Facebook—Even Before Formal Charges Are Filed*, TAMPA BAY TIMES (Feb. 16, 2018, 2:39 PM), http://www.tampabay.com/florida-sheriff-facebook-shaming-before-formal-charges [https://perma.cc/2Q7C-SFGN] (documenting the expanding and controversial social media presence of a Florida sheriff's department that regularly posts photos of vulnerable suspects with commentary).

123 *See supra* notes 117–19 and accompanying text.

124 *See* Lieberman et al., *supra* note 120, at 440, 456.

125 *Id.* at 440.

ing.[126] Agencies that use their social media presence for these purposes generally report positive results and constructive interactions with members of the public.[127] Many of these agencies focus on connecting with citizens by humanizing officers rather than dehumanizing suspects.[128]

### 2. *Ensuring Objectivity by Directly Disseminating Information*

Agencies increasingly issue details directly to the public via social media, eliminating the intermediary step of journalists' judgements of newsworthiness.[129] As a sociologist who studies policing and social media observed, bypassing journalists bestows more control on police by enabling them "to more directly influence and determine the timing and delivery of their institutional messages."[130] Many agencies use social media as a tool for marketing and self-promotion.[131] They "painstakingly work to maintain the appearance that they spend all of their time using criminal law to restore order, including by making arrests."[132] This reinforces the public's opinion that the core of policing is maintaining control over crime and allows law enforcement to steer conversation about crime in their communities.[133]

This direct-messaging argument, grounded in claims of accuracy and transparency, can be misleading. By allowing agencies to share their version of events as fact, with limited oversight and accountability, those agencies are shaping the narrative about crime and justice in their communities with a cloak of purported objectivity. For example, in 2017, the Albuquerque, New Mexico Police Department launched a large-scale plan to build community trust through social media.[134] The

---

126 *Id.* at 439.

127 *See, e.g.*, Indrajit Basu, *Social Media Elevates Community Policing*, GOV'T TECH. (Aug. 6, 2012), http://www.govtech.com/dc/articles/Social-Media-Elevates-Community-Policing.html [https://perma.cc/LD3V-JSX3] (lauding power of social media for community engagement and highlighting how the adoption of Facebook and Twitter allowed a department to gather enough helpful tips and information to "solve two different crimes within a two-week span").

128 *See* DiNatale, *supra* note 122 (contrasting Pinellas County Sheriff's Office practice of "positive interaction or engagement" with another Florida department's more aggressive social media tactics).

129 *See* Alice Speri, *NYPD Is Now Bypassing Journalists to Write News Stories About Itself*, VICE NEWS (June 19, 2014, 1:10 PM), https://news.vice.com/article/nypd-is-now-bypassing-journalists-to-write-news-stories-about-itself [https://perma.cc/2ZFB-8VSD].

130 SCHNEIDER, *supra* note 110, at 125.

131 *Id.* at 1.

132 *Id.* at 19.

133 *Id.*

134 Jacob Leyba & Sarene Clayton, *APD Resorts to Social Media for Public Connections, Bypassing News Media*, N.M. NEWS PORT (Apr. 18, 2017), http://www.newmexiconewsport.com/

department explained that the strategy helps increase transparency and provide accurate information "from the source."[135]

An Albuquerque journalist expressed skepticism about the effectiveness of social media in place of press conferences to share news, saying that "when journalists don't get the opportunity to ask questions what the public gets is essentially government propaganda."[136] This becomes problematic in the reputational harm context when an agency's incorrect or demeaning Facebook post about an accused individual is generally accepted as true, without scrutiny or further updates on a case's disposition.[137]

### 3. *Providing Traditionally Public Information Through a New Platform*

Many agencies limit what they share on social media to information within the public record. This includes booking photos, though departments are split on whether to leave photos online permanently or to remove them after a period of time. For example, an officer in Westbrook, Maine believes posting booking photos on Facebook is no different from the long-held practice of publishing mugshots in local newspapers.[138] Other departments, like the police in South Burlington, Vermont, have ended the practice of posting booking photos altogether to support the city's restorative justice efforts.[139] The city attorney's concerns extended to liability: "There's no due process that goes along with public judgment and scrutiny," which often "can be more damaging to an individual than the criminal penalty."[140]

Meanwhile, other agencies have no qualms about publishing detailed accounts of arrests, sometimes accompanied by flippant commentary about the people involved.[141] Police in Taunton, Massachusetts, offered a mocking account of a drunk driving incident and included comments directed at the woman who was arrested.[142] The Polk County Sheriff's Office in Florida frequently recounts crimi-

---

apd-resorts-social-media-public-connections-bypassing-news-media/ [https://perma.cc/5LJA-UCE5].

135 *Id.*

136 *Id.*

137 *See, e.g.*, Berman, *supra* note 10.

138 *See* Bidgood, *supra* note 24.

139 *See id.*

140 *Id.*

141 *See* Kim et al., *supra* note 117, at 9–10. The survey showed that 26% rarely or never use an informal tone, while 29% always or almost always use an informal tone. *Id.* at 9. More than half of the agencies reported using humor at least sometimes. *Id.*

142 *See* Taunton Police Dep't, Facebook, https://www.facebook.com/tauntonpolice/posts/

nal activity in irreverent tones, sometimes creating heavily edited versions of suspects' mugshots to accompany the narratives.[143] One such post about a truck theft suspect included the commentary "Somehow, with [55] arrests, he's only been to prison twice. Are ya kiddin me?!?" and the hashtags #FrequentFlyer and #WhoIsThisGuysAttorney.[144]

Constitutional confusion arises in this circumstance because of the elastic interpretation of what information falls within the public record. A line must be drawn between traditionally public information permissible for general release, such as the name of an arrested individual, charges, and even sometimes mugshots, and details with less convincing justification for being made public, such as altered mugshots, commentary about an individual's character, or speculation about the likelihood of a conviction.

#### 4. *Sharing Individual Cautionary Tales as Either Deterrence or Overt Shaming*

Some agencies use the threat of social media posting before arrests even occur, proclaiming deterrence as the goal. In 2014, the Prince George's County Police Department in Maryland announced plans to provide real-time Twitter updates while its vice unit carried out a prostitution sting operation.[145] The department promoted the move as a "progressive" and "unprecedented" tough-on-crime tactic to send a message about acceptable behavior in the community.[146] The stunt, dubbed #PGPDVice, received widespread criticism as detrimental to both the rights of arrested individuals and public perception of law enforcement.[147] Observers disagreed about the potential legal ramifications, with comments ranging from calling the sting "generally

---

1685413841487723 [https://perma.cc/UJ7P-LQ69] ("Sorry Amy, we can't move the car right now. If we do, what will you use to hold yourself up?").

143 *See generally* Polk Cty. Sheriff's Office, FACEBOOK, https://www.facebook.com/polkcountysheriff [https://perma.cc/G9K4-3U6F]; Eric Glasser, *Critics Want Cops to Stop "Shaming" People on Social Media*, WTSP 10 NEWS (July 14, 2017, 6:06 PM), http://www.wtsp.com/article/news/local/critics-want-cops-to-stop-shaming-people-on-social-media/456823143 [https://perma.cc/L9Q8-JB3N].

144 Polk Cty. Sheriff's Office, FACEBOOK, https://www.facebook.com/polkcountysheriff/photos/a.475201096817.250184.50386446817/10155437027071818/ [https://perma.cc/4ZNF-4JVN].

145 *PGPD to Live Tweet Prostitution Sting*, PGPD NEWS (May 1, 2014, 10:34 AM), http://pgpolice.blogspot.com/2014/05/pgpd-to-live-tweet-prostitution-sting.html [https://perma.cc/YX63-Y5GU].

146 *See id.*

147 *See, e.g.*, Lucy Westcott, *Maryland Police Department Will Live-Tweet a Prostitution Sting Next Week*, THE ATLANTIC (May 1, 2014), https://www.theatlantic.com/national/archive/2014/05/maryland-police-department-will-live-tweet-a-prostitution-sting-next-week/361534/ [https://perma.cc/9ALJ-9D8K] (calling the plan "a perverse social media experiment").

lawful" but a bad idea to a "legal liability time bomb."[148] In defense of the plan, a spokeswoman said it showcased a commitment to transparency and aimed to deter prostitution.[149] The department ultimately carried out the sting operation without a single tweet or arrest.[150]

Still others do not even assert deterrence as the goal, instead directly threatening the possible reputational harm that public posts by police could inflict. Before an annual community party in 2017, the Fredonia, New York police chief posted a Facebook warning to college students:

> The Fredonia Police Department wants to make the community aware that Officers are now wearing body cameras to assist in documenting the events as they are occurring and we will be posting all arrests on our FACEBOOK [sic] page for public viewing. . . . It would be unfortunate for future employers to see your arrest on social media.[151]

Other agencies have engaged in "john-shaming," the practice of publicizing photos and identifying information about individuals arrested for soliciting prostitution, as part of investigations in numerous cities, including Colorado Springs, Colorado; Albany, New York; Flint, Michigan; and at least four jurisdictions in California.[152] The Richmond, California police captain justified the practice by lamenting that the justice system is not achieving its aims of deterrence and rehabilitation, so "[a]ny law enforcement official who just relies on arrests is going to have a problem."[153]

Some law enforcement officers have recognized the role they play in promoting public shaming and causing reputational harm and have taken steps to avoid doing so in the future. Billy Grogan, a metropolitan Atlanta police chief who has risen to prominence as an expert in

---

148 *Id.*

149 *See Message to Our Community About Upcoming Prostitution Sting*, PGPD NEWS (May 1, 2014, 10:08 PM), http://pgpolice.blogspot.com/2014/05/message-to-our-community-about-upcoming.html [https://perma.cc/J5P4-SMKU]; *see also* Matt Sledge, *Police Department That Plans to Live Tweet a Prostitution Sting Explains Why*, HUFFINGTON POST (May 1, 2014, 6:46 PM), https://www.huffingtonpost.com/2014/05/01/live-tweet-prostitution-sting_n_5249612.html [https://perma.cc/TG7E-VPM5] (calling prostitution "a gateway crime" to future offenses).

150 Jennifer Golbeck, *The Live-Tweeted Prostitution Sting Was a Total Bust, and Not in a Good Way*, SLATE (May 7, 2014, 4:10 PM), http://www.slate.com/blogs/future_tense/2014/05/07/_pgpdvice_prince_george_s_county_pd_s_live_tweeted_prostitution_sting_was.html [https://perma.cc/6EZT-QYW8].

151 *Fredonia Police to Post Arrest Videos on Facebook*, WGRZ (April 26, 2017, 2:17 PM), http://www.wgrz.com/article/mobile/news/local/fredonia-police-to-post-arrest-videos-on-facebook/434301487 [https://perma.cc/6EPQ-JMFU].

152 Khimm, *supra* note 22.

153 *Id.*

law enforcement use of social media, has addressed the careful balancing that agencies must engage in to avoid shaming.[154] His department does not post booking photos and only posts arrest photos if the distance or angle makes it impossible to identify the arrestee.[155] He acknowledges the long-term negative effects of shaming on both suspects and community relations, and he suggests deferring to the proper entities for punishment: "We should leave the extra punishments and consequences to others. We are better served by using social media to engage, inspire and connect with our community."[156]

These varied stances expose serious discord about the role law enforcement should play in the justice system, enabling the recognized duties of enforcing laws and promoting public safety to bleed into the judicial duty of determining punishment. When law enforcement takes punishment into its own hands, individual rights and reputations bear the consequences.

## III. *Paul* Is Insufficient Protection from Online Stigmatization Because It Predates the Internet and Social Media Exacerbates Reputational Harm

More than four decades after *Paul* was decided, the stigma-plus test remains, despite the fact that technology has revolutionized the concept of reputational harm. Courts across the United States use that test—formulated after physical flyers were distributed to 800 merchants in one city—to analyze the constitutionality of social media posts that anyone in the world can find with a single search engine query. For example, the court in *Martin v. Cleveland Heights Police Department*,[157] which relied largely on *Paul* to reject the claim of due process deprivation,[158] found that "[d]isseminating arrest information through social media is not significantly different from posting flyers in stores or making the information available electronically on a website."[159]

For the reasons outlined below, the *Paul* interpretation of state-imposed reputational harm no longer suffices in the context of law enforcement agencies' social media posts. As compared with the phys-

---

154 *See* Billy Grogan, *Public Shaming on Social Media*, LESMChief (July 4, 2015), http://lesmchief.com/2015/07/04/public-shaming-on-social-media/ [https://perma.cc/9AMF-QNUV].

155 *Id.*

156 *Id.*

157 No. 1:13 CV 1750, 2014 U.S. Dist. LEXIS 8246 (N.D. Ohio Jan. 23, 2014).

158 *See supra* notes 84–89 and accompanying text.

159 *Martin*, 2014 U.S. Dist. LEXIS 8246, at *14.

ical posters disseminated by police in *Paul*, digital posts have a profoundly greater reach, endure much longer, often aim to accomplish different objectives, and typically provide additional personal information and commentary well outside the public record. Furthermore, the plus factor interpretation requiring allegations of a tangible harm fails to encompass the documented effects of online public shaming.

First, the flyers in *Paul* were distributed to 800 local merchants in the Louisville, Kentucky metropolitan area.[160] These physical flyers were given primarily to local merchants and security officers rather than to the public at large, and thus likely were seen by only a small portion of the metropolitan area's population of more than 800,000.[161] In comparison, the Polk County Sheriff's Office, for example, has nearly 200,000 followers on Facebook.[162] An informal analysis tool indicates that nearly 5,000 people interacted with the page or its content in a single week in February 2019.[163] The agency's post about a February 2018 truck theft garnered 444 reactions and 108 shares, spreading its derisive description of the suspect to an unknown number of additional users who are not connected to the agency's page itself.[164] Though impossible to quantify precisely, a single Facebook post shared by a law enforcement agency in 2019 is almost certain to reach exponentially more people than a physical flyer distributed in a limited geographic area in 1972.

Second, the physical flyers in *Paul* likely remained accessible for a finite amount of time before being discarded, disappearing, or, if posted publicly, being covered by new flyers. The impermanence of a limited number of physical flyers arguably would create only a slight risk of ongoing reputational harm.[165] In 1972, a person with a criminal

---

160 *See* Paul v. Davis, 424 U.S. 693, 695 (1976).

161 *See* U.S. DEP'T OF COMMERCE, CENSUS TRACTS: LOUISVILLE, KY.-IND. 1 (1972).

162 *See* Polk Cty. Sheriff's Office, FACEBOOK, https://www.facebook.com/polkcountysheriff/ [https://perma.cc/HEV8-TA2E].

163 The quantification of social media metrics—such as engagement, reach, and impression—is beyond the scope of this Note. The author employed the Likealyzer tool on February 7, 2019, to provide context and to make approximate comparisons between the circumstances of *Paul* and present-day online posts. *See* LIKEALYZER, https://likealyzer.com/ [https://perma.cc/JGP4-H26V].

164 Polk Cty. Sheriff's Office, FACEBOOK (Mar. 8, 2018), https://www.facebook.com/polkcountysheriff/photos/a.475201096817.250184.50386446817/10155437027071818/ [https://perma.cc/RVE5-DJNZ].

165 The actual effects on Edward Charles Davis III were more severe than one might expect: The resulting humiliation and strain led him to resign from his job to maintain his sanity and self-respect; he could not find other jobs as a newspaper photographer; other prospective employers were hesitant to hire him after the publicity created by the police's flyer. *See* Mitnick, *supra* note 65, at 87–88. In 1976, Mr. Davis wrote that he was "broke, without employment,

history could elect not to discuss his past with family, friends, or prospective employers. Researchers found that "stigma erosion," the decreasing awareness of and repercussions related to a criminal record as time passes, was a realistic and beneficial concept for offenders in the 1960s and 1970s.[166]

In today's digital world, rehabilitating a reputation or regaining anonymity in this manner is virtually impossible, meaning an unfavorable social media post can have lifelong ramifications. Online criminal information stigmatizes an individual who is seeking a job or an education, or looking for somewhere to live.[167] And, unlike physical flyers, social media posts cannot be destroyed or hidden, due to digital archives that cache old versions of websites and data-scraping tools that save items like mugshots.[168] Even employers who choose not to conduct official background checks can conduct a quick online search for information about job applicants, who then almost certainly cannot bring successful claims regarding loss of employment.[169]

Third, the police chief's articulated purpose of disseminating the flyers in *Paul* was to inform store owners of potential shoplifters during the Christmas shopping season.[170] In contrast, law enforcement agencies today assert various reasons for posting certain content and commentary on social media, some more constitutionally defensible than others.[171] The most concerning posts are public shaming masked as deterrence and punitive, vindictive posts explicitly aimed to cause reputational harm.[172] When these stigmatizing statements come directly from police, they carry more weight because they "are commonly considered authentic avowals of wrongdoing by the state."[173]

Fourth, the police in *Paul* noted that anyone seeking additional information beyond the name and photo included on the flyer were

---

emotionally sick and in a state of anxiety." *Id.* at 88 (quoting Edward Charles Davis III, *A "Keep Out" Sign on the Courthouse Doors?*, JURIS DR., July/Aug. 1976, at 31).

166 *See* Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387, 388–89 (2016).

167 *See id.* at 387–88.

168 *See* Rebecca Beitsch, *Fight Against Mugshot Sites Brings Little Success*, PEW (Dec. 11, 2017), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/12/11/fight-against-mugshot-sites-brings-little-success [https://perma.cc/YXV7-VZ2R] (explaining that even individuals who participate in diversion programs or have their records expunged can suffer ongoing negative consequences of websites that compile mugshots).

169 *See supra* notes 72–82 and accompanying text.

170 *See* Paul v. Davis, 424 U.S. 693, 694–95 (1976).

171 *See supra* Section II.B.

172 *See supra* Section II.B.4.

173 Mitnick, *supra* note 65, at 95.

required to request it in writing.[174] Despite the fact that the charges against Mr. Davis ultimately were dismissed, this limited disclosure is more akin to the information that falls within today's public record than the details and commentary provided on social media. Many posts contain extensive information outside the public record, including elaborate narrative accounts of an interaction between police and an individual, commentary on an individual's likelihood of guilt, and jokes or hashtags mocking someone's circumstances or background.[175]

Finally, because the preceding factors are difficult to quantify and future harm is unpredictable, claimants struggle to prove the plus factor that *Paul* requires.[176] This does not mean that the subjects of law enforcement social media posts are not suffering reputational harm. While tangible harm directly resulting from online public shaming can be difficult to exhibit in specific cases, research and anecdotal evidence demonstrate that its effects can be real and severe. The accessibility and longevity of online information about alleged conduct stigmatizes an individual in regard to employment, housing, and educational opportunities.[177] This holds true regardless of whether the individual's charge was minor or serious and whether an arrest led to a conviction.[178]

For example, Marlo Sue Johnson's mugshot remains on her local sheriff department's Facebook page even though the prosecutor did not pursue charges.[179] Ms. Johnson lost her job at a dance studio after her boss saw the photo and has yet to find new employment, saying the sheriff's office "hurt my family, cost me my job, cost my kids food in their bellies."[180] She has no criminal record, but her mugshot and the subsequent string of comments—some supportive, others critical—remains accessible with a single search.[181]

Louis DiMaria, the owner of a New York pizzeria, was among the names and photos included in a highly publicized antiprostitution campaign called "Operation Flush the Johns."[182] The Nassau County district attorney and police commissioner spearheaded publicity for

174 *Paul*, 424 U.S. at 695.

175 *See supra* notes 3–19 and accompanying text.

176 *See, e.g.*, Valmonte v. Bane, 18 F.3d 992, 1000 (2d Cir. 1994) (acknowledging elusiveness of the plus factor).

177 *See* Ispa-Landa & Loeffler, *supra* note 166, at 387–88.

178 *Id.* at 407.

179 DiNatale, *supra* note 122.

180 *Id.*

181 *Id.*

182 *See* Khimm, *supra* note 22.

the operation.[183] While the charges against Mr. DiMaria ultimately were dismissed, the notoriety lost his pizzeria 25% of its business, forced him to give up coaching student athletes, and exacerbated marital problems to the point that his wife filed for divorce.[184]

Karen and Daniel Gitelman were arrested in 2016 after a party at their home involving underage drinking led to at least one teen being seriously injured.[185] Some charges were dropped and others resolved through participation in a pretrial diversion program but not before the Sparta, New Jersey police department provided an exhaustive narrative of their arrests on its Facebook page.[186] Ms. Gitelman filed notice of intent to sue the department, saying her and her husband's names were searched online more than 100,000 times as a result of the post.[187] She intended to seek $500,000 in damages, claiming she and her family were forced to move to a different town, sell their home well below market value, and that she lost employment opportunities.[188]

These examples, and the growing body of research noted above, indicate that the *Paul* framework paved the way for significant harm to persist by preventing constitutional recourse, despite the ways in which the internet has changed societal understandings of publicity and reputation. With no clear explanation of what constitutes a plus factor and courts' continued gutting of harm to current or future employment as a viable option, the standard of proof for an individual alleging reputational harm is so high as to be practically unattainable.

Furthermore, the traditional methods of shielding individual rights and limiting exposure to outside information cannot address the myriad problems the internet creates or exacerbates. A continuance or change of venue, for example, has little effect on whether false or prejudicial information about someone accused of a crime continues to proliferate digitally. The possibility of only voluntary disclosure of

---

183 *See* William Murphy & Ann Givens, *Long Island Prostitution Sting, 'Operation Flush the Johns,' Leads to Arrests of 104 Men*, NEWSDAY (June 3, 2013, 7:37 PM), https://www.huffingtonpost.com/2013/06/03/nassau-da-lawyers-docs_n_3380219.html [https://perma.cc/ZQU5-S3RL].

184 *See* Khimm, *supra* note 22.

185 Joe Carlson, *Woman to Sue Police, Sparta over Facebook Post on Arrest*, N.J. HERALD (July 31, 2016, 12:01 AM), http://www.njherald.com/20160731/woman-to-sue-police-sparta-over-facebook-post-on-arrest# [https://perma.cc/76ZF-CM5S].

186 *Id.*; *see also* Sparta Police NJ, FACEBOOK (May 6, 2016), https://www.facebook.com/sparta.police/posts/1716340005304311 [https://perma.cc/P5QH-XMDN] (providing a detailed account of the party, the investigation, and the Gitelmans' involvement).

187 *See* Carlson, *supra* note 185.

188 *Id.*

an arrest or a criminal charge, even one that is dismissed, is a thing of the past.[189] Legal, technological, economic, and administrative impediments render procedural safeguards more important in protecting individuals' constitutional right to due process.

## IV. Solutions: Overturn *Paul* or Include Social Media Within Its Framework

The Supreme Court's evolving attitude about technology[190] opens the door for revision of the reputational harm doctrine to accommodate problems caused by social media. This section proposes two potential solutions: first, the Court could overturn *Paul* and—as articulated in *Constantineau*—recognize reputational harm as sufficient to trigger due process, justified by the magnified impact of public online postings. Alternatively, it could continue to operate within the *Paul* framework but determine that social media posts published by state actors, like law enforcement agencies, constitute a sufficient plus factor to satisfy the stigma-plus test.

Recent opinions indicate that the Court would agree to hear a claim seeking reevaluation of a previously settled issue that has been reshaped by technological advancements. The Court evaluated First Amendment free expression in the context of violent video games,[191] Fourth Amendment warrant requirements in the context of smartphones,[192] and First Amendment speech restrictions in the context of restricting social media access for certain classifications of people.[193] Several Justices have demonstrated a willingness to reassess long-held beliefs based on the rapidly changing technological landscape.[194] In an 8–0 decision in *Packingham v. North Carolina*,[195] Justice Anthony Kennedy wrote: "While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[196]

---

189 *See supra* notes 164–65 and accompanying text.

190 *See infra* notes 191–96 and accompanying text.

191 *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (holding 7–2 that video games are protected by the First Amendment).

192 *See* Riley v. California, 134 S. Ct. 2473, 2480 (2014).

193 *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017).

194 *See generally* Laurence H. Tribe & Joshua Matz, *How the New Supreme Court May Tackle Tech's Big Questions*, WIRED (Feb. 6, 2017, 7:00 AM), https://www.wired.com/2017/02/new-supreme-court-may-tackle-techs-big-questions/ [https://perma.cc/GXP7-89TL].

195 137 S. Ct. 1730 (2017).

196 *Id.* at 1736.

### A. *Overturn* Paul *and Return to the* Constantineau *Approach that Recognizes Reputational Harm as Sufficient to Trigger Due Process*

In his *Paul* dissent, Justice Brennan expressed apprehension about "plac[ing] a vast and arbitrary power in the hands of federal and state officials" to stigmatize members of the public with impunity.[197] His concerns not only remain legitimate today but are exacerbated by the widespread use of social media to circulate mugshots, personal details, and unfavorable commentary about people accused of crimes.[198]

The Court should grant certiorari in a case involving law enforcement posts on social media that constitute shaming as an opportunity to reconsider *Paul*. A plaintiff whose arrest details and mugshot, accompanied by additional conclusory or opinionated comments, are posted on Facebook should mount that challenge by arguing that the reputational harm resulting from online posting far exceeds the potential reach, duration, and scope of the harm imaginable when *Paul* was decided. The Court should hold that reputational harm alone is a constitutionally protected liberty interest when that harm is inflicted by a state actor. This solution (1) accounts for the inflated reputational harm that online postings can create compared to the circumstances in *Paul*, (2) would not be overly burdensome because it only triggers a due process inquiry and does not promise relief in all cases, and (3) is in line with several state courts that have recognized the adverse effects that state-imposed online labeling can have on reputation.

First, using a reputational harm framework based on pre-internet methods of disseminating information does not account for the expansive global reach of information posted online, as well as its potential to endure indefinitely and remain accessible to anyone with an internet connection.[199] Much as the Court has revisited warrant requirements and free speech in light of new technology, so, too, should it revisit reputational harm. This decision would return to the *Constantineau* Court's reasoning that the only issue is whether a state-imposed label is such a stigma or badge of disgrace that it threatens to damage an individual's good name or reputation.[200]

Second, recognizing a liberty interest in reputational harm does not create a per se due process violation; instead, it would merely trig-

197 *See* Paul v. Davis, 424 U.S. 693, 721, n.9 (1976) (Brennan, J., dissenting).

198 *See supra* Section II.B.

199 *See supra* Part III.

200 *See supra* Section I.A.

ger procedural safeguards.[201] This would still require courts to engage in the second part of the procedural due process inquiry to determine whether the government provided sufficient process before the rights deprivation. In the ruling affirmed in *Constantineau*, the lower court held that sufficient process would not require a full hearing but instead "an opportunity to confront the person claiming that his conduct warrants his being 'posted' and to present his side of the story before he is in fact 'posted.'"[202]

This means that not all social media posts by law enforcement agencies that lead to reputational harm would require a full hearing. This determination would depend largely on considering an individual post in context, allowing continued posting of traditionally public information about crimes,[203] updates vital to public safety, or community engagement efforts.[204]

Finally, several states have found the Supreme Court's reasoning in *Paul* unpersuasive and have interpreted their own constitutions as granting due process protections based on reputational harm. The New Jersey Supreme Court, in reviewing a challenge to sex offender classifications, held that state-imposed labels invite "public opprobrium" that undermines an individual's reputation in the community.[205] Similarly, and more recently, the New Hampshire Supreme Court explicitly rejected *Paul* to hold that an individual possesses a liberty interest in her reputation that is subject to state constitutional protections.[206] These rejections of *Paul* demonstrate a willingness, at the state level, to reconsider reputational harm through the present-day lens of pervasive social media. This turning tide is evidence of a mounting need for the Supreme Court to revisit its holding in *Paul* or, at the very least, reconsider the stigma-plus grounding.

### B. *Allow* Paul *to Stand and Instead Determine that an Online Public Posting Constitutes a Plus Factor Under the Existing Test*

Alternatively, the Court could follow a slightly different approach that yields essentially the same result in cases of reputation-harming online posts by law enforcement agencies while remaining true to the principle of stare decisis. Rather than overturning *Paul*, it could deter-

201 *See supra* notes 27–32 and accompanying text.

202 Constantineau v. Grager, 302 F. Supp. 861, 864–65 (E.D. Wis. 1969).

203 *See infra* note 226 and accompanying text.

204 *See supra* Section II.B.1.

205 Doe v. Poritz, 662 A.2d 367, 418–19 (N.J. 1995).

206 State v. Veale, 972 A.2d 1009, 1013–14 (N.H. 2009).

mine that publicly posting detailed arrest or criminal information online automatically satisfies the plus factor because the internet is long-lasting and far-reaching.

A New York Supreme Court case, *Bursac v. Suozzi*,[207] provides a model for what this determination looks like in practice. In that case, Alexandra Bursac was arrested and charged with driving while intoxicated ("DWI") in Nassau County, New York.[208] Shortly before her arrest, the county executive organized an online "Wall of Shame" campaign for the announced purpose of publicizing information about individuals arrested for DWI "to 'make sure their friends, neighbors and families know about it.'"[209] A week after Ms. Bursac's arrest, the executive posted her name, mugshot, and other identifying information online as part of the publicly accessible "Wall of Shame."[210] She filed a lawsuit against the county alleging that her inclusion caused "public humiliation, great embarrassment, the potential loss of employment, unwarranted telephone calls and emails as well as the potential for a multitude of future harm."[211] In its response, the county cited *Paul* to show that an individual has no protected liberty interest in reputational harm alone and must instead satisfy the stigma-plus test.[212]

The court held that publication of a mugshot and other identifying information is permissible, unless a context-dependent analysis demonstrates that the circumstances satisfy the stigma-plus standard.[213] In determining that Ms. Bursac's circumstances satisfied the plus factor, the court considered the instant accessibility of the "Wall of Shame" to anyone in the world and the potential harm if friends, prospective employers, or predators accessed the page.[214] It held that the "limitless and eternal notoriety" of publishing names, mugshots, and identifying information online was a sufficient plus factor.[215]

Broadening the interpretation of the stigma-plus test to include the internet's "limitless and eternal notoriety" as an accepted plus factor accounts for the demonstrated harm resulting from stigmatizing social media posts created by state actors. This allows claimants to

207 868 N.Y.S.2d 470 (N.Y. Sup. Ct. 2008).

208 *Id.* at 472.

209 *Id.* (quoting county executive's press release announcing "Wall of Shame" initiative).

210 *Id.* at 473.

211 *Id.*

212 *Id.* at 476–77.

213 *Id.* at 478.

214 *Id.* at 478–79.

215 *Id.* at 481.

sidestep issues of difficult-to-prove, tangible harm by relying on more general evidence of the harm that online public shaming causes.[216]

### C. *In the Meantime, Law Enforcement Agencies Should Enact Social Media Guidelines Focused on Exercising Reasonable Restraint*

Law enforcement officials' First Amendment protections are balanced with other concerns when they speak in their official capacity as state actors.[217] In his dissent in *Paul*, Justice Brennan went so far as to say that "a State cannot broadcast even such factual events as the occurrence of an arrest that does not culminate in a conviction . . . and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability."[218] In reality, a less restrictive rule would suffice to secure constitutional protections for individuals who are arrested or charged with an offense.

In response to the shortcomings of the Reardon Report,[219] an attorney-newsman team proposed a "reasonable and realistic" rule of restraint governing disclosures by law enforcement.[220] The rule's permissible disclosures included the circumstances of the offense and the arrest, and details regarding police pursuit of a suspect.[221] Prohibited information considered too prejudicial to disclose included "conclusionary statements, opinions, or any other remarks designed to influence the course of the case."[222]

Several current policies could serve as viable models for law enforcement agencies seeking to implement disclosure rules. In 1965, Attorney General Nicholas Katzenbach announced new uniform standards applicable to all federal prosecutors and investigators.[223] He outlined two categories of pretrial information: (1) public records and information available to the press, including a defendant's name, address, certain statistical information, the charge(s), the arresting

---

216 *See supra* notes 176–84 and accompanying text.

217 *See* Rankin v. McPherson, 483 U.S. 378, 384–85 (1987); Connick v. Myers, 461 U.S. 138, 142 (1983).

218 Paul v. Davis, 424 U.S. 693, 735, n.18 (1976) (Brennan, J., dissenting). For other cases supporting the proposition that arrest without conviction still causes harm to the individual who is arrested, see Schware v. Bd. of Bar Examiners, 353 U.S. 232, 241 (1957); Michelson v. United States, 335 U.S. 469, 482 (1948).

219 *See supra* notes 95–99 and accompanying text.

220 *See* FRIENDLY & GOLDFARB, *supra* note 91, at 248.

221 *Id.*

222 *Id.*

223 *Id.* at 130.

agency, the length of the investigation, prior federal criminal records, and information necessary to apprehend a fugitive; and (2) prejudicial information to be withheld, including details of any confession or admission made by the defendant, prosecutors' opinions about the case, references to investigative procedures like fingerprints or ballistics.[224] Katzenbach's standards were used to create regulations that, to this day, govern the release of information by Department of Justice personnel.[225] Specifically, those regulations dictate that "where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public."[226] Similarly, in 2012, the United States Marshals Service announced a new Booking Photograph Disclosure Policy, which outlined restrictions on releasing photographs that would serve no specific law enforcement purpose and exclusions when the release would serve a countervailing public interest.[227]

These policies' similar determinations of information suitable for public release could aid in formulating viable disclosure rules for other law enforcement agencies. Even with disclosure guidelines in place, a balancing of government necessity and individual rights would allow for exceptions in instances of violent fugitives and other immediate dangers to the public.[228]

Although self-governance provokes concerns about lax enforcement, several agencies have voluntarily reined in their previous social media posting habits, citing legal and ethical complications. After years of posting every booking photo on Facebook, the South Burlington, Vermont police department ended the practice in 2015 after the chief noticed the disparaging comments these posts elicited.[229] He weighed the importance of the public's right to know with the potential harm to the accused.[230] He decided that public humiliation was at

---

224 *Id.* at 130–31.

225 *See* 28 C.F.R. § 50.2 (2018).

226 *Id.* § 50.2(b)(3)(iv).

227 *See* Memorandum from Gerald M. Auerbach, Gen. Counsel, U.S. Marshals Serv., to All U.S. Marshals, All Chief Deputy U.S. Marshals, All Assoc. Dirs., and All Assistant Dirs. (Dec. 12, 2012), https://www.usmarshals.gov/foia/policy/booking_photos.pdf [https://perma.cc/PB5T-3EGR] (establishing new guidelines for releasing booking photos to the public or the media).

228 *Id.*

229 *See* Bidgood, *supra* note 24.

230 *See* Elizabeth Murray, *Vermont Police Weigh Mug Shots on Social Media*, USA TODAY (July 13, 2015, 1:34 PM), https://www.usatoday.com/story/news/nation/2015/07/13/police-mug-shots-social-media/30087473/ [https://perma.cc/4LLA-QQU6].

odds with his original intent in posting the photos.[231] In a 2015 interview, the director of research and programs for the International Association of Chiefs of Police and a former Greenville, North Carolina police chief urged caution on the part of agencies considering broad mugshot-posting policies. If a department seeks the community's trust and respect, that "involve[s] very, very careful measurement of the impact of your action, and sometimes, some things are just not worth it."[232]

## Conclusion

While the rapid expansion, indefinite duration, and broad accessibility of the internet has benefited society in countless ways, it also carries a heightened risk of harm when individuals are publicly and negatively branded online. This is especially concerning when a state actor, such as a law enforcement agency, is directly responsible for this stigmatization because these agencies are the very institutions tasked with protecting individuals. The prevailing legal framework for claimants alleging reputational harm is insufficient in our technologically advanced world. The law must respond to the realities of technological change; when information is available to anyone across the globe with a single search query, people with claims of reputational harm should have a realistic possibility of legal recourse.

The Supreme Court can remedy the potential lifelong stigmatization of individuals by law enforcement agencies by reworking its reputational harm doctrine. The Court either should overturn precedent by recognizing a liberty interest in an individual's reputation, or it should extend the current test to trigger due process protections in light of the host of proven harms that befall someone who is publicly shamed online. Our rapid technological innovation should not revert society to the primitive shaming tactics of the public stockade in a misguided pursuit of justice.

---

231 *Id.*

232 Bidgood, *supra* note 24 (quoting Hassan Aden, director of research and programs for the International Association of Chiefs of Police).