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DEFAMED BUT RETAINED PUBLIC EMPLOYEES:
ADDRESSING A GAP IN DUE PROCESS
JURISPRUDENCE

Nat Stern*

The Constitution restrains the discretion of public employers in a variety of ways. A public employee may not be dismissed for speech on a matter of public concern unless the comment demonstrably subverts the mission of the employee’s office. Likewise, a public employee who may be terminated only for cause must be afforded an adequate opportunity to respond to allegations of unfitness before being dismissed. Moreover, even an employee not entitled to tenure may, under certain circumstances, have recourse if the announced grounds for dismissal defame the employee and inflict a tangible injury on her.

In each of these instances, however, the event warranting constitutional relief is loss of a public position. In particular, stigma imposed in the course of discipline falling short of termination—for example, suspension or reprimand—is generally thought not to trigger procedural due process. Thus, whether a defamatory assessment of a public employee impinges on a liberty interest may rest on whether the statement formally occurred as part of a dismissal or other type of action.

This Article questions the wisdom of drawing a stark dichotomy between termination and other proceedings in which employees may be subject to false and damaging evaluations. After reviewing the origins of the controversial “stigma-plus” doctrine and its elaboration by the

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3. See infra Part I.A.
4. See infra notes 12-27 and accompanying text.
Supreme Court, this Article examines the doctrine’s treatment by lower courts in the context of public employment. This Article then argues for at least a minimal degree of procedural protection for maligned public employees who have retained their employment. Finally, conceding the unlikely prospect that this approach will be incorporated into federal due process doctrine, this Article proposes a model that could be adopted through construction of state constitutions.

I. THE RISE AND PERSISTENCE OF “STIGMA-PLUS”

A. From Roth to Siegert: The Exclusion of Reputation as a Liberty Interest

Modern procedural due process doctrine governing public employment effectively begins with the Supreme Court’s decision in Board of Regents v. Roth.\(^5\) The Court held that Roth, who challenged the termination of his stint as an assistant professor, was not entitled to a hearing because he had not been deprived of a property\(^6\) or liberty interest. The Court did, however, indicate that an employee’s liberty could be implicated where the state linked his discharge with an accusation that “might seriously damage his standing and associations in [the] community.”\(^7\) In a similar vein, the opinion suggested that a deprivation of liberty would take place where the manner of termination “imposed on [the discharged employee] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.”\(^8\) These statements, along with the Court’s approving citation to the proposition set forth in Wisconsin v. Constantineau\(^9\) 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

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5. 408 U.S. 564 (1972).
6. The Court stated that property interests “are defined by existing rules or understandings that stem from an independent [i.e., from the Constitution] source such as state law.” Id. at 577. Since Roth’s contract had not provided for renewal at the end of its term, he did not have an expectation of continued employment sufficient to create a property interest. See id. at 578. A contemporaneous decision, Perry v. Sindermann, 408 U.S. 593 (1972), furnished an example of anticipation of renewed employment rising to the level of a property interest. There, the university instructor dismissed without a hearing plausibly alleged that the university had a de facto tenure system assuring those in his position of continued employment if their work was satisfactory. See id. at 600-03.
7. Roth, 408 U.S. at 573.
8. Id.
opportunity to be heard are essential," could reasonably be read as recognizing reputation as a liberty interest protected by the Due Process Clause.  

Three years later, however, the Court repudiated the notion that damage to reputation per se implicates due process safeguards. In *Paul v. Davis*, the plaintiff alleged that police officials had falsely designated him as an “active shoplifter” in a flyer distributed to local merchants. The Court rejected Davis’s claim that the damage done to his reputation entitled him to relief under section 1983. Assuming that impairment of employment opportunities and other harms could result from the flyer, the Court found that these consequences would not retroactively transform the false portrayal into a deprivation of liberty. Rather, the crucial consideration was that the original injury was to Davis’s “reputation alone,” unaccompanied by damage to “more tangible interests.” In the Court’s eyes, its precedents had never endorsed the principle that “mere defamation” amounted to deprivation of liberty; where due process had come into play, the state’s action had simultaneously diminished a “right or status” that the victim had previously enjoyed under state law.  

*Paul* provoked an avalanche of criticism. Many have accused the opinion’s author, then Justice Rehnquist, of having deliberately distorted precedent to exclude reputation from the roster of liberty interests. A
number of commentators have perceived the decision as having been largely animated by the aim of curbing access to federal courts under section 1983. Some have detected inconsistency between Paul's refusal to accord enhanced status to the reputational interest under due process and the Court's limitations on First Amendment protection for individuals against defamation suits. More broadly, it has been argued that Paul's denial of an opportunity to participate in governmental decisions that may damage one's good name contradicts the value of individual dignity inherent in due process.

Whatever the strength of these criticisms, however, Paul's holding has persisted, and in particular its narrow construction of Roth has colored consideration of subsequent due process claims by allegedly defamed public employees. While preserving the principle that defamatory grounds for dismissal can violate due process, the Court has insisted that a number of conditions be met. In Bishop v. Wood, the Court held that the allegedly false reasons given for an employee's discharge could not infringe a liberty interest unless those reasons were publicly disclosed. Further, Codd v. Velger required that those reasons


be false;\textsuperscript{26} a pejorative assessment that does not imply specific untrue accusations, or dubious but accurate grounds for dismissal, presumably do not qualify.\textsuperscript{27}

Finally, the Court appears to have effectively confined public employees' suits for defamation by the state to instances of termination. Paul found the language of Roth "inconsistent with any notion that a defamation perpetrated by a government official but unconnected with any refusal to rehire would be actionable under the Fourteenth Amendment."\textsuperscript{28} Bishop's requirement of public disclosure referred only to instances in which the complaining employee had been discharged.\textsuperscript{29} Likewise, the Codd Court explained that a claim of stigmatization must arise from "some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation."\textsuperscript{30} Perhaps most tellingly, the Court in Siegert v. Gilley\textsuperscript{31} dismissed a suit by a former government employee against his former supervisor who wrote to a prospective new employer that he could not recommend the plaintiff because he was inept, unethical, and untrustworthy.\textsuperscript{32} While the plaintiff, Siegert, alleged that Gilley's letter had caused Siegert's rejection for the new position, the Court in a terse discussion found crucial that Gilley's alleged defamation "was not uttered incident to the termination of Siegert's [prior] employment."\textsuperscript{33} Rather, Siegert had already resigned from his earlier position when the letter was written. In thus emphasizing the uncoupling of Siegert's departure from his job and the subsequent alleged libel, the Court overrode the dissent's objection that it had misread Paul in "suggest[ing] that reputational injury deprives a person of liberty only when combined with loss of present employment, not future employment."\textsuperscript{34}

\begin{thebibliography}{9}
\bibitem{25} 429 U.S. 624 (1977) (per curiam).
\bibitem{26} See id. at 628.
\bibitem{27} In this respect the Court's due process jurisprudence appears substantially aligned with its First Amendment doctrine governing defamation suits against private individuals. See generally Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), discussed at notes 54-55 infra and accompanying text; Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 778 (1986) (making liability of media defendant for statement on matter of public concern dependent on proof of statement's falsity).
\bibitem{28} Paul v. Davis, 424 U.S. 693, 709 (1976).
\bibitem{30} Codd, 429 U.S. at 627 (emphasis added).
\bibitem{32} See id. at 228.
\bibitem{33} Id. at 234.
\bibitem{34} Id. at 241 (Marshall, J., dissenting).
\end{thebibliography}
B. The Understanding of "Stigma-Plus" in the Lower Courts

The principle that the state must harm more than one's reputation alone to violate the liberty shielded by due process is now well-settled, leaving only questions of its application to be resolved. For example, while commentators tend to regard sex offender notification statutes ("SORAs") as implicating due process, courts have been more divided on the issue. Similarly, federal courts of appeals have split on whether stigmatizing material in an employee's personnel file must actually be disseminated to meet Bishop's requirement of publication. Differences over the due process ramifications of other government action affecting one's standing in the community may loom as well.

On the question of whether disciplinary action short of termination can qualify as "stigma-plus," however, courts seem to have received a clear signal from the high court. Even courts of appeals that adopt a more expansive view of what constitutes publication of defamatory statements apparently assume the requisite of the employee's dismissal.


37. Compare, e.g., Hughes v. City of Garland, 204 F.3d 223, 228 (5th Cir. 2000) (rejecting due process claim where stigmatizing material in employee's file had not been disclosed), and McCullough v. Wyandanch Union Free Sch. Dist., 187 F.3d 272, 281-82 (2d Cir. 1999) (same), with Buxton v. City of Plant City, 871 F.2d 1037, 1045-46 (11th Cir. 1989) (holding that the presence of false statement in file of dismissed employee implicates due process). For a summary of the division among courts of appeals as of a few years ago, see Brannan, supra note 24, at 183-87.


39. See, e.g., Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 633 (2d Cir. 1996) (stating that procedural due process is implicated "[w]hen the state makes stigmatizing allegations in the course of dismissing an employee"); Ledford v. Delancey, 612 F.2d 883, 887 (4th Cir. 1980) (recognizing plaintiff employee's right "that his personnel file contain no substantially
While an unequivocal demotion may occasionally be treated as tantamount to termination, and thus warrant due process review, less severe disciplinary action is excluded. As the Eleventh Circuit Court of Appeals recently declared, "a 'discharge or more' is required in order to satisfy the 'plus' element of the stigma-plus test. A transfer or a missed promotion is not enough." In accordance with this approach, employees allegedly stigmatized in the course of a reassignment are routinely rebuffed when bringing due process claims. Even suspensions are generally considered insufficiently prejudicial to require a hearing.

II. THE INCONGRUITY OF DENYING DUE PROCESS IN NONTERMINATION ACTIONS

A. The Unjustified Wall Between Termination and Other Discipline

The wholesale distinction between dismissal and other disciplinary actions in employers' disparagement of employees appears to be rooted more in intuition than in logic. Obviously, loss of one's employment with a public agency altogether constitutes a more drastic injury than a diminution of the value of that employment through demotion, suspension, transfer, or reprimand. On the other hand, this is often a matter of degree rather than kind. At least in the case of relegation to a lesser rank, the change in status deemed crucial to activating due process false information with respect to his work performance or the reasons for his discharge when that information is available to prospective employers") (emphasis added). In Schneeweis v. Jacobs, No. 91-2665, 1992 U.S. App. LEXIS 15623, at *5-8 (4th Cir. July 7, 1992), the court did consider the liberty interest claim of a suspended basketball coach. The court rejected the claim, however, on the grounds that no derogatory information had been placed in the coach's personnel file. See id. at *8-9. Moreover, the court may have regarded suspension under the circumstances as tantamount to dismissal. See id. at *5-8.


41. Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1303 (11th Cir. 2001).

42. See, e.g., Oladeinde v. City of Birmingham, 963 F.2d 1481, 1486 (11th Cir. 1992); Hughes v. Whitmer, 714 F.2d 1407, 1417 (8th Cir. 1983); Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989); Blevins v. Plummer, 613 F.2d 767, 768 (9th Cir. 1980); Moore v. Otero, 557 F.2d 435, 438 (5th Cir. 1977).

is present. Demotion, or even transfer to a technically comparable but manifestly less desirable position, will doubtless be viewed by many as a harm at least as grievous as the denial of access to liquor that the Paul Court found crucial to Constantineau’s outcome.

Indeed, termination as a requisite to due process consideration assumes a bright line between dismissal and other discipline that may be blurred in reality. At a minimum, assignment to a lower position represents termination of one’s present position in a basic, if not the most extreme, sense. A transfer in many instances can plausibly be viewed as effectively ending one’s current job. Even a suspension, depending on its nature and length, can significantly diminish one’s professional status. While the gap between termination and other actions will often or even usually be pronounced, current doctrine errs in assuming that it invariably will be.

It is worth underlining that the nontermination discipline at issue in this context does not take place in the abstract. Rather, the discipline is accompanied by—and presumably the result of—the employer’s harsh, and allegedly false, appraisal of the employee’s performance. The action amplifies the force of the criticism that prompted it. Thus, the synergy between defamation and altered employment status that qualifies as stigma-plus in the termination setting operates here as well, if less dramatically.

Moreover, the same concerns for participation, accuracy, and dignity that presumably underlie recognition of due process in the case of termination-cum-smear do not categorically disappear when the employer’s axe falls short of entirely severing the employee’s association with the agency. A suspended employee, for example, may well be relieved that she has been allowed to retain a position with the agency. However, she is still likely to feel keenly the absence of any process before she was openly branded—assuming that Bishop’s publication requirement has been met—as incompetent, insubordinate, or otherwise defective.

The stark dichotomy between dismissal and other employer action where due process is at stake stands in contrast to employment law, where statutory proscriptions extend to nontermination conduct that impinges on the statute’s underlying values. For example, bans on gender discrimination in employment encompass far more than outright dismissal based on sex.

45. See id. at 708-09.
behavior that falls short of firing an employee may qualify as prohibited harassment. 47

The formal separation of dismissal from other employer decisions also departs philosophically, if not technically, from First Amendment doctrine in other areas. Perhaps most notably, the Court has refused to confine the bar on dispensing patronage according to political affiliation to instances of the discharge of public employees for belonging to a particular party. 48 Rather, in Rutan v. Republican Party of Illinois, 49 the Court held that a variety of personnel decisions involving low-level employees—promotions, transfers, recalls, and hiring—could not be based on party affiliation. 50 The Court determined that the same rationales undergirding the First Amendment's general prohibition of patronage firing applied to these practices as well. While the penalties for exercising the right of association in these instances fall short of the ultimate price of immediate dismissal, the Court recognized that they are hardly trivial: "Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a 'temporary' layoff." 51 Likewise, the government's asserted interests in applying partisan criteria, such as efficiency and fostering party-based democracy, were deemed no more promoted in these contexts than in the case of dismissal. 52 Similarly, it should be recognized that the values

47. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (stating that "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality"); Christopher M. Courts, An Adverse Employment Action—Not Just an Unfriendly Place to Work: Co-Worker Retaliatory Harassment Under Title VII, 87 IOWA L. REV. 235, 243-45 (2002).

48. Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507, 517-18 (1980), established that public employees can't be dismissed because of their refusal to support the political party of their superior, unless party affiliation is an appropriate requirement for the position involved.


50. See id. at 65, 75.

51. Id. at 74.

52. See id.; see also O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 712 (1996) (invalidating city's removal of independent contractor in alleged retaliation for contractor's support of mayor's opponent in election campaign).
embodied by due process are implicated, if with lesser force, by allegedly defamatory evaluations made in the course of personnel decisions other than dismissal.

It is also instructive that in defamation doctrine itself, the Court has eschewed bright-line distinctions that would automatically place an entire category of statements beyond the reach of plaintiffs. In Milkovich v. Lorain Journal Co., the Court rejected the proposition that expression denominated as “opinion” should be fully privileged in every instance. Rather, the Court found more logical a case-by-case determination of whether the statement in question conveyed to a reasonable audience a provably false assertion. Again, a similarly individualized assessment of whether a putatively false reason for a particular personnel decision rises to the level of “stigma-plus” seems more appropriate than a blanket assumption that nontermination actions must inevitably fall below it. Indeed, the Court has refused to adopt a crabbed notion of the injury that can result from defamatory expression; on the contrary, the Court has embraced a sweeping conception of the harms that can warrant an award of actual damages.

B. Impact of Defamation on Nonterminated Employees

In some ways, current doctrine leaves a defamed but retained public employee in a worse legal position than if she had been simply discharged. If the alleged defamation takes place as part of a dismissal, then the employee has recourse to remedies for violation of due process. However, if the government treats the employee as deserving censure but not release, then this adverse evaluation may shadow the employee throughout her service with the agency, and perhaps beyond. If the employee later voluntarily leaves the agency, or she is terminated on grounds unrelated to the earlier disparagement, then the libelous assessment may haunt her pursuit of future positions without her having had the opportunity to respond.

53. See infra Part III for suggestions as to how to accommodate the lesser impact of personnel decisions short of dismissal.
55. See id. at 21. The Court confined its holding to statements on matters of public concern, see id. at 19-20, and reserved the question of whether it applied to cases involving nonmedia defendants. See id. at 20 n.6.
In a sense, this line of argument extends the logic of those courts of appeals that have adopted a more expansive interpretation of Bishop’s publication requirement. Courts finding the likelihood of disclosure of stigmatizing information in a discharged public employee’s personnel file to meet the publication requirement have recognized the potential of this damaging material to interfere with prospects for other employment. The Second Circuit Court of Appeals has considered publication to have occurred

“where the stigmatizing charges are placed in the discharged employee’s personnel file and are likely to be disclosed to prospective employers.” We have recognized, in fact, that this is the very action that circulates the stigmatization. Potential future employers undoubtedly will consult plaintiff’s prior employer when she applies for supervisory positions.

The court had earlier explained that compelling an employee under these circumstances to wait until the derogatory comments had actually deprived her of future employment would place her in an untenable position. As one court vividly put it, the combination of the accusation’s appearance in the file and the likelihood of its disclosure trapped the employee “between the devil and the deep blue sea.”

Where the disparaging information is placed in the file in connection with discipline that leaves the employee within the agency, the likelihood that the information will be disclosed to a potential future employer is admittedly less than when the disparagement is accompanied by dismissal. Realistically, however, the possibility of disclosure is far from negligible. Public employees, after all, often do move on to other positions, and it seems reasonable to assume that a disciplined employee is more likely than others to eventually leave. If she is not provided a contemporaneous opportunity to question her employer’s allegedly false statement, then the charge may haunt her later application for new employment. In that case, the prejudice to her job prospects will be substantial, if not as severe as if the charge had occasioned her dismissal.

57. See supra note 37 and accompanying text.
59. Brandt, 820 F.2d at 45 (citation omitted) (internal quotations omitted); accord Ledford v. Delancey, 612 F.2d 883, 886 (4th Cir. 1980) (stating that dismissed employee had “a protected right with respect to the contents of his personnel file when that file may be the subject of inspection by prospective employers”).
Moreover, someone whose pursuit of different employment is plagued by an old unanswered charge may encounter formidable evidentiary obstacles in attempting to satisfy potential employers of the charge’s falsity. First, of course, is the sheer staleness of evidence to rebut accusations that may be years old. The law has long sought to guard against the erosion of a party’s ability to prove her case because of faded memories and the unavailability of other supportive material. Many job applicants hobbled by damning charges in their file may have great difficulty locating, much less enlisting, witnesses who can offer refuting testimonials. Ironically, some public employees may be better off in the long run if their employer’s disgruntlement provokes their dismissal rather than less draconian measures. Whatever the circuits’ various understandings of publication, current doctrine undoubtedly does provide due process for the terminated, allegedly defamed employee where publication has occurred. Thus, an opportunity exists for an airing of the charges at a time when potentially corroborative witnesses and other evidence are relatively readily accessible.

The argument for not categorically distinguishing between termination and other discipline is especially strong insofar as some courts may not require that the allegedly false contents of a personnel file pertain to an employee’s dismissal in order for the discharge to trigger due process review of the file. In that case, the employee’s right to address a particular charge would hinge on the fortuity of whether the charge had been leveled in the context of dismissal or other action. Thus, an employee might be assigned to another position for allegedly having defied an agency rule, chafe under the less rewarding conditions, and ultimately resign in discouragement; the employee would not have had a liberty interest in challenging the memorialization of her supposedly obstreperous behavior. However, if that employee remained with the

60. This is a major purpose of statutes of limitations. See Jordache Enters., Inc. v. Brobeck, Phleger & Harrison, 958 P.2d 1062, 1074 (Cal. 1998); Totura & Co. v. Williams, 754 So. 2d 671, 681 (Fla. 2000), appeal dismissed sub nom., Williams v. Garden City Claims, Inc., 783 So. 2d 267 (Fla. Dist. Ct. App. 2001); Blanco v. American Tel. & Tel. Co., 689 N.E.2d 506, 513 (N.Y. 1997).

61. In Ledford v. Delancey, 612 F.2d 883, 887 (4th Cir. 1980), the court stated broadly that the discharged employee had “a right that his personnel file contain no substantially false information with respect to his work performance or the reasons for his discharge when that information is available to prospective employers.” While the facts of Ledford apparently did not require the court to distinguish between the grounds for dismissal and other allegedly false material in the employee’s file, see id. at 885, there is good reason to read the court’s use of the disjunctive literally. Otherwise, employers inclined to place dubious charges in an employee’s file might be given perverse incentive to avoid linking the charges to the employee’s intended dismissal, even if they in fact substantially prompted the dismissal. Rather, an employer might reach to devise other grounds, not involving potentially defamatory allegations, for releasing the employee.
agency and was later fired, then her liberty interest would be acknowledged if the charge continued to taint her personnel file. Even courts adopting a stricter publication standard would find a liberty interest implicated once the charge was actually disclosed to a prospective employer. While a terminated employee saddled with this denigrating material in her file will presumably be more inhibited in her job search than one who has voluntarily left, this difference should not be constitutionally dispositive. A potential employer who regards certain employee conduct as intolerable will consider an applicant's commission of that conduct as grounds for rejection whether it provoked the applicant's dismissal or less severe discipline. The value of constitutional protection against unjustified stigmatization of public employees is heightened by the precarious position of at-will employees, who are especially in need of recognition of a liberty interest in their good name. For employees who enjoy greater job security, procedural protection against unfair discipline will typically already exist. An at-will employee, on the other hand, will be more vulnerable to arbitrary employer behavior even if she is not dismissed. In addition, while at-will employees are not universally less marketable than their more entrenched counterparts, they are significantly more likely to be so. Accordingly, they will generally be more hampered by a tainted personnel file.

C. The Floodgates Problem

Perhaps the strongest objection to recognizing that nontermination discipline can sometimes be the vehicle for "stigma-plus" is the danger of excessive constitutionalization of routine personnel decisions. The Court itself in a related context has admonished against the judiciary's becoming a monitor of public officials' management discretion. Forcing additional procedural requirements on public employers could seriously hamstring their ability to run their office efficiently and hence to fulfill the agency's mission.

One response to this concern is that the circumstance of a stigmatized employee is different from the situation in Paul that

62. See, e.g., Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th Cir. 1997); Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71, 72-74 (1st Cir. 1990); Copeland v. Phila. Police Dep't, 840 F.2d 1139, 1148 (3d Cir. 1988).
64. See Connick v. Myers, 461 U.S. 138, 146 (1983) (stating that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices").
prompted the Court to express its opposition to making the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may already be administered by the States." On the contrary, an employee who seeks to invoke tort law against an employer for citing allegedly false grounds for disciplining the employee will probably confront a formidable set of privileges. Courts' willingness to find a liberty interest when those grounds pertain to dismissal probably reflects in part tacit recognition of this obstacle. Besides, the fundamental interest of the besmirched employee is not—or should not be—the recovery of damages, but rather the restoration of employability that a fair hearing could provide.

In any event, erasing the sharp boundary between termination and other employer action need not entail an explosion of procedural obligations. Rather, a more modest and nuanced approach can tailor the process provided to both the impact on the employee and the practical requirements of management. The following section suggests how such an approach might operate.

III. A PROPOSED MODEL FOR A LIMITED CHANCE AT VINDICATION

The Court has long recognized that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." In particular, the extent to which a disciplined employee who has allegedly been defamed could be determined by individualized consideration of the factors spelled out by the Court in Mathews v. Eldridge.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

69. Id. at 335.
Under this approach, due process could be satisfied in most instances by only the modest degree of procedure needed to avoid fundamental unfairness.

A. The Presumption of Informality

The type of procedural protection, to which an employee facing discipline on potentially defamatory grounds should be entitled, will reflect the strong presumption of flexibility and informality that has governed the Court's due process jurisprudence over the last three decades. Encumbering the state's managerial discretion with an elaborate set of procedures is neither necessary nor desirable. Rather, public employees should be provided a minimal opportunity to guard against the impairment of their career by a record of disciplinary action founded on a significantly inaccurate charge.

The Court's decision in *Goss v. Lopez* illustrates that disciplinary imperatives need not preclude all consideration of due process. *Goss* held that public school officials could not summarily suspend students from school on charges of misconduct. Students' interest in "avoid[ing] unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences," compelled officials to offer an accused student a meaningful degree of input. The Court did not wish to impose elaborate procedural requirements that would undermine schools' capacity to administer discipline; it simply determined that students facing temporary suspension "be given some kind of notice and afforded some kind of hearing." In that "hearing," a student would simply be entitled to "an explanation of the evidence the authorities have and an opportunity to present his side of the story." Similarly, a public employee who suffers the immediate detriment of disciplinary action and the seeds of later harm from its record should be notified of the reason for the action and given a chance to contest it.

70. In a sense, the elaborate procedural requirements of *Goldberg v. Kelly*, 397 U.S. 254, 264-68 (1970) (requiring prior to termination of welfare benefits that recipient have right to evidentiary hearing that includes, *inter alia*, opportunity to state recipient's positions orally, to confront and cross-examine adverse witnesses, and to retain an attorney), represented a last gasp of the Warren Court "revolution" in the area of due process. Since *Goldberg*, the Court has routinely refused to insist on a panoply of trial-type procedures. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 478, 480, 487 (1995); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 85 n.2 (1978); *Mathews*, 424 U.S. at 343; *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).
72. Id. at 579.
73. Id.
74. Id. at 581.
The Goss Court recognized that recorded charges of misconduct could "seriously damage ... students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." An employee branded with recorded charges of misconduct confronts a comparable, and arguably more severe and less speculative, threat to her future livelihood. Accordingly, she too should be entitled to the degree of participation necessary to prevent arbitrary stigmatizing action by her employer. In the ordinary instance, confronting the employee with the alleged basis for the discipline and allowing her to respond—in recorded written form if she wishes—could suffice. Beyond that, the degree to which these procedural safeguards need ever extend beyond the most "rudimentary precautions against unfair or mistaken findings of misconduct" would depend on a number of elements described below.

B. The Spectrum of Discipline

The proposition that disciplinary measures short of dismissal can trigger procedural due process does not mean that all discipline is fungible. A spectrum exists, from mere reprimand to termination. Accordingly, given a particular charge of employee misconduct, procedural protection should be commensurate with the severity of the action taken in response to the alleged behavior.

The most difficult case may be the first and mildest point on the spectrum: viz., a written reprimand unaccompanied by any sort of tangible penalty. Ideally, an employee should have some constitutional safeguard against a charge in her personnel file that could act as a "time bomb waiting to explode when sent to a prospective employer." Admittedly, however, no plausible construction of "stigma-plus" would acknowledge a presumptive right to even a highly informal exchange before a reprimand could be issued. Moreover, even though this Article proposes a more expansive conception of due process under state constitutions to transcend the narrow confines of Paul’s "stigma-plus,"

75. Id. at 575 (footnote omitted).
76. Id. at 581.
77. Clark v. Maurer, 824 F.2d 565, 567 (7th Cir. 1987) (internal quotations omitted). This image was invoked by the plaintiff employee in Clark, who had been dismissed, to challenge the presence of damaging material in his personnel file. In holding that no cognizable harm could occur until a prospective employer actually viewed the material, however, the Seventh Circuit rejected the metaphor and its implication. See id. at 565-67.
78. See infra Part IV.
state courts are likely to be too influenced by federal jurisprudence to stray this far from the Court’s threshold of required harm.

Much easier to justify is some process for employees threatened with demotion on the basis of charges that they may wish to challenge. As discussed earlier, relegation to a lesser position within an agency can constitute significant harm to an employee, both to her current welfare and to her prospects for employment outside the agency. Where the demotion is based on potentially rebuttable allegations against the employee, she should first be informed of the allegations and given an opportunity to respond. The grounds should be set forth with sufficient specificity as to alert the employee of the behavior of which she is being accused. Conversely, the employee should be afforded time and opportunity to gather evidence to refute the charge. While no formal hearing or even a live proceeding would be required, the employee would be entitled to present her written response. This approach would promote reasoned decision making by government managers, and the contemporaneous record of the employee’s version of events would offer a fuller perspective to potential future employers.

Although generally not as devastating as demotion, suspension still calls for some degree of procedural consideration. Whether a particular suspension warrants more than the rudiments of notice and an opportunity to respond prescribed in Goss should depend on a number of factors: the length of the suspension, whether it is paid or unpaid, and, as discussed below, the severity of the charge. In other words, the harsher the impact of the suspension on both the employee’s current standing in the agency and her prospects there, the more closely her hearing should resemble that accorded an employee threatened with demotion.

The most difficult situation, and the one calling for especially individualized consideration, is allegation of improper behavior made in the course of a formally lateral reassignment. Courts have tended to pigeonhole such employer action as transfers wholly immune from due process review. Yet, at least in some cases, this approach seems to elevate simple classification over practical consequences. While it is tempting to regard horizontal movement on an organizational chart as neutral and nonpunitive, careful investigation may indicate a different reality. Certainly, an official who “merely” transfers an employee to

79. See supra notes 44-45 and accompanying text.
80. See Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (refusing to require evidentiary hearing prior to termination of Social Security disability benefits); supra note 70.
81. See supra note 42.
another position in response to the employee’s alleged misconduct presumably views the reassignment as having negative implications.

In light of the ambiguous ramifications of transfers, an employee’s entitlement to due process should depend principally on two factors. First, a court should evaluate whether the “transfer” label aptly describes the shift in the employee’s circumstance. Just as demotion or harsh treatment can sometimes amount to constructive discharge, so the conditions of an ostensibly transfer might be so inferior to those of the employee’s prior position as to represent a functional demotion. Additionally, the link in such cases between the allegedly false charge and the adverse reassignment should be definite before procedural requirements are imposed. Since the rationale for procedural protection is that the record of the transfer in the employee’s personnel file will prejudice her future employment, it is crucial that the transfer would reasonably be viewed in a critical light. If both of these conditions are met, then the employee deserves process comparable to that described above for employees who have suffered an unequivocal demotion.

C. The Depth of Stigma

A different sort of sliding scale involves the nature of the accusation against the employee. The charge of misconduct provoking the disciplinary action should be exceptionally serious before the employee is entitled to procedural safeguards. To avoid excessive interference with officials’ managerial latitude, generalized evaluations of incompetence or reports of relatively minor infractions should not be regarded as infringing even more generous notions of liberty interests.

To a considerable extent, this approach incorporates existing principles requiring a conspicuous degree of stigma for a terminated employee to be deprived of a liberty interest. The allegedly false charge must either involve criminal or highly offensive conduct, or otherwise substantially diminish the employee’s attractiveness to potential future employers. These same criteria could be applied to charges associated


with disciplinary actions besides dismissal, but applied more stringently. For example, a heightened demonstration of the probable effect of the charge, its falsity, and even the employer’s scienter could be required. Thus, whereas the Second Circuit has stated that stigmatizing comments about terminated employees can reach matters beyond illegality, dishonesty, or immorality to encompass government pronouncements of unfitness, a narrower conception could obtain where termination does not occur. Only ascribed behavior that would manifestly thwart the employee’s ability to pursue comparable employment might qualify. Similarly, while a discharged employee can presumably prevail by meeting the ordinary preponderance standard, an employee otherwise disciplined could be made to demonstrate by clear and convincing evidence the charge’s falsity and the employer’s knowledge of it. Such burdens would go far toward preventing a flood of unwarranted claims by disgruntled employees. Combined with limitations on the scope of the remedy available, these standards would discourage due process challenges in nontermination cases except in instances of egregious abuse of employer discipline.

D. Factual Explicitness

As suggested above, only charges that can be reasonably understood as attributing verifiable misconduct to a nonterminated public employee should receive procedural consideration. It should not be enough that the agency has disciplined the employee “for

85. See Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 n.4 (2d Cir. 1980).
86. See O’Neill v. City of Auburn, 23 F.3d 685, 692 (2d Cir. 1994).
87. Cf. Monaghan, supra note 18, at 433 (suggesting as limiting principle to Paul that “wholly unjustified defamation of an individual with the purpose and effect of inflicting unjustifiable mental suffering” still qualify as invasion of liberty interest under Due Process Clause). Experience with the “actual malice” standard in defamation cases, N. Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (requiring plaintiff to whom standard applies to prove that defendant made allegedly defamatory statement “with knowledge that it was false or with reckless disregard of whether it was false or not”), shows that such a burden poses an exceedingly daunting barrier. See Marc A. Franklin, Suing Media for Libel: A Litigation Study, 1981 AM. B. FOUND. RES. J. 795, 801, 829 (1981); Marc A. Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 AM. B. FOUND. RES. J. 455, 471, 489, 498 (1980).
88. See infra Part III.E.
89. In theory, an employer might circumvent even the limited protection proposed here by issuing a series of relatively light defamatory charges, the cumulative effect of which would be to darken the employee’s file. It seems advisable, though, to confront such conduct on a case-by-case basis if it materializes rather than to design a standard in anticipation of this degree of malicious cynicism.
incompetence or because she can no longer do the job." 90 Rather, only allegations of specific behavior susceptible to resolution by an objective factfinder should implicate the liberty interest of a disciplined employee. Under this standard, critical personnel evaluations that could be plausibly viewed as insinuating particular conduct would not qualify unless the implication unmistakably amounted to a specific accusation in all but form. In a sense, the Milkovich Court's receptiveness to finding defamation by connotation 91 would be modified in this context in order to contain the volume of employee complaints. Following Milkovich's rejection of a blanket constitutional privilege for statements classified as "'opinion,'" 92 a number of courts have displayed a willingness to detect defamatory factual assertions lurking in apparent statements of viewpoint. 93 A readiness to interpret employers' critical assessments of employees' performance as defamatory charges, however, would chill candid evaluation and hamper managerial discretion.

The gatekeeping function of this approach is reinforced by the courts' role in determining the range of reasonable constructions of allegedly defamatory statements. Even under the relatively permissive Milkovich regime, courts have continued to dismiss a substantial proportion of defamation suits on summary judgment on the grounds that the defendant's expression cannot fairly be read to contain provably false assertions against the plaintiff. 94 Exercised even more rigorously here, this judicial responsibility would shield government employers from the specter of jury second-guessing of good-faith evaluations and discipline. By the same token, awareness of the high threshold of explicitness will deter employees from lightly contending that an employer has committed an actionable slur.

E. Limitations on Remedy

The formidable prerequisites to procedural relief already proposed would probably deflect any potential clamor by large numbers of

90. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630 (2d Cir. 1996) (finding liberty interest implicated where public employee has been dismissed on such basis).
91. See supra notes 54-55 and accompanying text.
92. Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990). The Court approvingly cited the approach of the Restatement. See id. at 19 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a (1977)). That approach broadly authorizes liability for a statement in the form of an opinion "if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT, supra, § 566.
94. See id. at 506-35, 540-50.
disciplined public employees for entitlement to due process. As ultimate assurance against promoting a plethora of claims, however, the remedy available in the infrequent instance where relief is warranted should also be tightly restricted. Specifically, the employee should be given the opportunity that she should have received in the first place to rebut the charge. If the hearing demonstrates the falsity of the charge, then the charge should be expunged from her file. The employer would not be subject to personal damages.

Under this system, employees (and their lawyers) would not be tempted to demand relief by prospects of a lucrative award. Instead, the remedy would be designed to attract only those seeking vindication of their good name in the face of what they believe to be false and damaging allegations. At the same time, since the employee remains within the agency, the remedy would provide worthy plaintiffs what they presumably need above all—removal of a stain on their record before its harm can spread.95

Of course, the redress of simple vindication may be considerably less appealing than damages to many employees. However, it can be seen as commensurate with the liberty interest affected. While at least one circuit court of appeals has entertained the possibility of damages when the grounds for termination of a public employee are shown to be false,96 they would generally be disproportionate to the harm caused a disciplined employee. It is not unalterably enshrined in our jurisprudence that damages are the exclusive satisfactory remedy for injury to reputation.97 Moreover, in the case of the most outrageous employer abuses, state law could be expected to make available the possibility of damages notwithstanding the normal employer’s privilege.98 Directing employees to pursue a state cause of action in such

95. It has been argued that in the case of the government’s falsely branding an individual, “monetary damages can never adequately compensate an individual for the loss of his ability to engage in the normal activities of daily life. Thus, the only effective means of protecting a person against such egregious state action is to prevent it.” Thomas J. Stulzer, Note, Reputation as a Constitutionally Protectible Interest, 52 NOTRE DAME LAW. 290, 305 (1976).


instances furthers Paul's purpose of avoiding redundancy between federal and state remedial schemes.\textsuperscript{99}

Finally, as a practical matter, the potential availability of some kind of hearing and ultimately a correction strikes a reasonable balance of incentives and deterrents for employers who feel moved to record pejorative grounds for discipline. Without the fear of personal liability, an employer will have less need to resist revisiting a charge of employee misconduct that may not have been well-founded. On the other hand, the discomfort of even an informal hearing and the possibility of retraction will give pause to employers before memorializing damaging statements about their employees.

\textbf{IV. CONCLUSION: THE INDISPENSABLE ROLE OF STATE CONSTITUTIONS}

As already indicated, it is extremely unlikely that courts would embrace the right of public employees proposed here as implementing the central principles of Paul and its progeny. Rather, this more expansive conception of due process must come from a different source: \textit{viz.}, state constitutions. By interpreting their own constitutions as affording some procedural protection to nonterminated public employees, state supreme courts can fill this gap in federal doctrine.

The idea that state courts need not slavishly confine the interpretation of state constitutional rights to those conferred by their federal counterpart provisions is neither new nor radical. Perhaps most famously, a quarter-century ago Justice Brennan, in the face of the Burger Court's retreat from the Warren Court revolution, urged litigants to invoke state constitutions in asserting violations of their liberty.\textsuperscript{100} Whether or not influenced by Brennan and other commentators,\textsuperscript{101} state courts on numerous occasions since then have ascertained the existence of rights under their own jurisprudence that the Supreme Court had declined to find in the Constitution.\textsuperscript{102}

The promulgation of state due process rights for disciplined public employees who assert that they have been falsely accused would not

\textsuperscript{99} See supra note 65 and accompanying text.
impose a significant strain on interpretive methodology. State constitutions have their own express due process clauses; extending the right already enjoyed by dismissed employees under the federal regime would hardly represent a drastic leap. Besides, in the unlikely event that recognition of this right were to arouse broad outrage, state constitutional amendment is generally much easier to accomplish than the cumbersome process prescribed by the Constitution.

Of course, recognition by state courts of a state-based right to due process by these employees would provide no succor to members of federal agencies. Furthermore, the recognition of this right by some, but not all, state courts would aggravate the patchwork nature of available relief to public employees. However, experience with the existence of the right in even a few jurisdictions might counter fears of disruption of government efficiency if disciplined employees are sometimes entitled to challenge charges against them. This success might spur other states, through judicial interpretation or legislation, to grant this right; even the federal government might ultimately follow suit. In this way, states will have served their function in the federal system as laboratories for experimentation. Finally, even if contrary to the premise of this Article, the scheme proved unworkable, the experiment will still have performed this function.

103. See, e.g., CONN. CONST. art. I, § 6; TEX. CONST. art. I, § 19.