Limiting Liability under Section 1983: The Narrowing of Constitutional Liberty

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LIMITING LIABILITY UNDER SECTION 1983: THE NARROWING OF CONSTITUTIONAL "LIBERTY"

INTRODUCTION

In two recent decisions, the United States Court of Appeals for the Tenth Circuit limited governmental exposure to liability under section 1983 at the expense of individuals' constitutionally protected "liberty" interests. In *Melton v. City of Oklahoma City*, the court narrowed the circumstances under which a public employee can sustain a section 1983 action for the deprivation of a liberty interest in an untarnished reputation. In *Hilliard v. City and County of Denver*, the court indicated that an individual's liberty interest in personal security against bodily harm is not redressed under section 1983 unless the state has physical control over the person. Section one of this Survey discusses the history of the liberty interest in personal security and in public employment.

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   Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.


5. See discussion *infra* section 1.

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two examines the Tenth Circuit’s decisions in *Melton* and *Hilliard*. Sec-
tion three argues the *Melton* and *Hilliard* decisions narrowly construe lib-
erty interests in section 1983 actions and are, in effect, a ruse for simply
limiting state liability.

I. THE LIBERTY INTEREST IN PERSONAL SECURITY AND PUBLIC
EMPLOYMENT

Liberty interests derive from the Due Process Clause of the Fifth
Amendment, made applicable to the states through the Fourteenth
Amendment. Due process has two fundamental components: proce-
dural and substantive. The procedural aspect, addressed by the Tenth
Circuit in *Melton*, guarantees a fair decision-making process before gov-
ernmental action impairs a person’s constitutional rights. Substan-
tive due process, interpreted by the Tenth Circuit in *Hilliard*, is concerned
with the constitutionality of a rule or governmental action.

In 1897, the Supreme Court explicitly repudiated the long standing
proposition that due process liberty included “only the right of a citizen
to be free from physical restraint.” Twenty six years later, in *Meyer v.
Nebraska*, the Court recognized that liberty preserved by the Constitu-
tion, “denotes not merely freedom from bodily restraint but also the
right . . . generally to enjoy those privileges long recognized at common
law as essential to the orderly pursuit of happiness by free men.”
Although the Court continues to acknowledge its broad interpretation in *Meyer*, during the last three decades it has restricted the liberty protec-
tion of the Due Process Clause in the areas of public employment and
personal security.

A. Public Employment

Since the 1960’s, the Court has recognized that the government,
acting in its role as employer, is subject to the limitations imposed by the

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6. See discussion infra section II.
7. See discussion infra section III.
11. Id.
14. Id. at 399. In a later decision, the Court stated: “[T]he liberty safeguarded (by
due process) is liberty in a social organization which requires the protection of law against
the evils which menace the . . . safety . . . and welfare of the people.” West Coast Hotel Co.
Constitution when dealing with its employees. Consequently, the Court aggressively applied conventional constitutional analysis to protect the rights of individual employees. More recently, however, the Court's opinions have favored deference to public employers, emphasizing the need to provide governmental services efficiently. At the core of the Court's rationale is the notion that the state must be free to make day-to-day decisions without interference from individual claims of deprivation of constitutional rights. To implement its "deference policy" the Court has narrowly construed the liberty interests protected by the Due Process Clause.

Among the broad historical interests protected by the Court are people's interests in their reputation. More specifically, in the context of public employment, the Court has invoked the procedural safeguards of due process to protect an employee's liberty interest in an untarnished reputation. In Board of Regents v. Roth, the Court first explicitly recognized the right of a public employee to a name-clearing hearing to rebut government allegations implicating the reputation interests. Liberty guaranteed by the Fourteenth Amendment, the Court acknowledged, included the right "to enjoy those privileges ... essential to the orderly pursuit of happiness by free men." But the Court found "the range of interests protected by due process is not infinite." In Roth, the Court identified two standards for evaluating due process claims that the government violated an employee's liberty interest in an untarnished reputation. First, the government's statements must have stigmatized the employee and damaged his standing in the community. Second, the allegation must have foreclosed the person's freedom to take advantage of other employment opportunities.

During the late 1970s, further requirements were added to the Roth standards in Paul v. Davis and Codd v. Velger. First, the Court found stigmatizing an employee's reputation, alone, was not sufficient to invoke procedural due process protection. In addition to stigmatization, there must be a causal connection with termination of employment.

17. Id.; see, e.g., Keyishan v. Board of Regents, 385 U.S. 589 (1967) (government employment conditions could not include unreasonable restrictions on First Amendment expression); Sherbert v. Verner, 374 U.S. 398 (1963) (state could not terminate employment based on public employee's religious beliefs).
20. See id.; see also Haines, supra note 15, at 191.
22. Id. at 569-70.
23. Id. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
24. Id. at 570.
25. Id. at 573.
26. Id.
30. Id.
Also, the stigmatizing statement must have been publicized and the employee had to allege it was false. Finally, the public employer was required to "create and disseminate" the false and defamatory impression about the employee in connection with his termination. If these requirements were met, due process mandated that the government provide the employee with a hearing to rebut the allegations.

In 1980, however, the Court retreated from its restrictive interpretation of reputation interests in the context of public employment. In Owen v. City of Independence, the City Council publicized an investigative report alleging Chief of Police Owen took part in corrupt and criminal activities. Although the investigation found no criminal activity, Owen was discharged by the city manager who gave no reasons for the dismissal. The local press gave prominent coverage to a report released by the City Council and linked Owen's dismissal to the investigation.

The Owen majority opinion was written by Justice Brennan, a dissenter to the Court's previous decisions curtailing public employees' reputation interests. In Owen, Justice Brennan relied on the finding of the federal court of appeals that whether stigmatizing charges came from the government was immaterial. Of greater importance, according to the lower court and Justice Brennan, was that the public believed Owen was dismissed for perjury. In dissent, Justice Powell pointed out the Owen decision was contrary to precedent. The government must "create and disseminate" a false impression about the employee in order to violate an employee's liberty interest. Justice Powell concluded the majority's reliance on "public misapprehension" as a due process violation was irrelevant.

32. Codd, 429 U.S. at 627.
33. Id. at 628.
34. Id. at 627-28.
36. Id. at 627-628.
37. Id. at 629.
38. Id.
39. See Paul v. Davis, 424 U.S. 693 (1976). Paul held that stigmatization, alone, did not trigger due process protection. Id. at 701. Brennan found the Court's decision "wholly excludes personal interest in reputation from the ambit of 'life, liberty or property.'" Id. at 721 (Brennan, J., dissenting). He concluded with the statement: "Today's decision must surely be a short-lived aberration." Id. at 735. In Bishop v. Wood, 426 U.S. 341 (1976), Brennan found the Court's requirement that the stigmatizing statements were publicized by the government "simply another [unwarranted] curtailment of precious constitutional safeguards." Id. at 352-53 (Brennan, J., dissenting). Finally, in Codd v. Velger, 429 U.S. 624 (1977), Brennan adopted the reasoning of Justice Stevens. Id. at 629 (Brennan, J., dissenting). Stevens did not agree with the majority that a person claiming to have been stigmatized without being afforded due process was required to allege that the charge against him was false. Id. at 635 (Stevens, J., dissenting).
41. Id. at 631-32.
42. Id. at 661-64 (Powell, J., dissenting) (citing Codd, 429 U.S. at 628).
43. See id. at 664.
CIVIL RIGHTS SURVEY

B. Personal Security

The Supreme Court has long recognized a liberty interest in personal security in cases involving the Fourth Amendment right to be free from unreasonable searches and seizures. More recently, the Court found the same liberty interest implicated in the Eighth Amendment's prohibition against cruel and unusual punishment. In Ingraham v. Wright, the Court concluded public school students' liberty interest in personal security, derived from the substantive component of the Due Process Clause, protected them from punishment that included infliction of physical pain.

Recognizing the primary purpose of due process was to prevent the government from infringing on the rights of individuals, the Court in Youngberg v. Romeo found, as a general rule, "a State is under no constitutional duty to provide substantive services [to its citizens]." It held, however, the Due Process Clause required the state to provide involuntarily committed mental patients with services necessary to ensure their "reasonable safety." Alternatively, courts have recognized that the government has a constitutional duty to provide for a citizen where a "special relationship" existed between the state and a particular individual. Finally, substantive due process has protected individuals from conduct by governmental officials that was fundamentally offensive to a sense of justice.

II. TENTH CIRCUIT DECISIONS

A. Melton v. City of Oklahoma City

1. Facts

Raymond Melton was a lieutenant in the Oklahoma City Police De-

44. See Boyd v. United States, 116 U.S. 616, 630 (1886).
46. 430 U.S. 651 (1976).
47. Id. at 673-74. The Court in Ingraham determined the right to be free from unjustified intrusions on personal security was among the historic liberties granted at common law and therefore was included in the definition of "liberty" set forth in Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court, however, decided the case based on the plaintiff's procedural due process claim. It held the state post-deprivation tort remedies satisfied due process. Id.
49. Id. at 317.
50. Id. at 319.
51. See Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("If the state puts a man in a position of danger from private persons and then fails to protect him . . . it is as much an active tortfeasor as if it had thrown him into a snake pit."); see also Jensen v. Conrad, 747 F.2d 185, 193-94 (4th Cir. 1984) (custodial or other relationships created or assumed by states in respect of particular persons may give rise to a state duty to protect those individuals), cert. denied, 470 U.S. 1052 (1985). But see DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1990) (limiting "special relationships" to situations involving state imposed "custody"). For a discussion of DeShaney see infra notes 160-66 and accompanying text.
partment and friend of William Page, a judge indicted on felony charges. Melton surreptitiously recorded his conversation with a federal prosecutor during an interview in connection with Page's trial and turned the tape over to defense counsel. Following the trial, the F.B.I. accused Melton of improperly disclosing the details of his conversation with the prosecutor and of perjuring himself in an affidavit and during trial. An investigation revealed the perjury charge was unfounded. However, pursuant to police department policy, the filed report reached no conclusions. Prior to a police department disciplinary board hearing, a local newspaper reported that Melton was under investigation for committing perjury during Page's trial. The information was attributed to "informed sources" and to Lieutenant McBride, the police department's public information officer. McBride's quoted statements included confirmation that Melton was under investigation for perjury charges and that "[the] investigation did not establish whether Melton perjured himself."

The police disciplinary board did not consider the perjury charge, but found Melton's recording of the conversation with the federal prosecutor warranted dismissal from the force. In response to media inquiry, McBride confirmed that Melton was discharged for violating the department's code of ethics. No media report carried information that Melton was cleared of the perjury charge. McBride testified, however, that he told several radio stations the perjury charge was unfounded.

Melton filed suit under 42 U.S.C. § 1983, claiming the published quotes of Lieutenant McBride, which revealed the F.B.I. perjury accusations, tarnished his reputation. The procedural component of the Due Process Clause, he argued, required the government to afford him an opportunity to rebut the allegations reported to the media. A jury found that Melton was deprived of his liberty interest when he was discharged from the police department. To prevail on his liberty interest claim, the jury was instructed that Melton must have proven his termination was accompanied by public dissemination of the charges against him and that the reasons for dismissal stigmatized his reputation or foreclosed him from future employment opportunities.

54. Id. at 922.
55. Id.
56. Id. at 924. It was the duty of the reporting officer only to state facts in the report which were later interpreted by the police department disciplinary board. Id.
57. Id.
58. Id.
59. Id.
60. Id.
61. Id. at 925.
62. Id.
63. Id.
64. Id. at 926 (emphasis in original).
2. The Tenth Circuit Opinion
   a. Majority Opinion

   After reversing a portion of the district court's judgment, the Tenth Circuit granted rehearing en banc to resolve issues relating to Melton's liberty interest claim. The majority opinion was delivered by Circuit Judge Moore. The Tenth Circuit reversed the district court as to the parameters of a liberty interest claim involving discharge of a public employee. It determined the lower court erred because a public employee was entitled to a name-clearing hearing only if he proved stigmatization and that he was an unlikely candidate for future employment. The court found "stigmatization" required proof of five factors: first, the public employer was the source of the derogatory statements; second, the employer took affirmative action against the employee as part of a punitive proceeding; third, the government's accusations were publicized; fourth, the statements constituted a false charge of dishonesty or immorality and finally, the allegations damaged the employee's standing or associations in the community.

   The Tenth Circuit concluded Lieutenant McBride's statements to the Oklahoma City Times failed to qualify as "stigmatizing." McBride was not the sole source of the charges, nor was he responsible for their publication. Also, the statements made by the police department were true—Melton was accused of perjury by the F.B.I. Although the court found truth was not a complete defense to every liberty interest claim of this nature, it concluded that this case warranted exoneration of the police department.

   Finally, the court found that since the police department never "charged" Melton with perjury, he was not entitled to a name-clearing hearing. In order to constitute a charge, "a stigmatizing statement

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67. Id. at 922. Chief Judge Holloway heard oral arguments but did not participate in the decision of the court.
68. See id. 927 (emphasis added). The court found an employee is not required to prove actual denial of a job opportunity but emphasized the rule must be read as conjunctive. Id.
69. See id. at 926 (citing Codd v. Velger, 429 U.S. 624 (1977)).
70. Id. (citing Paul v. Davis, 424 U.S. 693 (1976)).
71. Id. (citing Bishop v. Wood, 426 U.S. 341 (1976)).
72. Id. (citing Codd, 429 U.S. at 627) (emphasis added)).
73. Id. at 927 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).
74. Id. at 929-930.
75. Id. at 928 n.12. The court relied on Codd, 429 U.S. at 628, in which the Supreme Court stated the employer must "create and disseminate" the false statement or impression in order to stigmatize an employee.
76. Melton, 928 F.2d at 928 (emphasis in original).
77. Id. at 929 (citing Codd, 429 U.S. at 628). The court stated that past decisions indicated falsity was an element of a public employee's liberty claim. Id. at 929 n.14 (citing Rich v. Secretary of the Army, 735 F.2d 1220, 1227 (10th Cir. 1984); Asbill v. Housing Auth. of Choctaw Nation, 726 F.2d 1499, 1501 (10th Cir. 1984)).
78. Id. at 930.
must be the basis of punitive action taken by a public entity against one of its employees."79 Stigmatization without punitive action, the court found, did not violate a protected liberty interest.80 Denying Melton's claim, the court concluded the perjury charges were not part of the disciplinary measure taken against Melton. Furthermore, the police department did not take affirmative action against Melton. Mere reporting of third party defamatory accusations, the majority held, did not make the government liable for the deprivation of a liberty interest.81 The court recognized, however, that Melton's liberty would be deprived if the police department manifestly adopted the accusations as the basis for his discharge.82 Nevertheless, it found the evidence completely contrary to the inference that the perjury accusations played any part in Melton's dismissal.83

b. Dissecting Opinion

Circuit Judge Logan dissented, joined by Circuit Judges McKay and Seymour.84 The dissent agreed with the majority that a public employee must prove both stigmatization and foreclosure of future employment to warrant due process protection.85 The dissent concluded, however, that Melton satisfied the inference of stigmatization with evidence of the media reports surrounding his dismissal from the police department.86 Contrary to the majority view, the source of the defamatory statements should be irrelevant.87 Additionally, the truthfulness of the charges should not matter—a public employee need only allege the accusations were false.88 Also, the dissent disagreed with the majority's finding that the government must take affirmative action against an employee. The dissent argued due process was violated since the government contributed to public awareness of the charges and then failed to take sufficient action to dispel the stigma.89 Lastly, the dissent found the police department stigmatized Melton by implying adopting the media reports that he was discharged for perjury.90

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79. Id. The court emphasized the government must take affirmative action against the employee to trigger due process protection.
80. Id.
81. Id. at 931.
82. Id.
83. Id.
84. Id. at 932 (Logan, J., dissenting).
85. Id. (emphasis in original).
86. Id. at 934, 937.
87. Id.
88. Id. (emphasis added).
89. Id. at 937.
90. Id. at 936.
B. *Hilliard v. City and County of Denver* 91

1. Facts

Kathy Hilliard was a passenger in an automobile involved in a minor accident. The operator of the vehicle was arrested for driving under the influence of alcohol and removed from the scene. The arresting officers, after determining Hilliard was too intoxicated to drive, impounded the vehicle leaving her in a high crime area. 92 After an unsuccessful attempt to phone for assistance, she returned to the vehicle where she was robbed and sexually assaulted. 93 Hilliard was found the next morning stripped naked, bleeding, and barely conscious. 94 She brought suit under section 1983 claiming the police officers' failure to take her into protective custody pursuant to the state emergency commitment statute 95 violated her constitutional right to life, liberty, travel and personal integrity. 96

The district court dismissed Hilliard's allegations of general constitutional deprivation under section 1983. 97 The court did not dismiss her claim that the officers' reckless disregard for the state emergency commitment statute violated her Fourteenth Amendment liberty interest in personal security. 98 The district court denied the government's motion for summary judgment on qualified immunity grounds, concluding the officers' actions violated "clearly established" constitutional rights of which a reasonable person would have known. 99

2. The Tenth Circuit Opinion

Circuit Judges Tacha and Ebel, and District Judge Johnson, sitting by designation, reversed the lower court and ordered dismissal of Hilliard's complaint. 100 Judge Tacha delivered the opinion of the court concluding the officers were entitled to qualified immunity since their actions did not violate a "clearly established" constitutional right. 101 The court also stated "[w]hether such a liberty interest [in personal security] exists under the facts of this case is an issue we do not reach." 102

Despite its disclaimer, dicta of the court indicates it did not believe Hilliard was deprived of a constitutional right. 103 The decision recognized the existence of a liberty interest in personal security in cases in-

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92. Id. at 1517.
93. Id. at 1517-18.
94. Id. at 1518.
96. Hilliard, 930 F.2d at 1518.
97. Id.
98. Id. at 1518-19.
99. Id. at 1518.
100. Id. at 1521.
101. Id.
102. Id. at 1519.
103. Id. at 1521.
volving the Fourth and Eighth Amendments. The court also acknowledged the Supreme Court's holding in Ingraham v. Wright that the substantive component of the Due Process Clause is the source of a liberty interest in personal security. The Hilliard court concluded, however, "[t]he existence of a constitutional right to personal security as recognized in Ingraham may well depend on [the] element of legitimate state power over the person of the plaintiff." Distinguishing the facts in Hilliard, the Tenth Circuit found the public school students in Ingraham were in an environment where the state had lawful control over their liberty. Their situation, the court stated, could be analogized to that of arrestees, convicts, and patients involuntarily committed to state mental hospitals, whose liberty interests in personal security were protected by the Fourth and Eighth Amendments. No such lawful control over the personal security of Hilliard was found. Finally, the court was not persuaded by decisions of the Seventh and Ninth Circuits, which treated the Fourteenth Amendment's Due Process Clause as the source of a right to personal security in instances where the state had no physical control over the plaintiff.

III. Analysis: Limiting State Liability Under Section 1983 at the Expense of Individual Liberty

The Tenth Circuit's decisions in Melton v. City of Oklahoma City and Hilliard v. City and County of Denver effectively limit the scope of section 1983 under the guise of a restrictive interpretation of the liberty protected by the Due Process Clause. Failing to recognize that "[i]n a Constitution for a free people... the meaning of liberty must be broad indeed," the court in both cases narrowed the circumstances in which the government is liable under section 1983 at the expense of individuals' liberty.

In Melton, the court narrowly interpreted the liberty in the Fourteenth Amendment by severely limiting the circumstances under which procedural due process protects a public employee's reputation. Such a result, the court leads us to believe, is mandated by precedent and nec-
necessary to afford the state flexibility required to function as an efficient employer. This balancing approach unjustly leaves individual liberty subordinate to efficiency. The court thinks we cannot see its true motive—limit state liability under section 1983.

The Tenth Circuit's decision in Melton reflects an unnecessarily narrow interpretation of the liberty protected by the Fourteenth Amendment. Its stigmatization requirements severely limit the circumstances under which due process liberty ensures a public employee's unmarred reputation. The circuit court's standards constitute a misinterpretation of the Supreme Court decision in Board of Regents v. Roth and its progeny, including a failure to recognize the Court's decision in Owen v. City of Independence. Furthermore, the Tenth Circuit departs from its previous rationale in devising the "stigmatization test." Its disregard of indications that Melton was stigmatized by the police department reveals its underlying goal of limiting state liability under section 1983.

The court cited three reasons for denying Melton's stigmatization claim, each of which is unwarranted. First, the court rejected Melton's liberty interest claim because statements by the Oklahoma City Police Department were found truthful. However, as the dissent in Melton indicated, the Supreme Court's holding in Codd v. Velger requires only that a plaintiff allege falsity of the stigmatizing charge, which Melton did in the instant case. This sentiment is mirrored in the Supreme Court's decision in Owen. The Court found a liberty interest implicated where the government, "released to the public an allegedly false statement." More importantly, however, Melton is particularly difficult to reconcile in light of the Tenth Circuit's decision in McGhee v. Draper (McGhee II). In that case the court was presented with the question of whether a public school teacher was stigmatized when she was dismissed amid publicity alleging immoral conduct. In determining the teacher was stigmatized, the court stated: "The truth or falsity of any charges made... is not relevant to determining the existence of a due process violation." The Tenth Circuit required only that the employee chal-

114. Cf. Monaghan, supra note 12, at 420-23 (explosion of procedural due process litigation encourages a judicial effort to limit the conception of "liberty" under due process clause).
115. See supra notes 69-73 and accompanying text.
117. See supra notes 21-43 and accompanying text.
120. Melton, 928 F.2d at 937 (Logan, J., dissenting) (emphasis added); see Developments, supra note 16, at 1790.
121. Owen, 445 U.S. at 633 n.13 (emphasis added); see Codd, 429 U.S. at 634 (Stevens, J., dissenting). Note that Justice Brennan, author of Owen, apparently agreed with Stevens that a person need not allege the falsity of a stigmatizing charge. See Owen, 445 U.S. at 633 n.13.
122. 639 F.2d 659, 643 (10th Cir. 1981). The court in McGhee II also stated that Codd read in context meant only that, absent a challenge to the truthfulness of the charges, no hearing is necessary. Id. at 643 n.3 (citing Codd, 429 U.S. at 628).
123. Id. at 643.
lenge the veracity of the charge. Thus, the principal requirement in Codd is not the truthfulness of the charges, rather whether the victim has alleged that the statements were false. Lastly, the Melton court found Codd supported a decision that the truthfulness of the police department's statements warranted exoneration of the department since damage to Melton's reputation was not intended. The Tenth Circuit's inquiry into the police department's intent for reporting the statements, however, is unfounded. The Supreme Court's analysis in Codd makes no reference to a public employer's intentions—they are not a relevant factor in considering whether an employee was stigmatized.

Second, the Tenth Circuit concluded, since the Oklahoma City Police Department was not the source of the charges, the department did not stigmatize Melton. This requirement is again unsubstantiated. The Supreme Court in Owen determined that the source of the allegations was irrelevant. The most important factor, the Court found, was what the public perceived to be the reason for dismissal. Even past decisions of the Tenth Circuit have not required that the government be the source of stigmatizing charges. For example, in Eames v. City of Logan, the director of parks alleged he was stigmatized by publicity and rumors of criminal misconduct surrounding his termination. The Tenth Circuit held the circumstances were sufficient to implicate Eames's liberty interest in a good reputation. Similarly, in McGhee v. Draper (McGhee I), a public school teacher claimed she was stigmatized by rumors and gossip in the community when her contract was not renewed. The court held that McGhee's allegations were adequate evidence of infringement of her liberty interest to withstand a directed verdict.

The Melton court's final inconsistency is the finding that the liberty interest claim was insufficient since the police department did not take

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124. Id. at 643 n.3. The majority in Melton failed to recognize McGhee II, relying instead on Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) and Asbill v. Housing Auth. of the Choctaw Nation, 726 F.2d 1499 (10th Cir. 1984). These decisions, however, offer weak support for the court's "actual falsity" requirement since the employees in both cases failed to allege the public employer's charges were false.

125. Melton, 928 F.2d at 929.


127. Melton, 928 F.2d at 928 & n.12.


129. Id.; cf. Haines, supra note 12, at 224 n.187 (a stigma must be obvious to the public and constitute a special discrepancy between virtual and actual social identity). Similarly, the Third, First and Fourth Circuits focus on whether the employer's actions create a stigmatizing impression. See Fraternal Order of Police, Lodge No. 5 v. Tucker, 868 F.2d 74 (3d Cir. 1989); Rodriguez de Quinonez v. Perez, 596 F.2d 486 (1st Cir.) cert. denied, 444 U.S. 840 (1979); Cox v. Northern Va. Transp. Comm'n, 551 F.2d 555 (4th Cir. 1976).

130. See Melton, 928 F.2d at 935-36 (Logan, J., dissenting) (citing cases).

131. 762 F.2d 83 (10th Cir. 1985).

132. Id. at 84.

133. Id.

134. 564 F.2d 902 (10th Cir. 1977).

135. Id. at 904.

136. Id. at 910.
action against Melton. In the past, the Tenth Circuit has found that government inaction may constitute stigmatization. In Eames the city park service failed to dispel public sentiment that an employee’s discharge was related to stigmatizing rumors and accusations. The court held procedural due process was violated since the city denied the employee a name-clearing hearing to rebut the allegations. Similarly, the court held in McGhee I the government could violate an employee’s liberty interest by impliedly adopting defamatory accusations asserted against the employee.

Circumstances in Melton are analogous to those in Eames since the police department failed to dispel a false perception that Officer Melton had been discharged for perjury. His fellow police officers believed the perjury charges were the basis for Melton’s dismissal. The Tenth Circuit’s conclusion that the police department did not impliedly adopt the published charges that Melton was dismissed for perjury is also tenuous since the law enforcement community did in fact make the connection. In either case, the government’s inaction adversely affected Melton’s reputation in the community, a protected liberty interest.

After a close look at the case law, the Tenth Circuit’s decision in Melton is not compelled by precedent. The court in Melton misinterpreted the Supreme Court’s decision in Owen and failed to apply past Tenth Circuit decisions. Were these decisions properly applied in Melton, the public’s perception that Officer Melton was dismissed for perjury would provide a reasonable basis for concluding he was stigmatized by the government. As the dissent pointed out, the law enforcement community believed Melton was discharged for perjury. No great leap of faith is required to conclude the public shared in this perception. The Melton “stigmatization test” circumscribes the instances in which a public employee’s liberty interest in a good reputation is protected. Its practical effect was to fulfill the court’s apparent goal of limiting the potential claims against the state under section 1983.

The Tenth Circuit’s underlying intent to limit the scope of section 1983 is even more apparent in Hilliard v. City and County of Denver. The court resolved Hilliard by invoking qualified immunity to shield the city from section 1983 liability for the conduct of its police officers, who left Kathy Hilliard stranded and alone in a high-crime area. More significantly, the Tenth Circuit based its rejection of a liberty interest violation on the rationale that the state did not have physical control over her. For the Tenth Circuit to hinge the existence of a liberty interest in personal security on a threshold determination of whether the state has

137. Melton, 928 F.2d at 930.
138. Eames, 762 F.2d at 84.
139. McGhee I, 564 F.2d 902.
140. Melton, 928 F.2d at 935 (Logan, J., dissenting).
141. Id. During Melton’s trial, there was testimony by a police officer that the law enforcement community believed Melton was discharged for perjury. Id.
physical control over a person is unwarranted. Two factors support this conclusion.

First, decisions by other appellate courts recognize an individual’s liberty interest in personal security in circumstances in which the state has no physical control over the person. The Seventh Circuit in White v. Rochford\(^{143}\) and the Ninth Circuit in Wood v. Ostrander\(^{144}\) found that a liberty interest in personal security was violated in circumstances analogous to those in Hilliard.\(^{145}\) These decisions undoubtedly support the conclusion that physical control is not a condition precedent to the existence of an individual’s due process right to be free from unjustified infliction of bodily harm by state actors.

In White, police officers arrested the driver of an automobile on the Chicago Skyway, impounded his vehicle and left three minor children stranded at the scene.\(^{146}\) The children, exposed to the cold, left the car and crossed eight lanes of traffic to telephone for help. They were finally retrieved by a neighbor but as a result of the incident one child was hospitalized for a week and all three suffered mental pain and anguish.\(^{147}\) The Seventh Circuit found that due process afforded a right to some degree of bodily integrity and protected the children from unjustified intrusions on bodily security.\(^{148}\) The right to personal security, the court stated, included freedom from “unnecessary and unjustifiable exposure to physical danger or injury to health.”\(^{149}\) Additionally, the court found due process restrained the government from activities which were “fundamentally offensive to a sense of justice.”\(^{150}\) The Seventh Circuit concluded that abandoning children on a high-speed expressway on a cold evening was a clear violation of their liberty interest in bodily integrity.\(^{151}\)

Following the rationale of White, the Ninth Circuit’s Wood decision recognized a liberty interest in personal security when presented with facts again strikingly similar to those in Hilliard.\(^{152}\) Wood was a passenger in an automobile stopped by State Trooper Ostrander. After placing the driver under arrest and removing him from the scene, Ostrander impounded the car and ordered Wood to leave the vehicle. Left stranded in a high-crime area at 2:00 a.m., Wood accepted a ride with an unknown man who raped her. The court found Wood protected by the substantive component of the Due Process Clause.\(^{153}\) First, the court concluded the officer acted “in callous disregard for Wood’s personal

\(^{143}\) 592 F.2d 381 (7th Cir. 1979).
\(^{144}\) 851 F.2d 1212 (9th Cir. 1988), cert. denied, 111 S. Ct. 341 (1990).
\(^{145}\) Hilliard, 990 F.2d at 1520-21.
\(^{146}\) White, 592 F.2d at 382.
\(^{147}\) Id.
\(^{148}\) Id. at 383 (quoting in part Ingraham v. Wright, 430 U.S. 651, 673 (1976)).
\(^{149}\) Id. at 387 (Tone, J., concurring).
\(^{150}\) Id. at 383 (quoting Rochin v. California, 342 U.S. 165, 172-73 (1952)).
\(^{151}\) Id. at 384. The Seventh Circuit reaffirmed White in Ellsworth v. City of Racine, 774 F.2d 182 (7th Cir. 1985), cert. denied, 475 U.S. 1047 (1986).
\(^{152}\) Wood, 851 F.2d at 1213.
\(^{153}\) Id. at 1213, 1216.
security, a liberty interest." The court also adopted the interpretation of section 1983 found in White and imposed liability where innocent parties were unnecessarily endangered in "reckless disregard of their safety."

The courts' rulings in White and Wood stand for the proposition that physical control by the state is unnecessary to invoke due process protection. These decisions are persuasive toward finding a violation of Hilliard's liberty interest in personal security. Leaving Kathy Hilliard stranded and alone in a high-crime area constitutes "unjustifiable exposure to physical danger," and callous disregard for her personal security. In Hilliard, the Tenth Circuit's statement that it was, "appalled by the conduct of the [officers]," indicates that the state's actions were fundamentally offensive to a sense of justice. Indeed, rejection of the clear parallels with White and Wood exposes the Tenth Circuit's plan to limit state liability by narrowly interpreting the liberty protected by the Fourteenth Amendment.

The Tenth Circuit's failure to recognize Hilliard's liberty interest in personal security is further unwarranted when based on the Supreme Court's decision in DeShaney v. Winnebago County Department of Social Services. The Court in DeShaney specifically left open the possibility that a liberty interest in personal security exists in circumstances similar to those in Hilliard, indicating that physical control by the state is not a condition precedent to the existence of a liberty interest in personal security. In DeShaney, a section 1983 claim was filed alleging that social workers and local officials failed to remove four-year-old Joshua DeShaney from his father's custody when they should have known the child was being abused. Joshua was beaten so severely that he suffered massive brain damage and was expected to spend the rest of his life in an institution. Rejecting DeShaney's claim that his Fourteenth Amendment liberty interest in personal security was violated, the Court stated: "As a general matter, . . . a State's failure to protect an individual

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154. Id. at 1216.
155. Id. at 1218 (quoting White, 592 F.2d at 388). The court in Wood held that Ostrander was not entitled to qualified immunity. It found his conduct exceeded "mere negligence" and his actions violated a "clearly established" law. Id. Applying the standard for qualified immunity set forth in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Ninth Circuit concluded the "clearly established law" requirement should not allow section 1983 defendants to escape liability if their actions defy common sense. The court held a "reasonable police officer" would have been aware of the potential danger facing a woman in Wood's circumstances and therefore denied Ostrander the protection of qualified immunity. Wood, 851 F.2d at 1218.
156. White, 592 F.2d at 387 (Tone, J., concurring).
157. See Wood, 851 F.2d at 1216. The court's holding in Wood also warrants the conclusion that Ostrander was not entitled to qualified immunity. Id. But see Courson v. McMillian, 939 F.2d 1479 (11th Cir. 1991) (citing Hilliard for the proposition that a government official is entitled to qualified immunity since the right to personal security in a non-custodial setting is not clearly established).
159. See White, 592 F.2d at 383.
161. Id. at 193.
against private violence simply does not constitute a violation of the Due Process Clause.” 162 It also denied that due process imposed a duty upon the state to act pursuant to a “special relationship” it created with the child. 163 No such relationship existed, the Court concluded, because the child was not under the “custody” of the state. 164

However, DeShaney explicitly left room for finding a liberty interest in personal security in circumstances where the state does not have physical control over an individual. The Court found substantive due process would be violated “when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for . . . reasonable safety.” 165 Due process protection from bodily harm under DeShaney does not hinge on an element of physical control by the state. 166 Rather, a liberty interest in personal security is violated where the state fails to provide reasonably safe conditions after it has rendered an individual incapable of helping himself or herself. 167 This was the case in Hilliard where the Denver Police abandoned Kathy Hilliard after depriving her of the transportation necessary to leave a high-crime area.

Moreover, the circumstances presented in Hilliard were precisely those the Court intended to except from the rule that a liberty interest in personal security exists only if the state has physical control over the person. 168 The dissent in DeShaney made reference to White v. Rochford, 169 indicating that custody need not be considered the only relevant state action. 170 Consequently, the Supreme Court provided the Tenth Circuit with a sufficient basis to rule that a liberty interest was violated. Rejection of this basis again exposes the court’s intentions in Hilliard to limit governmental liability under section 1983. The Tenth Circuit’s decision in Hilliard, which acknowledges a person’s liberty interest in personal security only where the state has physical control over the individual, is very troubling. It seems particularly disingenuous that the court in Hilliard was, “appalled by the conduct [of the officers],” 171 yet not so appalled to find Kathy Hilliard was deprived of her personal security.

162. Id. at 197.
163. Id. at 199-200.
164. Id.
165. Id. at 200.
166. See Daniel A. Farber, Supreme Court Review: Government Liability After DeShaney, TRIAL, May 1989, at 18. Farber argued that, after DeShaney, the government may have a duty to protect individuals when it has helped to make them more vulnerable. Id. He cited White as an example of circumstances under which the government may be liable. Id. For a discussion of White, see supra notes 146-51 and accompanying text.
167. See DeShaney, 489 U.S. at 199-200.
168. Farber, supra note 166.
169. 592 F.2d 381 (7th Cir. 1979).
170. DeShaney, 489 U.S. at 205 (Brennan, J., dissenting).
171. Hilliard, 930 F.2d at 1521.
Conclusion

The court’s intention to limit state liability under section 1983 is evident and the cost to individual liberty is high. The Tenth Circuit’s narrowing of a public employee’s liberty interest in his reputation in Melton ignores William Blackstone’s conviction that without one’s reputation, “it is impossible to have the perfect enjoyment of any other advantage or right.”\(^{172}\) The court’s decision in Hilliard, limiting the protection of a liberty interest in personal security, jeopardizes what Justice Oliver Wendell Holmes’ identified as the most important element in any civilized society: “[S]ome protection for the person.”\(^{173}\)

John M. Spesia


\(^{173}\) Oliver W. Holmes, Natural Law, in Collected Legal Papers 310, 312 (1920).