Freedom for Reputation

WHILE WE FIND ourselves in rather frequent disagreement with the Supreme Court these days, it is rare that we encounter an opinion that leaves us aghast, as did one announced by the justices last week. The case involved the question of whether a person falsely labeled a criminal by a local police department has any redress under federal law. The answer the Court gave, by a vote of 5 to 3, was no. While that answer is troubling enough, it is not nearly as bad as the rationale by which the Court reached it. The majority opinion, written by Justice William H. Rehnquist, demonstarted not only great insensitivity to legitimate fears of citizens, but also treated prior decisions of the Court with remarkable disdain.

It is, for example, extremely difficult to square one of the key holdings in this case—that an individual's reputation is not part of the "liberty" or "property" protected by the Constitution's due process clauses—with what the Court said just five years ago. Then, the Court held unconstitutional a Wisconsin statute that authorized local officials to post, without notice or a hearing, the names of persons who were hazards to themselves or others because of excessive drinking. In striking down that law, the Court said, ". . . (W)here the state attaches 'a badge of infamy' to the citizen, due process comes into play . . . Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

That language seems to us to be reasonably clear but Justice Rehnquist found a way around it. The Court was not really concerned with the *act* of "posting" in that case, he concluded, but the *effects* of posting, which were to deny those labeled as exeessive drinkers the right to buy liquor. That's a neat distinction but one can search for it in vain in the older opinion which described the label of excessive drinker as degrading, unsavory, a stigma, the mark of illness, an official branding and a badge of infamy. In other words, Justice Rehnquist simply revised history by reading into the old case something that isn't there and reading out what is there. The Court, of course, is entitled to change its mind and to reverse itself. But when it does so, it also has an obligation to come clean about what it is doing.

The result of the Court's new view is that local officials must meet the requirements of due process to take away rights granted by state governments (the rights to buy liquor, drive a car, and go to school are those the Court cited) but do not have to meet those requirements to take away reputations. Presumably, from the way Justice Rehnquist described this view, those officials would have to meet such due process requirements concerning a reputation if a state passed a law granting every newborn child an unblemished one. To be fair about it, we should add that if a local official defames your reputation falsely and because of his act you lose your job, you still may be able to get help from the federal courts. That is because the Court sees a job as part of the "property" protected by the due process clause. Such a view reflects an approach to the Constitution popular in the early 20th century when the Court had a much greater respect for property than liberty.

We recognize the problem the Justices were trying to avoid in this case, which was that of opening up the federal courts to libel cases against local officials which traditionally fall to the state courts. This case involved an almost classic libel —describing a person as an "active shoplifter" and warning local merchants to watch him although the one charge against him was still pending (it was soon dropped) when the flyer was distributed. But the way in which the Court decided it runs far beyond such simple cases. Indeed, this opinion opens up the possibility, as Justice William J. Brennan put it in a dissent, "that no due process infirmities would inhere in a statute constituting a commission to conduct *ex parte* trials of individuals, so long as the only official judgment pronounced was limited to the public condemnation and branding of a person as a Communist, a traitor, an 'active murderer,' a homosexual, or any other mark that 'merely' carries social opprobrium." That is what we meant by the insensitivity of Justice Rehnquist's opinion to legitimate fears. By trying to curtail the meaning of the word "liberty" so sharply he has put the Court on a course it may some day regret.