

Constitutional Law: Federal Civil Rights Act: Absolute Immunity Extended to Prosecuting Attorney. (Imbler v. Pachtman)

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speech. The importance of allowing a free flow of commercial information will have to be weighed against the importance of the restriction which is being challenged. This must be done on a case by case basis, and the weighing process should involve consideration of the factors which have been outlined above. Another case involving commercial speech has been appealed to the Supreme Court, and hopefully it will give the Court an opportunity to elaborate on the *Virginia Citizens* rationale.⁷⁶ However, it appears today that the Court is unwilling to give the fullest measure of first amendment protection to commercial speech.

PAUL M. LOHMANN

Constitutional Law—Federal Civil Rights Act—Absolute Immunity Extended to Prosecuting Attorney—In the recent case of *Imbler v. Pachtman*,¹ the United States Supreme Court held that a prosecuting attorney, acting within the scope of his duties in initiating and prosecuting a case, has absolute immunity from liability for damages for alleged violations of another's constitutional rights under section 1983 of the Civil Rights Act.² In so holding the court further limited the effect of section 1983 in civil tort actions and elevated the position of prosecuting attorney to the same protected status enjoyed by judges³ and grand jurors⁴ acting within the scope of their duties. This article will discuss the decision and attempt to ana-

76. *Population Services Int'l v. Wilson*, 398 F. Supp. 321, 337 (S.D. N.Y. 1975) *prob. juris. noted* *Carey v. Population Services Int'l*, 96 S. Ct. 2621 (1976).

1. 96 S. Ct. 982 (1976).

2. 42 U.S.C. § 1983 (1970) was originally passed as § 1 of the Civil Rights Act of 1871, 17 Stat. 13, and reads in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. See, e.g., *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1952), *cert. denied*, 346 U.S. 835 (1953); *Bradley v. Fisher*, 80 U.S. 335 (1871).

4. See, e.g., *Turpen v. Booth*, 56 Cal. 65 (1880); *Hunter v. Mathis*, 40 Ind. 356 (1872).

lyze its impact on the role of the prosecutor and upon those wronged through prosecutorial misconduct.

The decision of this case marks the apparent end of petitioner Imbler's lengthy odyssey through the California state and federal courts. The series of events leading to this point date back to an attempted armed robbery of a Los Angeles market in 1961 which resulted in the fatal shooting of the store's proprietor. Paul Imbler was involved in an attempted robbery in Pomona, California, a short time thereafter. The day following the Pomona robbery, he turned himself in as an accomplice to that crime. After an investigation, the Los Angeles District Attorney's office charged Imbler with first-degree murder for the Los Angeles market shooting.

At the trial, the State produced identification testimony of one Alfred Costello, who identified Imbler as the gunman at the Los Angeles market. As a defense, Imbler offered the alibi of having spent the night in question touring bars with several friends. The jury rejected Imbler's alibi, found him guilty as charged and fixed punishment at death. On appeal, the California Supreme Court unanimously affirmed the lower court decision.⁵

Later that year, Pachtman, the prosecutor at Imbler's trial, wrote a letter to the Governor of California in which he described evidence which corroborated Imbler's alibi. He also disclosed revelations which impeached the credibility of Costello's identification testimony. Shortly after this letter, Imbler filed a state habeas corpus petition which was unanimously denied by the Supreme Court of California.⁶

One year later, in 1964, Imbler succeeded in having his death sentence overturned on grounds unrelated to the instant action.⁷ Imbler was then sentenced to life imprisonment and no further action was taken until three years later, when he filed a federal habeas corpus petition. The petition was based on the same grounds which the Supreme Court of California had earlier rejected.⁸ The district court viewed the record quite differently than the California court and issued the writ.⁹ The State

5. *People v. Imbler*, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962).

6. *In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963). See also Bergeson, *California Prisoners: Rights Without Remedies*, 25 STAN. L. REV. 1 (1972).

7. *In re Imbler*, 61 Cal. 2d 556, 39 Cal. Rptr. 375, 393 P.2d 687 (1964).

8. See 60 Cal. 2d at 557, 566-68, 35 Cal. Rptr. at 296-98, 387 P.2d at 7-11.

9. *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Cal. 1969).

then appealed to the Ninth Circuit Court of Appeals¹⁰ which affirmed the district court's decision.¹¹ The State's petition for certiorari was denied.¹²

Thus, after a decade of confinement and court battles, Paul Imbler was a free man. In April of 1972, Imbler filed a civil rights action under 42 U.S.C. section 1983 and related statutes against Pachtman and others involved in the investigation and prosecution of the charges stemming from the Los Angeles robbery attempt. The gravamen of Imbler's complaint against Pachtman was that he had "with intent and on other occasions with negligence"¹³ allowed Costello to give false testimony and suppressed prosecution evidence which would have exonerated Imbler from the charges against him.¹⁴

The district court dismissed the complaint, holding that Pachtman was immune from civil liability because the acts complained of were within the traditional area of the prosecutor's official functions. Upon Imbler's appeal, the Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed on the basis that the alleged civil rights violations were committed in the course of "prosecutorial activities which can only be characterized as 'an integral part of the judicial process'."¹⁵ In a decision written by Justice Powell, expressing the view of five members, the Supreme Court affirmed.

After a recital of the pertinent facts, the Court traced the history of the Supreme Court's interpretation of section 1983 in suits against public officials. Historically, the Court has read section 1983 in harmony with general principles of tort immunities and defenses rather than in derogation of them.¹⁶ As a result, the Court has accorded absolute immunity to legislators¹⁷ and judges,¹⁸ and a qualified immunity to governors and

10. The State based its appeal on the claim that the district court had failed to give appropriate deference to the factual determination of the Supreme Court of California as required by 28 U.S.C. § 2254(d) (1970).

11. *Imbler v. California*, 424 F.2d 631 (9th Cir. 1970).

12. 400 U.S. 865 (1970).

13. 96 S. Ct. at 988.

14. Imbler alleged that Pachtman withheld the results of a lie detector test and a fingerprint expert's evidence. He also charged Pachtman with alteration of a police artist's sketch which was used at trial.

15. 500 F.2d 1301, 1302, *quoting* *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1968).

16. 96 S. Ct. at 989, *citing* *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

17. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

18. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. 335 (1871).

other executive officials¹⁹ and to school officials under certain specified circumstances.²⁰ In each instance "the considerations underlying the nature of the immunity of the respective officials in suits at common law led to essentially the same immunity under § 1983."²¹

This case marked the first time the Court addressed the question of a public prosecutor's liability under section 1983.²² The Court examined the record of the federal courts of appeals on the issue of prosecutorial immunity from section 1983 suits and found the results to be "virtually unanimous that a prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties."²³ However, while this statement may be generally accurate, there have been several significant decisions holding that a prosecutor is subject to section 1983 liability for his willful misconduct.²⁴ Moreover, the scope of the immunity accorded in the majority of federal decisions, as well as the reasons given in support of the holdings, has varied.

As a basis for its grant of immunity, the Supreme Court relied on the policy considerations underlying the federal decisions as well as those underlying the common-law immunity of prosecuting attorneys from civil suits for malicious prosecution.²⁵ The Court pointed to the potential detrimental effects on the role of the prosecutor and the administration of criminal justice which could result from a grant of qualified or limited

19. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

20. In *Wood v. Strickland*, 420 U.S. 308 (1975), the officials were not liable so long as they could not reasonably have known that their action violated clearly established constitutional rights and did not act with malicious intention to injure another. *Cf. O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975).

21. 96 S. Ct. at 990.

22. However, in 1926, the Court affirmed in a memorandum opinion the decision of the Court of Appeals for the Second Circuit, *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), which held that an assistant to the Attorney General of the United States was immune from a civil common law action for malicious prosecution. 275 U.S. 503 (1927).

23. 96 S. Ct. at 990; *see* cases cited therein at note 16.

24. *See, e.g., Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), *vacated and remanded for reconsideration in light of Imbler v. Pachtman*, 96 S.Ct. 1453 (1976); *Picking v. Pennsylvania R.R.*, 151 F.2d 240 (3d Cir. 1945), *cert. denied*, 332 U.S. 776 (1947).

25. For a general discussion of these considerations, *see* RESTATEMENT OF TORTS § 656 (1938); Keefe, *Personal Tort Liability of Administrative Officials*, 12 *FORDHAM L. REV.* 130 (1943); Note, *Liability of Public Officials to Suit under the Civil Rights Acts*, 46 *COLUM. L. REV.* 614 (1946).

immunity only.²⁶ The Court expressed the concern that potential liability would tend to inhibit the discreet prosecution of criminal cases and that the burden of defending civil suits would consume far too much of the frequently overtaxed time and resources of the prosecutor's office.

In a concurring opinion, Mr. Justice White, joined by Justices Brennan and Marshall, agreed with the majority's result that:

[A] prosecutor is absolutely immune from suit for money damages under 42 U.S.C. § 1983 for presentation of testimony later determined to have been false, where the presentation of such testimony is alleged to have been unconstitutional solely because the prosecutor did not believe it or should not have believed it to be true.²⁷

However, the concurring justices rejected any implication that the absolute immunity extends to suits alleging that the prosecutor unconstitutionally suppressed evidence.²⁸ They contended that the grant of absolute immunity was not necessary or even helpful in protecting the judicial process. Instead, these justices suggested that liability in damages for unconstitutional or illegal conduct would have the very desirable effect of deterring such conduct. Justice White considered that immunity from suit alleging an unconstitutional suppression of evidence was counterproductive, since it would discourage the disclosure of evidence which is vital to our judicial system and which is encouraged by rules such as the privilege accorded to prosecutors in the law of defamation.²⁹

The majority and concurring opinions illustrate the conflicting views on the necessity and utility of prosecutorial im-

26. It is important to note the procedural difference between an absolute immunity and a qualified or limited immunity. An absolute immunity defeats a suit at its outset, as long as the acts complained of were committed while acting within the scope of the immunity. Whether an official is protected under a qualified immunity is dependent upon the circumstances and motivations of his actions, and if the claim is properly pleaded, this can often be determined only after all of the relevant evidence is introduced at trial. *See Wood v. Strickland*, 420 U.S. 308, 320-22 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974).

27. 96 S. Ct. at 996.

28. *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of evidence bearing on degree of crime as well as evidence bearing upon guilt is a denial of due process). *See also United States v. Poole*, 379 F.2d 645 (7th Cir. 1967); *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963). *Cf.* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.11 and Commentary at 100-101 (App. Draft 1971).

29. 96 S. Ct. at 996.

munity. Underlying this disagreement are the basic differences of opinion with regard to the propriety of section 1983 as a basis for civil tort actions.³⁰ Section 1983, a long-dormant section of the Civil Rights Act of 1871, has become the source of a flood of private rights actions in the federal courts.³¹ Judicial malevolence toward the act — Justice Frankfurter once described it as “loosely and blindly drafted”³² — and concern for the principles of federalism³³ has led the courts to constrict the application of section 1983. Three principal techniques have been used to effect this restrictive application:³⁴ (1) by construction of the eleventh amendment,³⁵ to prohibit section 1983 suits against the states by a narrow interpretation of the word “person” in the Act³⁶ and through the application and extension of common law immunities as in *Imbler*; (2) by use of doctrines such as abstention to avoid deciding certain actions; and (3) by the application of the principles of *res judicata* to prevent collateral attack of state court decisions through section 1983.³⁷

When viewed against the history of narrow interpretation of the ambit of the Civil Rights Act of 1871, the grant of absolute immunity to the prosecutor is a predictable extension of past decisions. Such a grant of immunity is likely to have both beneficial and adverse effects on the criminal justice system: “To be sure, this immunity does leave the genuinely wronged

30. For a good illustration of these differing opinions, see *Monroe v. Pape*, 365 U.S. 167 (1960) (Harlan, J., concurring and Frankfurter, J., dissenting); Averitt, *Federal Section 1983 Actions after State Court Judgment*, 44 COLO. L. REV. 197 (1972).

31. In McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974), it is noted that between the fiscal years of 1960 and 1972, the number of actions under section 1983 filed in the federal courts had increased from approximately 300 in 1960 to approximately 8,000 in 1971. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR 287, Table C-2.

32. *Stefanelli v. Minard*, 342 U.S. 117, 121 (1951).

33. Perhaps the most articulate expression of this concern is found in Justice Frankfurter's dissent in *Monroe v. Pape*, 365 U.S. 167, 211-58 (1960). See also Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW AND THE SOCIAL ORDER 557.

34. Cf. McCormack, *Federalism and Section 1983*, *supra* note 31.

35. *Hans v. Louisiana*, 134 U.S. 1 (1890); *In re Ayers*, 123 U.S. 443 (1887).

36. For example, in *Monroe v. Pape*, the Court held that “person” did not include municipal corporations, placing them outside the purview of the act. 365 U.S. at 911.

37. The judicial application of the latter two techniques, use of the abstention doctrine and the application of principles of *res judicata*, is discussed extensively in McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 VA. L. REV. 250 (1974).

defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty."³⁸

Justice White expressed the concern that such a grant of immunity would remove a necessary deterrent to prosecutorial malversation. The majority pointed to the fact that prosecutors are not beyond the reach of the criminal law since they can be punished criminally for willful deprivations of constitutional rights based on 18 U.S.C. section 242.³⁹ However, actions under section 242 have been infrequent and on its face the scope of the statute is much narrower than that of section 1983. Section 242 has been described as "a federal criminal statute having to do with subjecting one to a different punishment because he is alien or because of color or race."⁴⁰ Moreover, the number of actions brought under this section is further limited by the fact that "[a]ny charge thereunder may only be initiated by a Federal Grand Jury or a United States Attorney."⁴¹

Thus with the deterrent effect of section 1983 liability eliminated, the already broad latitude accorded a prosecuting attorney⁴² appears to be further extended. This is especially true in Wisconsin where the district attorney is a constitutional officer⁴³ and is endowed with a discretion that approaches the quasi-judicial.⁴⁴ The Wisconsin Supreme Court in *State ex rel.*

38. Justice Powell, speaking for the majority in *Imbler*, 96 S. Ct. at 993.

39. Whoever under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 242 (1970).

40. *Kennedy v. Anderson*, 373 F. Supp. 1345, 1346 (E.D. Okla. 1974).

41. *Id.*

42. See *Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971), and *Briatel, Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960):

Surely it must be conceded at the outset that illegal or unauthorized conduct by public officials is a net evil, regardless of offsetting advantages. It is that, if only because it breeds general disrespect for law. It is also that because it leads to the unbridled and the oppressive. So too, it must be conceded that discretion — even legally permissible discretion — involves great hazard. It makes easy the arbitrary, the discriminatory and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption. It is conducive to the development of a police state — or, at least a police-minded state.

43. WIS. CONST. art. VI, § 4.

44. *State v. Pearson*, 195 Wis. 351, 359, 218 N.W. 367, 370 (1928).

*Kurkierewicz v. Cannon*⁴⁵ held that performance of the district attorney's function, being of a discretionary nature, could not be compelled by mandamus:

[T]he district attorney is not answerable to any other officer of the state in respect to the manner in which he exercises those powers. True, he is answerable to the people, for if he fails in his trust he can be recalled or defeated at the polls. In the event he wilfully fails to perform his duties or is involved in crime, he may be suspended from office by the governor and removed for cause. These, however, are political remedies that go not to directing the performance of specific duties but rather go to the question of fitness for office.⁴⁶

It would appear that in Wisconsin the threat of gubernatorial removal is the only truly operative deterrent against wrongful conduct on the part of the district attorney during the course of his term. A John Doe investigation of a prosecutor's activities "is a feeble investigative device indeed, unless both the district attorney and the magistrate are amenable to using their offices in furtherance of the investigation."⁴⁷ The magistrate at a John Doe proceeding is only obligated to hear the complainant and his witnesses. Only at the district attorney's request, and subject to the magistrate's discretion, may other witnesses be subpoenaed and examined.⁴⁸

The other supposed deterrent to prosecutorial malfeasance is the threat of defeat at the polls. The effect of this deterrent on official conduct is questionable for two reasons: (1) defeat at the polls removes the official at the expiration of his term in office; it is of no concern to those officials not seeking reelection; (2) the reputation of the prosecutor and his popularity at the polls is often linked to his ability to obtain convictions; and this fact may actually encourage the self-serving official to use unconstitutional means to secure convictions. Thus, the security of the citizenry from illicit activities on the part of district and prosecuting attorneys is only as sound as the integrity of those who hold the office.

Unfortunately, history has shown that dishonest men have

45. 42 Wis. 2d 368, 166 N.W.2d 255 (1969); cf. *Thompson v. State*, 61 Wis. 2d 325, 212 N.W.2d 109 (1973).

46. *Id.* at 378-79, 166 N.W.2d at 260.

47. *Id.* at 377, 166 N.W.2d at 259.

48. *Id.* Cf. Wis. STAT. § 968.26 (1973).

occupied the position of prosecutor all too often.⁴⁹ Absolute immunity forecloses any possibility that those genuinely and intentionally wronged through prosecutorial misconduct may be recompensed for their anguish or wrongful imprisonment. The majority in *Imbler* felt that this situation was unfortunate but necessary in order to serve "the broader public interest."⁵⁰ The number of people who will be left without redress for civil rights violations as a result of this decision is small when compared to the general populace. However, a significant number of individuals are today denied any compensation for serious deprivations of rights as a result of the consistently constrictive interpretation of section 1983 by the federal and supreme courts.⁵¹ Today, section 1983, once a watchdog over private rights, retains its bark in theory but in practice carries a feeble bite.

Thus, it is evident that under our present system an equitable answer "must be found in a balance between the evils inevitable in either alternative"⁵² of denying those wronged their just compensation or impeding the orderly performance of governmental functions. Judge Woodbury of the First Circuit Court of Appeals in his concurring opinion in *Kelly v. Dunne* suggested a procedure to be used in civil rights actions against public officials.⁵³ He proposed that officials be granted a conditional immunity by permitting an action only upon a clear showing of "malice, corruption, or cruelty" and "ruthless indifference to a citizen's rights."⁵⁴ The official's time would be protected by providing for summary judgment for the defendant unless the plaintiff could produce solid evidence that the officer's acts were in excess of his powers and inspired by bad faith.

49. The cases illustrating this point are far too numerous to list. For examples of prosecutorial impropriety see *Hilliard v. Williams*, 516 F.2d 1344 (6th Cir. 1975), *vacated and remanded for reconsideration in light of Imbler v. Pachtman*, 96 S.Ct. 1453 (1976), wherein the prosecutor directed a law enforcement officer to give false testimony implying that stains on the accused's jacket were blood, and withheld an F.B.I. report which showed that such stains were not blood, in order to obtain a murder conviction, and *United States v. Poole*, 379 F.2d 645 (7th Cir. 1967), where the prosecutor knowingly withheld a physician's report that the alleged rape victim had not had sexual intercourse.

50. 96 S. Ct. at 993.

51. McCormack, *Federalism and Section 1983*, *supra* note 31.

52. 96 S. Ct. at 994, quoting Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579, 581, *cert. denied*, 339 U.S. 949 (1950).

53. 344 F.2d 129 (1st Cir. 1965).

54. *Id.* at 135.

Another alternative⁵⁵ to absolute immunity would be to preserve the immunities and good faith defenses of public officials and still provide a compensatory remedy to citizens harmed by unconstitutional actions of the officials. This system would require an abrogation of the doctrine of sovereign immunity to allow suits against the appropriate governmental entity without subjecting the individual officers to personal liability for their mistakes of judgment. Such a reparations system, somewhat akin to the vicarious liability arising under the doctrine of respondeat superior, would: (1) avoid the chilling effects on public service; (2) provide just reparations for those genuinely wronged through official misconduct; (3) be a more likely vehicle for effecting necessary systemic and institutional changes than liability on the part of the individual officer.⁵⁶

In his dissenting opinion in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,⁵⁷ Chief Justice Burger recommended a system of reparations for those suffering damages as a result of illegal searches and seizures. His recommendation, which could be applied to other civil rights violations at the hands of public officials, called for the enactment of legislation by Congress which would: (1) waive sovereign immunity as to unconstitutional acts of officials committed in the performance of assigned duties, (2) create a cause of action for damages resulting from such acts, and (3) create a quasi-judicial tribunal to adjudicate the claims for such damages.⁵⁸

Each of these three proposals has merit. Each seeks to remedy a situation which has presented the courts with the necessity of making difficult choices between the conflicting policies, of compensation for those wronged on the one hand and removal of impediments to the orderly and efficient operation of vital public functions on the other. The case of *Imbler v. Pachtman* is significant for the expansive effect it will have on prosecutorial discretion and for the impact it will have on those wronged through illicit action on the part of a prosecutor. However, the most important message of this case is that legislative action on the part of Congress is required to resolve the difficult

55. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

56. *Id.* at 1555-58.

57. 403 U.S. 388 (1971).

58. *Id.* at 422-23.

problems which face the courts in deciding cases under section 1983. The statute for all practical purposes is overly broad. In response to this, the courts have given the section such restrictive interpretation as to render it ineffective. Only through a redrafting of section 1983 or through additional definitive legislation can an equitable balance be struck between the conflicting policies of just compensation for those genuinely deprived of protected rights and freedom from undue burdens on efficient performance by public officials.

PATRICK R. GRIFFEN

Constitutional Law—Fourteenth Amendment Due Process—Availability of Federal Remedies—Reputation as a Protected Interest—In *Paul v. Davis*,¹ the United States Supreme Court considered whether a person's reputation was a liberty interest protected by the fourteenth amendment.² In holding that the scope of 42 U.S.C. section 1983³ does not extend to defamation by a municipal police department, the Court has significantly changed its approach to civil liberties questions and has restricted the availability of federal forums for the litigation of those questions. *Paul v. Davis* contradicts many well established principles of civil liberties law. Numerous weaknesses appear in the Court's discussion of (1) the relationship of state tort remedies to federal remedies, (2) the nature of the interest in reputation, and (3) the source of the rights protected by the fourteenth amendment. This article will examine the Court's rationale and its implications.

Paul v. Davis arose when the police chiefs of the City of Louisville, Kentucky, and surrounding Jefferson County distributed a flyer to local merchants containing the names and

1. 96 S. Ct. 1155 (1976).

2. The Court also considered Mr. Davis's right of privacy, a question that will not be dealt with here.

3. Section 1983 reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).