RECENT DEVELOPMENTS

SECOND-GUESSING THE QUALITY OF MERCY: DUE PROCESS IN STATE EXECUTIVE CLEMENCY PROCEEDINGS, *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1998).

Death penalty cases often provide judges opportunities to make poor decisions based on emotion. Last year the Supreme Court was given just such an opportunity in a case concerning the role of the judiciary in reviewing gubernatorial grants of clemency to prisoners slated for execution. A majority of the Justices made a judicial power grab under the guise of due process. They expanded the jurisdiction of the courts to bring the executive power of clemency into the realm of judicial review. Unsurprisingly for a decision based more on emotion than cool logic, the Court has opened the floodgates to allow another layer of judicial review in capital cases even though that review will be, in practicality, nearly useless.

Last Term, in *Ohio Adult Parole Authority v. Woodard*,[1] the Court held that Ohio's clemency procedures do not violate the Due Process Clause[2] or the Fifth Amendment[3] privilege against compelled self-incrimination.[4] At first glance, this opinion seems to comport with other cases holding that there is no due process protection in capital cases during postconviction proceedings[5] and that pardon and commutation decisions are

1. 118 S. Ct. 1244 (1998).

2. U.S. CONST. amend. XIV ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

3. U.S. CONST. amend. V ("nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

4. *See* 118 U.S. at 1253.

5. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 8-9 (1989)(opinion of the Chief Justice) (no constitutional right to counsel in collateral proceedings for death row inmates; only during the trial stage); Satterwhite v. Texas, 486 U.S. 249, 256 (1988) (applying traditional standards of appellate review to a Sixth Amendment claim in a capital case); Smith v. Murray, 477 U.S. 527 (1986) (applying same standard of review on federal habeas in capital and noncapital cases); Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring) (noting that the Court's decisions imposing heightened requirements on capital trials and sentencing proceedings do not apply in the postconviction context).

not appropriate subjects for judicial review.[6] However, the concurring and dissenting opinions show that a majority[7] of the Court believes that due process protections are available to inmates during clemency hearings in capital cases.[8] The concurring and dissenting opinions took a functionalist view of postconviction proceedings and held that due process protections are available to inmates at clemency hearings, even though they are not available to inmates at parole hearings.[9] The concurring and dissenting opinions also agreed that the life interest is stronger than the liberty interest, and thus the life interest cannot be extinguished by the adjudicative process but instead remains through all postconviction proceedings until its extinction at physical death.[10]

I. FACTS AND HISTORY OF THE CASE

In 1993, Eugene Woodard was sentenced to death by the state of Ohio for aggravated murder committed in the course of a car-jacking.[11] His conviction and sentence were affirmed on appeal[12] and the Supreme Court denied certiorari.[13] In accordance with state law, the Ohio Parole Authority began its clemency investigation when Woodard failed to obtain a stay of execution within forty-five days of his scheduled execution.[14]

The Ohio Constitution gives the governor the power to grant

6. *See, e.g.*, Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (holding that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."); Greenholtz v. Inmates of Neb. Penal & Corrections Complex, 442 U.S. 1 (1979) (rejecting claim that a constitutional entitlement to release on parole exists independently of a right explicitly conferred by the state).

7. Justices Stevens' and O'Connor's opinions agreed on all main points except the need for remanding this particular case. *See* 118 S. Ct. at 1256-57 (Stevens, J., concurring in part and dissenting in part). Thus, for the purpose of this note, their opinions will be discussed as if they are one and the same. This gives their views the weight of the majority of the Court because Justices Souter, Ginsburg, and Breyer joined Justice O'Connor's opinion.

8. *See* 118 S. Ct. at 1256 (Stevens, J., concurring in part and dissenting in part) ("The interest in life that is at stake in this case warrants even greater protection than the interests in liberty at stake in [parole and probation] cases.").

9. *See id.*

10. *See id.*

11. *See id.* at 1248.

12. *See* State v. Woodard, 68 Ohio St.3d 70, 623 N.E.2d 75 (1993).

13. *See* 512 U.S. 1246 (1994).

14. *See Woodard*, 118 S. Ct. at 1248.

clemency upon such conditions as he thinks proper.[15] The Ohio General Assembly cannot limit the governor's discretionary decision-making power, but it can and does regulate the application and investigation process.[16] The General Assembly has delegated the conduct of clemency review to the Parole Authority.[17] The Authority is responsible for holding hearings and making recommendations to the governor on whether clemency should be granted.

The Ohio Parole Authority informed Woodard that he could have a clemency interview[18] on September 9, 1994, and that his clemency hearing would be on September 16, 1994.[19] Woodard did not request an interview. Instead, he filed suit on September 14 in United States District Court alleging, under 42 U.S.C. §1983, that Ohio's clemency process violated his Fourteenth Amendment right to due process and his Fifth Amendment right to remain silent.[20] The District Court granted the state's motion for judgment on the pleadings.[21]

On appeal, a divided Sixth Circuit panel affirmed in part and reversed in part.[22] Judge Moore, writing the lead opinion,[23] held that under a "first strand" of procedural due process analysis focusing on the clemency proceeding itself, respondent had failed to establish a protected life or liberty interest."[24] He noted that *Connecticut Bd. of Pardons v. Dumschat*[25] "decisively rejected the argument that federal law can create a liberty interest in clemency."[26] Judge Moore further concluded that

---

15. *See* OHIO CONST., art. III, §11 ("The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law.").

16. *See* State v. Sheward, 71 Ohio St.3d 513, 524-25, 644 N.E.2d 369, 378 (1994).

17. *See* OHIO REVISED CODE ANN. §2967.07 (1993).

18. Counsel is not allowed to attend the interview. *See Woodard*, 118 S. Ct. at 1248.

19. *See id.*

20. *See id.*

21. *Id.*

22. *See Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (1997).

23. Judge Merritt concurred fully with the reasoning and results of Judge Moore's opinion with respect to the Fourteenth Amendment due process claim, and concurred in the result but not the reasoning of Judge Moore's opinion with respect to the Fifth Amendment claim. *See id.* at 1194.

24. *See id.* at 1186.

25. 452 U.S. 458, 464-65 (1981).

26. *Woodard*, 107 F.3d at 1183 (Judge Moore noted that *Dumschat* went on to hold that "[t]he ground for a constitutional claim, if any, must be found in statutes or other rules

Ohio has created neither a life nor a liberty interest in clemency, because the governor retains complete discretion over the final decision.[27]

Judge Moore then held, however, that Woodard's "original" pretrial life and liberty interests were protected by a "second strand" of due process analysis under *Evitts v. Lucey*.[28] The Court in *Evitts* said that "if a [s]tate has created appellate courts as an 'integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of [due process]."[29] Judge Moore reasoned by analogy that all additional proceedings provided by the government, including postconviction proceedings and clemency, must therefore comport with due process.[30] He then backstepped a bit, adding that because the clemency hearing is far removed from the trial, the amount of due process protection might be minimal.[31] Judge Moore remanded this issue to the district court to decide what process was due.[32]

Finally, Judge Moore held that the voluntary interview procedure was an unconstitutional "Hobson's choice"[33] between asserting one's Fifth Amendment rights and participating in the clemency review process.[34] He held that there was no compelling state interest that justified forcing such a choice on an inmate, and that an inmate has an interest in not providing

---

defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465).

27. *See id.* at 1184-85 (citing Olim v. Wakinekona, 461 U.S. 238, 249 (1983). *See also* Sandin v. Conner, 515 U.S. 472 (1995)).

28. 469 U.S. 387 (1985).

29. *Id.* at 393 (quoting Griffin v. Illinois, 351 U.S. 12 (1956)).

30. *See Woodard*, 107 F.3d at 1186-87.

31. *See id.* at 1187. Judge Nelson, in the minority, argued that Judge Moore's argument had already been made by Justice Stevens' dissent in *Dumschat*. There Justice Stevens argued that clemency proceedings are "a regular and critical component" of thr process of deciding deprivations of liberty, and that due process protections should therefore be available. *See Dumschat*, 452 U.S. at 469 (Stevens, J., dissenting). Judge Nelson noted that the majority of the Court in *Dumschat* rejected this argument. *See Woodard*, 107 F.3d at 1196, (Judge Nelson, concurring in part and dissenting in part) (referring to his colleagues' "apparent wish that the dissent [of Justice Stevens in *Dumschat*] had been the majority opinion").

32. *See id.* at 1194.

33. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 675 (unabridged ed. 1969) defines Hobson's choice as "the choice of taking either that which is offered or nothing; the absence of a real choice or alternative [after Thomas Hobson (1544-1631), of Cambridge, England, who rented horses and gave his customer only one choice, that of the horse nearest the stable door]."

34. *See Woodard*, 107 F.3d at 1189.

testimony that could be used against him in ongoing postconviction proceedings or to charge him with other crimes.[35]

The Supreme Court reversed.[36] Chief Justice Rehnquist wrote for the entire Court in Part III of his opinion, which considers whether it is a violation of the Fifth Amendment to schedule inmate clemency hearings if the inmate's words may be used against him in ongoing collateral proceedings. The Court held that "this pressure to speak in the hope of improving his [the inmate's] chance of being granted clemency does not make the interview compelled."[37] Thus, the Court held that the inmate in this situation "merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment."[38]

In Part IV of his opinion, the Chief Justice was joined by a near-unanimous Court in holding that no Due Process Clause violation had occurred in this case.[39] The Chief Justice wrote that "neither the Due Process Clause nor the Fifth Amendment privilege against self-incrimination are violated by Ohio's clemency proceedings."[40] However, the Chief Justice was unable to persuade a majority of the Court to adopt his view that due process protections should not apply to clemency proceedings at all. Therefore, Chief Justice Rehnquist only wrote for a plurality in Part II of his opinion.[41] There he opined that death row inmates have no due process protections during clemency proceedings because (1) there is no life interest in clemency broader than the original life interest that has been extinguished; (2) capital cases do not provide additional due process rights beyond the trial stage; (3) Ohio's clemency procedures do not create a life or liberty interest; and (4) clemency proceedings are not an integral part of the adjudication system.[42]

---

35. *See id.*

36. *See Woodard*, 118 S. Ct. 1244 (1998).

37. *Id.* at 1253.

38. *Id.* at 1252.

39. *See id.* Justice Stevens was the only justice who dissented to Part IV.

40. *Id.* at 1253.

41. Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist in Part II of his opinion.

42. *See* 118 S. Ct. at 1250-52.

Chief Justice Rehnquist believes that *Greenholtz v. Inmates of Neb. Penal and Correctional Complex*[43] and *Connecticut Bd. of Pardons v. Dumschat*[44] are the controlling cases on the issue of due process applicability to clemency proceedings. In *Greenholtz,* the Court stated, "[t]hat the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained. . . . a hope which is not protected by due process."[45] The Court further held that the individual's interest in release "is indistinguishable from the initial resistance to being confined," and that the interest has already been extinguished by the inmate's conviction and sentencing.[46]

In *Dumschat,* an inmate claimed that Connecticut's clemency procedure violated due process when the Connecticut Board of Pardons failed to provide an explanation for its denial of the inmate's commutation application. The Court held that "an inmate has 'no constitutional or inherent right' to commutation of his sentence."[47] The Court in *Dumschat* therefore held that a petition for commutation "is simply a unilateral hope."[48]

Chief Justice Rehnquist stated that the petition for clemency is also a "unilateral hope" and that there is no life interest in clemency broader in scope than the "original" life interest adjudicated at trial.[49] As to the contention that Ohio has created a life interest for criminal defendants by instituting clemency proceedings,[50] Chief Justice Rehnquist argued that the fact that the governor retains complete discretion in the actual clemency decisions precludes any substantive expectation of clemency.[51]

Continuing Part II of his opinion, the Chief Justice turned to

---

43. 442 U.S. 1 (1979).

44. 452 U.S. 458 (1981).

45. *Greenholtz,* 442 U.S. at 11 (citations omitted).

46. *Id.* at 7.

47. *Dumschat,* 452 U.S. at 464 (quoting *Greenholtz,* 442 U.S. at 7).

48. *Id.* at 465.

49. *See Woodard,* 118 S. Ct. at 1249-50.

50. *See* 118 S. Ct. 1255-56 (Stevens, J., concurring in part and dissenting in part). Justice Stevens echoed an argument made by the appellate court's *Woodard* decision. There Judge Moore argued that cases of state provided clemency proceedings are similar to cases in which a state grants criminal defendants a right to appeal. The Supreme Court has held that once a state establishes appellate courts, the procedures employed by those courts must satisfy the Due Process Clause. *See* Evitts v. Lucey 469 U.S. 387, 396 (1985). Justice Stevens believed that Ohio's creation of mandatory clemency application and review procedures likewise create a life interest protected by the Due Process Clause.

51. *See Woodard,* 118 S. Ct. at 1250-51.

the "second strand" of analysis that the Court of Appeals drew from *Evitts*. He disagreed with the lower court about the role of clemency in the judicial process. He stated that the clemency procedure is completely outside of the judicial process and not subject to the Due Process Clause.[52] He argued that *Evitts* did not "purport to create a new 'strand' of due process analysis," but instead merely relied on two lines of cases to achieve its results.[53] The first line of cases held that the Fourteenth Amendment provides a criminal defendant pursuing a first appeal as of right certain minimum safeguards, including the right to counsel.[54] The second line of cases held that the Sixth Amendment right to counsel at trial means the right to effective assistance of counsel.[55] Chief Justice Rehnquist stated that *Evitts* "did not rely on the notion of a continuum of due process rights," but instead merely followed precedent dealing with the narrow issue of the right to effective counsel in first appeals as of right.[56]

Justice O'Connor concurred in part and concurred in the judgment.[57] She agreed that Woodard's due process rights had not been violated. However, she disagreed with Chief Justice Rehnquist's contention that a death row inmate has no life or liberty interests cognizable under the Due Process Clause. Three justices joined her opinion.[58] Because Justice Stevens' opinion, discussed *infra*, agrees with that of Justice O'Connor[59] on all matters except the need to remand this case, a majority of the Court held that Due Process Clause protections are available during clemency proceedings.

Justice O'Connor stated that a death row inmate "remains a living person and consequently has an interest in his life."[60] She strongly disagreed with the principal opinion's suggestion that "because clemency is committed to the discretion of the

52. *See id.* at 1250.

53. *Id.* at 1251.

54. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 20 (1956); Douglas v. California, 372 U.S. 353 (1963).

55. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

56. 118 S. Ct. at 1251.

57. *Id.* at 1253 (O'Connor, J., concurring in part and concurring in the judgment).

58. Justices Souter, Ginsburg, and Breyer joined Justice O'Connor in her opinion.

59. *See* 118 S. Ct. at 1254 (Stevens, J., concurring in part and dissenting in part).

60. *Id.* at 1253 (O'Connor, J., concurring in part and concurring in the judgment).

executive, the Due Process Clause provides no constitutional safeguards."[61] Justice O'Connor said that *Dumschat* and *Greenholtz* stand for the proposition that "[w]hen a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished . . .," but that it is incorrect "to say that a prisoner has been deprived of all interest in his life before his execution."[62] She then concluded that "although it is true that 'pardon and commutation decisions have not traditionally been the business of the courts,' . . . the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings."[63] She gave the example of a governor flipping a coin to determine whether to grant clemency as an instance when judicial intervention might be warranted.[64] In *Woodard*, however, she held that the Ohio Death Penalty Procedure, which includes notice and an opportunity to participate in an interview, "comports with . . . whatever limitations the Due Process clause may impose on clemency proceedings."[65]

Justice Stevens concurred in part and dissented in part.[66] He agreed that no Fifth Amendment violation had occurred but, like Justice O'Connor, he disagreed with the idea that a death row inmate has no life interest. He also disagreed with Chief Justice Rehnquist's characterization of clemency as "a matter of grace."[67] Rather, Justice Stevens characterized the clemency proceedings as the process by which the "parole board conducts a hearing to determine whether the [s]tate shall actually execute one of its death row inmates—in other words, whether the state shall deprive that person of life . . . ."[68]

Justice Stevens' dissent turned on three things. First, he views the clemency proceedings as part of the adjudicative process and thus amenable to judicial oversight.[69] Second, he believes that as long as physical life remains there must be a life interest

61. *Id.*
62. *Id.* at 1253-54.
63. *Id.* at 1254 (emphasis in original) (quoting *Dumschat*, 452 U.S. at 464).
64. *See id.*
65. *Id.*
66. *See id.* (Stevens, J., concurring in part and concurring in the judgment).
67. *Id.* at 1252 (Rehnquist, C.J.).
68. *Id.* at 1254 (Stevens, J., concurring in part and concurring in the judgment).
69. *See id.*

protected by the Due Process Clause.[70] Third, he believes that death penalty cases deserve more procedural protections than cases with imprisonment as the punishment. Therefore, he believes due process protections should apply to capital clemency procedures, even though they clearly do not apply to non-capital clemency procedures according to *Dumschat*.[71]

Justice Stevens distinguished *Dumschat* from *Woodard* by arguing that the inmate in *Dumschat* had already had his liberty interest extinguished by conviction and imprisonment. He said that *Greenholtz* marked a "crucial distinction between being deprived of liberty that one has, as in parole, and being denied a conditional liberty that one desires."[72] In the case of *Woodard*, he said that the "'crucial distinction' points in the opposite direction . . . because respondent is contesting the [s]tate's decision to deprive him of life that he still has, rather than any conditional liberty that he desires. Thus it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause."[73] Justice Stevens agreed with the Sixth Circuit that the case should be remanded to determine whether Ohio's procedures meet the "minimal" requirements of due process.[74]

II. DISCUSSION

The Court rightly decided that no due process violation occurred in this case. Unfortunately, four of the eight justices who found no due process violation also said that judicial review of clemency is appropriate. When combined with Justice Stevens' dissent, this means that a majority of the Court thinks that some level of judicial review is appropriate over the executive act of clemency. This position is logically inconsistent with prior case law regarding executive powers of clemency and commutation, and this case is likely to be seen as a signal to lower courts to encroach upon areas traditionally left to the states and their governors. It will also cause increased delay

70. *See id.* at 1255. *But see id.* at 1245 (Rehnquist, C.J.) ("Although respondent maintains a residual life interest, e.g., in not being summarily executed by prison guards, he cannot use that interest to challenge the clemency determination by requiring the procedural protections he seeks.")

71. *See id.* at 1254-55 (Stevens, J., concurring in part and concurring in the judgment).

72. *Id.* at 1255 (quoting *Greenholtz*, 442 U.S. at 9).

73. *Id.*

74. *See id.* at 1256-57.

and expense in death penalty cases without a counterweighing benefit.[75]

The logical deficiencies of the concurring and dissenting opinions are evident upon a careful examination of the three bases they used to argue for judicial review of clemency. Justices O'Connor and Stevens both justified their positions by arguing (1) that there is a continuum of due process rights that applies to every aspect of the criminal law process; (2) that clemency is part of the adjudicatory system and that a prisoner is not deprived of his life interest before clemency; and (3) that because "death is different," more procedural protections are needed and judicial review of clemency should be one of those additional protections.[76]

---

75. Claims of due process violations in clemency proceedings based on the *Woodard* decision are already being filed and appealed. *See, e.g.*, Moody v. Rodriguez, 164 F.3d 893 (5th Cir. 1999) (Prisoner filed §1983 claim alleging violations of his due process rights during clemency proceedings against the Texas Board of Pardons and Paroles three hours before his scheduled execution. The district court granted summary judgment to the Texas Board of Pardons and Paroles and the Fifth Circuit affirmed.); Wilson v. United States District Court for the Northern District of California, 161 F.3d 1185 (9th Cir. 1998) (state of California petitioned for writ of mandamus seeking review of the district court's grant of a temporary restraining order staying a prisoner's execution based on prisoner's petition to the district court claiming violation of his due process rights during clemency proceedings. The Ninth Circuit held that the state was not entitled to mandamus relief, given the absence of harm and lack of clear error in district court's order.); Duvall v. Keating, 162 F.3d 1058 (10th Cir. 1998) (Prisoner filed suit under §1983 alleging that the state of Oklahoma's clemency procedures violated his due process rights. The district court found for the state and the Tenth Circuit affirmed.); Texas Board of Pardons and Paroles v. Williams, 976 S.W.2d 207 (Court of Criminal Appeals of Texas, en banc. 1998) (Texas Board of Pardons and Paroles sought mandamus writ to prohibit the district court from staying execution based on a claim of due process violation in Texas' clemency procedures. The Court of Criminal Appeals granted mandamus relief.); Perry v. Brownlee, 122 F.3d 20 (8th Cir. 1997) (Prisoner brought §1983 claim, alleging that Arkansas Post Prison Transfer Board and the governor violated the prisoner's due process and equal protection rights in state clemency proceedings. The district court granted inmate's request for temporary restraining order and stay of execution, relying on the Sixth Circuit's *Woodard* decision. The state appealed. The Eighth Circuit held that the inmate failed to show substantial likelihood of success on the merits of his claim and reversed.); Sellers v. State of Oklahoma, 973 P.2d 894 (Okla.Crim.App. 1999) (Prisoner sought writ of habeas corpus to stay his execution alleging that his due process rights had been violated by Oklahoma's clemency process. The Oklahoma Criminal Appeals Court held that Oklahoma's clemency procedures provided the necessary level of due process protections because the process provides for notice and a right to be heard.).

76. The entire discussion is very value-laden because it has to do with the death penalty. To one who thinks that clemency is an application for mercy from a condemned man who has had his case fully adjudicated, the procedure surrounding due process is relatively less important. To another person who views clemency as closer to a state created right, the procedures surrounding the petition for and grant of clemency are extremely important. Whichever side one takes, it is tempting to wish for the Supreme Court to decide the manner in favor of one's position so that individual

A. CONTINUUM OF DUE PROCESS RIGHTS?

Chief Justice Rehnquist and Justice Stevens each devoted significant segments of their opinions to debating whether due process exists as a continuum covering the entire criminal system. Chief Justice Rehnquist relied on *Dumschat,* which says that due process protections do not apply to executive consideration of paroles and pardons. *Dumschat* specifically held that a criminal sentenced to a term of years loses liberty interest protection under due process for the term of his sentence.[77]

Because the Court already has held that due process liberty interests can be extinguished, Chief Justice Rehnquist stated in *Woodard* that "there is no continuum requiring varying levels of due process at every conceivable phase of the criminal system."[78] He went on to cite three cases that he said make the point clear. He pointed out that *Murray v. Giarratano*[79] held that there is "no due process right to counsel for capital inmates in state postconviction proceedings."[80] He cited *Pennsylvania v. Finley,*[81] which held, similarly, that there is "no right to counsel in state postconviction proceedings."[82] Finally, the Chief Justice cited *Ross v. Moffit,*[83] which held that there is "no right to counsel for discretionary appeals on direct review."[84]

Justice Stevens disagreed, stating that "we have never held or suggested that the Due Process Clause does not apply to these [postconviction] proceedings."[85] He commented that "[t]he Chief Justice . . . is simply wrong when he states that these cases [*Finley* and *Giarratano*] 'make clear that there is no continuum requiring varying levels of process at every . . . phase of the criminal system;' instead, these cases simply turned on *what process is due.*"[86] Justice Stevens noted that both cases referenced due process concerns in postconviction

states whose citizens might hold contrary views cannot achieve the "wrong" outcome.

77. *See Dumschat,* 452 U.S. at 464-65.

78. *Woodard,* 118 S. Ct. at 1251.

79. 492 U.S. 1 (1989).

80. 118 S. Ct. at 1251 (Rehnquist, C.J.).

81. 481 U.S. 551 (1987).

82. 118 S. Ct. at 1251.

83. 417 U.S. 600 (1974).

84. *Woodard,* 118 S. Ct. at 1251.

85. *Id.* at 1255-56 n.3 (Stevens, J., concurring in part and dissenting in part).

86. *Id.* (citation omitted) (emphasis in original) (quoting Chief Justice Rehnquist, *id.* at 1251).

proceedings. *Finley* asked "whether the [s]tate's postconviction proceedings comported with the 'fundamental fairness mandated by the Due Process Clause.'"[87] In the *Giarratano* opinion the Chief Justice himself wrote that "the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer . . . ."[88]

Because of the apparent conflict in the relied-upon precedent, the question of whether there exists a continuum of due process rights appears open for debate. *Dumschat* says due process liberty interest is extinguished by conviction, and *Finley* says that the state's postconviction proceedings are acceptable because they comport with the Due Process Clause. *Finley* could be interpreted to mean that the postconviction proceedings at issue comported with the requirements of due process because none was due, as Chief Justice Rehnquist believes. Alternatively, Justice Stevens' interpretation could be correct, that the Due Process Clause was applied and the state met the minimum requirements thereof.

Either Chief Justice Rehnquist or Justice Stevens could be correct, depending on how one defines the "criminal system." If one defines it as only the adjudicatory system, then the Due Process Clause clearly applies. However, if one defines the criminal system to include such things as the legislative process and sentencing guidelines made by a sentencing commission, the notion that these areas should fall under a continuum of due process rights upon which a criminal can sue for relief seems absurd. Thus, the question of whether there is a continuum is a red herring. The answer depends on what one places within the "criminal system."

B. Is Clemency Part of the Adjudicatory System?

The logical question to ask is whether clemency should be considered part of the adjudicatory process, and thus a part of the "criminal system" within which the Due Process Clause generally gives criminal defendants direct rights. Case law does not provide a direct answer to this question, so examining history and tradition is a logical place to start.

---

87. *Id.* (quoting *Finley*, 481 U.S. at 555-57).

88. *Id.* (quoting *Giarratano*, 492 U.S. at 8 (opinion of Rehnquist, C.J. (quoting *Finley*, 481 U.S. at 557))).

American clemency is rooted in the traditions of England. In colonial America, governors were granted clemency powers in their capacity as royal representatives. In 1787, when the framers were writing the Constitution, they noted that the King's clemency power was practically absolute. The framers adopted that model for the federal Constitution, and the states passed on to their elected governors the clemency power held by the colonial governors.[89]

Debate about the purposes of clemency quickly arose and has continued to the present.[90] In this debate, one side typically considers clemency as a subset of justice[91] and the other considers it to be separate from, if not opposed to, justice.[92]

Those who believe that clemency is a subset of justice believe that clemency can have the following purposes: (1) to allow the executive to take into account factors that the judicial system cannot, due to brightline legal or procedural rules;[93] (2) to give

---

89. For this reason the Supreme Court has looked to English tradition to define the power of clemency. In *United States v. Wilson*, 32 U.S. 150, 160 (1833), Chief Justice Marshall explained as follows:

> As [the Pardon Power] had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

90. For a fuller account of this debate, see Malla Pollack, *The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, 66 UMKC L. REV. 513, 543-49 (1998).

91. By a subset of justice it is meant that the clemency power is used to better carry out individualized justice. *See* THE FEDERALIST NO. 74 (Alexander Hamilton) ("The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."); James Iredell, NORTH CAROLINA RATIFYING CONVENTION (JULY 28, 1788), in 4 THE FOUNDERS' CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner eds., 1987) ("It is the genius of a republican government that the laws should be rigidly executed, without the influence of favor or ill-will.... [However, i]t is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.").

92. By this it is meant that clemency is dispensed to those who actually deserve punishment but that for reasons of kindness or political expediency they are given a lesser punishment. *See* Iredell, *supra* note 86, at 18 (clemency may be used to motivate accomplices to testify against "great offenders"). This view of clemency is necessarily arbitrary in terms of justice in that similarly situated people are treated differently regardless of equal culpability.

93. Examples of the types of things that might be taken into account are abusive upbringings and unusual circumstances. *See, e.g.*, Regina v. Dudley and Stephens, 14 Q.B.D. 273 (1884) (defendants were convicted of murder and sentenced to death but their sentences were commuted by the Crown to six months imprisonment because, while lost at sea in a lifeboat, they had killed a shipmate who was sick and dying so

weight to repentance on the part of the defendant; and (3) to allow the consideration of new evidence that arises after the conclusion of judicial proceedings, in order to prevent miscarriages of justice.[94] Those who believe that clemency is separate from considerations of justice believe that it can be used to (1) affect the public will through the elected executive; (2) show mercy even though a defendant is deserving of his sentence; (3) affect political purposes;[95] or (4) perhaps even prevent uprisings and civil unrest.[96]

The courts traditionally have taken the second position, that the clemency power is outside of the adjudicative process.[97] They have adopted this stance even in cases in which governors have pardoned those in contempt of court.[98] Some have argued that clemency operates as a check on the courts precisely because it is outside of the adjudicatory system.[99]

---

that they might eat him rather than die themselves).

94. *See* Herrera v. Collins, 506 U.S. 390, 411-412 (1993) ("Clemency is . . . the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.").

95. An example of clemency used for political purposes occurred during the visit of Pope John Paul II to Missouri in January of 1999. During his visit, the Pope asked the governor to grant clemency to a death row inmate who was scheduled to be executed shortly after the Pope's visit. Governor Carnahan granted the Pope's request and commuted the inmate's sentence to life without parole, stating that he took this action because of the historical significance of the Pope's visit to Missouri and "a deep and abiding respect for the Pontiff and all that he represents." Kit Wager, *Pope's Plea Saves Inmate on Death Row*, THE KANSAS CITY STAR, January 29, 1999, A1. Clemency used in this manner can be seen as a legitimate way for the governor, who is concerned with larger matters than the individual, to strengthen diplomatic relations. However, it is hard to see clemency granted in these circumstances as part of the adjudicatory system concerned specifically with the rights of individuals and to which "fundamental fairness" rules apply. The inmate's public defender, Steve Harris, said of the reason for the pardon: "The basis appears to be no more than that the Pope happened to visit Missouri at this time . . . . That's very arbitrary. We have several clients that [sic] could be facing execution within the next few months and those people have an argument that it's not fair." *Id.*

96. "[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth . . . ." THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 86. *See also* Iredell, *supra* note 86, at 18 ("Thus, at a critical moment, the President might, perhaps, prevent a civil war.").

97. *See Woodard*, 118 S. Ct. at 1254 (J. O'Connor, concurring) (quoting *Dumschat*, 452 U.S. at 464)("pardon and commutation decisions have not traditionally been the business of the courts"); Solesbee v. Balkcom, 339 U.S. 9, 12 (1950); Rosenberg v. United States, 346 U.S. 322 (1953) (Frankfurter, J. conc.); United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489 (2d Cir.1950) (L. Hand, J.); United States v. Soeder, 120 F. Supp. 594, 595-96 (N.D. Ill. 1954).

98. *See, e.g.*, Ex Parte Grossman, 267 U.S. 87, 120-22 (1925).

99. *Id.* at 120-21 ("Executive clemency exists to afford relief from the undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of

Justice Stevens argues, however, that clemency is within the adjudicatory system, saying, "if a state adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause."[100]

Here Justice Stevens is begging the question. Properly framed, the question is *whether* the state has adopted clemency as an integral part of the system for determining if a person should be deprived of life (clemency as part of the adjudication system), or whether clemency is, instead, the granting of a life interest after a person has legally been deprived of it (clemency as mercy). In the first case, clemency procedures would have to comport with the Due Process Clause, while in the second case they would not. Ohio falls under the second case because it has placed clemency outside of the adjudicatory process by giving total discretion over clemency decisions to the executive.

C. SHOULD DUE PROCESS APPLY TO CLEMENCY BECAUSE "DEATH IS DIFFERENT"?

At the root of Justices O'Connor's and Stevens' arguments for extending due process review to clemency proceedings is the conviction that "death is different;"[101] due to the severity and permanence of the death penalty, more protections are needed in capital cases.[102] Justices O'Connor and Stevens argue not only that a life interest deserves more protection than a liberty interest, but that a life interest cannot be extinguished by the

---

circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases . . . . [W]hoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the [President] in confidence that he will not abuse it.").

100. *Woodard*, 118 S. Ct. at 1255.

101. The sentiment that death is a unique punishment and that capital cases therefore deserve special treatment is expressed well in *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) ("[D]eath is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

102. *See, e. g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Eighth Amendment requires additional procedural protections in capital cases).

same process as a liberty interest.[103]

As previously noted, *Dumschat* held that a liberty interest is lost when a defendant is convicted and legally sentenced.[104] The defendant may already have been deprived of liberty during the trial for purposes of public safety or to keep him from fleeing, but his future liberty is not taken from him for a term of years until he is convicted and sentenced.[105] So it is that he has no liberty interest in commutation proceedings or parole hearings. However, if he is granted parole, then a new liberty interest attaches to this conditional freedom.[106] Likewise, if state law sets up a reasonable expectation of freedom, such as an expectation that parole will be granted after a certain time unless good cause is shown, then the convict gains a liberty interest in parole to which due process applies.[107]

Justices O'Connor and Stevens argue that unlike liberty interest, life interest is not lost at the time of sentencing.[108] They believe that a life interest cognizable by due process remains until the time of death. In advancing this view, Justice Stevens distinguished *Woodard* from *Dumschat*, stating that "in [*Dumschat*] the Court held that a refusal to commute a prison inmate's life sentence was not a deprivation of his liberty because the liberty interest at stake had already been extinguished."[109] In contrast, he describes Mr. Woodard as "contesting the [s]tate's decision to deprive him of life that he still has . . . ."[110] Thus, Justice Stevens argues that it is the physical act of depriving someone of life or liberty that extinguishes due process rights.

However, a life interest cannot remain in place until the instant of execution. If this were so then only the physical act of the executioner could rightfully deprive a defendant of his due process life interest. This is clearly wrong, for the state's act of killing a person cannot, in itself, render the killing legitimate. To argue this, at its logical extreme, would be to argue that the

---

103. *See Woodard*, 118 S. Ct. at 1253-55.
104. *See Dumschat*, 452 U.S. at 464.
105. *See id.*
106. *See id.*
107. *See* Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979).
108. *See Woodard*, 118 S. Ct. at 1254-55.
109. *Id.* at 1255 (citing *Dumschat* at 461, 464).
110. *Id.*

state executioner may kill as he pleases, because only the executioner would have the authority to deprive a person of his life interest.

Although some believe that the death penalty can never be imposed legitimately, the Court has held that the death penalty is constitutional and may be used by the states. However, in order for the death penalty's use to be legitimate, there must be some procedure recognized by law that terminates a life interest. The Court held in *Greenholtz* that "[g]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."[111] Thus it is conviction that deprives a person of liberty, not the physical fact of incarceration. Otherwise, those defendants out on bail awaiting sentencing after a conviction could be said to retain their due process rights to liberty until they are actually manhandled by a bailiff.[112]

Perhaps realizing the logical weakness of arguing that due process rights remain until the instant of death, Justice Stevens argued in Part II of his opinion that it is actually at the clemency hearing that an inmate may be deprived of his life interest.[113] The major problem with this suggestion is that clemency is inherently *discretionary* and *arbitrary*.[114] The principal opinion notes this, as does the dissent.[115] Clemency, by its nature, involves treating two persons situated similarly under the law differently in fact. The persons are similarly

111. *Greenholtz*, 442 U.S. at 7 (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

112. A further example helps to illustrate this point. A prisoner who escapes from prison does not regain his liberty interest simply because he is free. If he is recaptured he will be returned directly to prison; he does not regain liberty interest and get the right to a trial or a hearing simply because he regained his liberty for a time. Thus, although there is a "crucial distinction" between being denied liberty that one is lawfully enjoying, such as parole, and being denied a conditional liberty that one desires, as in the case of an inmate awaiting a parole hearing; the difference is legal not physical. In the first case a limited liberty interest has been given back to an inmate, while in the second a liberty interest has yet to be granted. From all of this one sees that just as in the case of a criminal convicted and sentenced to a term of years, in the case of a criminal sentenced to death his due process life interest is extinguished by the pronouncement of the court, not by physically being deprived of his life.

113. Justice Stevens characterized clemency hearings as a determination of "whether the [s]tate shall actually execute one of its death row inmates—in other words, whether the [s]tate shall deprive that person of life. . . ." *Woodard*, 118 S. Ct. at 1254.

114. *See* Schick v. Reed, 419 U.S. 256, 268 (1974) ("Individual acts of clemency inherently call for discriminating choices because no two cases are the same.").

115. *See Woodard*, 118 S. Ct. at 1255 ("[A state] unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy.").

situated in the eyes of the judge because they are both convicted and sentenced to death. The clemency process, however, allows a governor to consider factors that courts are not allowed to consider in order to differentiate the two people.[116] Therefore, the clemency process involves both an arbitrary use of discretion and the consideration of factors not allowed into court—things usually prohibited where due process applies.[117]

The O'Connor-Stevens argument is not, however, that the clemency decision cannot be arbitrary, but only that the arbitrariness cannot go too far, like to flipping a coin.[118] Their expansion of judicial review to clemency is not based on an application of precedent—it is a policy choice.[119] To evaluate whether Justices O'Connor's and Stevens' decision was correct functionally, as opposed to formally, one must look at the costs and benefits of their expansion of due process.

Although Justices O'Connor and Stevens did not discuss the issue in terms of cost, there is no other way to make a functional determination. A realistic look at the allocation of

---

116. *See* United States v. Wilson, 32 U.S. 150, 160-61 (1833) (opinion of Marshall, C. J.) ("A pardon is an act of grace . . . . It is the private, though official, act of the executive magistrate . . . . It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted on.").

Perhaps because of the somewhat awkward wording of this passage, commentators often misconstrue it and assert that Chief Justice Marshall described the clemency power as a "constituent part of the judicial system." *See* Daniel T. Kobil, *The Quality of Mercy Sustained: Wrestling the Pardoning Power from the King*, 69 TEX. L.R. 569, 611; Coleen E. Klassimer, Note, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1515 (1995); Paul W. Cobb, Note, 90 YALE L.J. 889, 896 & FN. 30 (1981); Sheree S. Carson, Note, *Walking the Thin Line in* Otey v. Stenberg*: Did the Attorney General's Dual Role of Arbiter and Prosecutor Shock the Conscience?*, 73 NEB. L. REV. 483, 486 (1994). Careful reading shows that Chief Justice Marshall was actually stating the opposite, that clemency is an act of the executive that occurs completely outside of the judicial branch and that the court is not even aware of it unless it is brought to the judge's attention in court.

117. Note that during the trial stage, due process protects the defendants from the admissibility of certain evidence and from arbitrariness and governmental discretion based on factors not directly related to the case. How then can it be said that due process protections are still in place at the clemency hearing where consideration of the prohibited evidence is allowed and the governor is acknowledged to have the right to act with arbitrary discretion?

118. *See Woodard*, 118 S. Ct. at 1254.

119. The Court has pointed out previously that the utmost care must be used in expanding the reach of the Due Process Clause, "lest [the Due Process Clause] be transformed into the policy preferences" of the courts. Washington v. Glucksberg, 117 S. Ct. 2258, 2262 (1997).

government resources illustrates the point. Although society desires truth seeking and protection of the innocent, it does not desire this at any cost. If it did, much greater resources could be expended on the justice system. As it is, the federal and state governments have to allocate financial resources among a range of public goods and services of which the justice system is but one of many. Resources ideally are allocated is by determining which expenditures increase aggregate utility the most. The question, therefore, is whether the extra protection provided by judicial review is worth the cost. Upon review, the answer is no because there are three significant costs that outweigh the single, almost negligible, benefit.

The first cost of this extension of due process is the departure from the tradition of complete executive discretion that is deeply ingrained in both federal and state criminal law, as well as in popular thought.[120] There is little logical, as opposed to emotional, distinction between how a life interest differs from a liberty interest. Extension of the judiciary's power over clemency decisions of the executive branch is precedent for further expansion of judicial power in the future.[121] It is a shift in the balance of powers, an erosion of the traditional boundaries between the branches of government, and an encroachment on the states' abilities to structure their own political systems.

A second cost of expanded due process review is to subject courts to more appeals and delay by adding another layer of due process protection before a capital sentence could be carried out.[122] The extra cost and time that this would entail is obvious. In their amicus brief offered in this case, the Criminal Justice Legal Foundation argued that this extra layer of due process protections, along with the judicial supervision that it entails, could lead some states to do away with their clemency

120. *See, e.g.*, Schick v. Reed, 419 U.S. 256 (1974).

121. The Court has noted "the tendency of all rights 'to declare themselves absolute to their logical extreme' . . . ." Ross v. Moffit, 417 U.S. at 611-12 (quoting Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (Holmes, J.)). The Court in *Ross* declined to let the rights to due process and equal protection run to their logical extremes; instead it held that the right to effective assistance of counsel did not extend past the first appeal as of right, concluding "the question is not one of absolutes, but one of degrees." *Ross*, 417 U.S. at 612.

122. For examples of how this is already happening, *see supra* note 69.

proceedings entirely.[123] The Court has never held that clemency procedures are required; therefore, a state may constitutionally decide to do away with its clemency statute.[124] This suggests that adding due process judicial supervision whenever a state voluntarily regulates itself or provides procedural protections for its citizens is a perverse incentive that may encourage states not to provide additional benefits or protections at all.

A final cost to be considered is that the small benefit gained from judicial oversight may negate a larger benefit that is present under the status quo. Governors now take extreme care in making clemency decisions because the full weight of these decisions rests upon their consciences alone. The provision of a reviewing body will take some of the responsibility off of individual governors, and the care with which they approach their decisions might lessen as a result. Thus the judicial protections advocated by Justices O'Connor and Stevens might ultimately lead to less review of clemency petitions rather than more.[125]

Justices O'Connor and Stevens can counter the argument that their expansion of due process has significant costs by offering only one tenuous potential benefit. They can claim that courts will gain the power to supervise the clemency process and make sure that no excessively arbitrary grant or denial of clemency occurs. At first blush this may appear an important benefit. It certainly is contrary to notions of fairness and justice that a governor might flip a coin to decide whether to grant clemency. But the important question is how much beneficial protection will be gained from increased judicial scrutiny?

---

123. *See* Amicus Brief for Criminal Justice Legal Foundation at 8, *Woodard*, 118 S. Ct. 1244 (1998).

124. Justice Stevens acknowledges this, saying, "Presumably a [s]tate might eliminate this aspect of capital sentencing entirely . . . ." *Woodard*, 118 S. Ct. at 1255.

125. History seems to show that Alexander Hamilton was right in his assessment of the effect of placing the clemency decision on one person. *See* THE FEDERALIST NO. 74 (Alexander Hamilton). *See also* Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 221 (1993) ("I believe that traditionally capital clemency requests have been given meaningful consideration by decisionmakers."); M. Disalle, *The Power of Life or Death* 175-76 (1965) ("I have never known a governor so blase or so heartlessly devoted to the rule of eye for an eye that he did not go into a long executive session with his conscience when faced with a decision involving clemency."); Brown, *The Quality of Mercy*, 40 U.C.L.A. L. REV. 327, 328 (1992). *But see* Kobil, *The Quality of Mercy Strained*, *supra* note 118, at 608-10 (arguing that political pressures often cause governors to withhold clemency against their better judgment).

Four out of five justices urging due process protections in clemency proceedings think that the actual level of protection needed is very low. In *Woodard,* Justice O'Connor found that Ohio's clemency proceedings exceeded the minimum process required by the Due Process Clause, without ever saying what that minimum is.[126] In fact, the amount of process provided in Ohio is meager. Ohio does not allow counsel at its clemency hearings.[127] It does not allow the calling or cross-examination of witnesses.[128] It allows the Parole Authority to consider past crimes and behavior that were excluded from consideration at trial.[129] Notice is given a few days before his the hearing, so an inmate has little time to prepare any presentation that he may wish to give.[130] The inmate may be forced to answer questions, or his silence may be used against him.[131] In short, Ohio denies most of the procedural protections that are thought to be most vital in due process cases.[132]

If this low level of procedural protection satisfied the Court in this case, it is hard to imagine what will not satisfy it. A court will be likely to step in only when a governor acts in a blatantly arbitrary or discriminatory manner and then publicizes that fact.[133] The chances of this happening seem extremely low. Furthermore, if a governor does act in such a transparently arbitrary manner, the state legislature will likely attempt to curtail his behavior (if it is constitutionally within the legislature's power to do so) or voters will simply vote him out of office at the next opportunity.[134] Knowledge of this should be deterrent enough for rational governors.[135]

---

126. *See Woodard,* 118 S. Ct. at 1255.

127. *See id.* at 1248.

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.* at 1252.

132. Indeed, the respondent's brief argued that in Ohio "[t]he [Parole Authority] procedure turns death penalty clemency into a 'meaningless ritual.'" Brief for Respondent at 35, *Woodard,* 118 S. Ct. 1244 (1998).

133. It would have to be publicized—otherwise the Court would have no idea that it was going on—because governors are allowed total discretion in most states such that, if they wanted to, they could secretly flip a coin and no one would ever know.

134. It is hard to imagine a better political advertisement for a challenger than one depicting the sitting governor as willing to kill arbitrarily and discriminatorily.

135. Even in the unlikely event of a court finding a due process violation in a clemency procedure, the question can be asked as to what remedy Justices O'Connor and Stevens would envision. Would they have the governor revoke or grant clemency?

In conclusion, the protection, if any, of expanded judicial review of clemency decisions is already provided by the political system. The costs of expansion, however, are potentially significant in terms of erosion of executive discretion, increased delay and costs for the courts, and decreased deliberation by governors. The expansion of judicial review effected in *Woodard* is logically inconsistent with prior case law, and with *Dumschat* specifically. Nevertheless, a majority of the Court expanded judicial review because it does not trust the state governors, state legislatures, or the voters within the states to effectively regulate executive clemency through their political systems. This is but the latest area into which the Court feels it should extend its power, and *Woodard* provides another bad precedent for those on the Court who would like to extend the role of the judiciary even further. Historically, when the Court has encroached upon states' rights in the name of due process it has done so in order to provide protections to groups or individuals that the Court believed were otherwise unprotected. In *Woodard,* however, the Court intruded on states' rights without providing any real substantive increase in individual protection.

David S. Olson

Would they set up a system by which the government must justify every decision to the Court? If the Court found that a governor's granting clemency to one inmate because of a papal visit was unfair, would they make the governor take it back? The obvious separation of powers problems that this question raises leads one to suspect another answer. Perhaps Justices O'Connor and Stevens hope that this would never be necessary, and that instead the threat of judicial intervention will serve to warn governors to stay in line.

PASSING THE BUCK: THE SUPREME COURT'S FAILURE TO CLARIFY QUALIFIED IMMUNITY DOCTRINE TO PROTECT PUBLIC OFFICIALS FROM FRIVOLOUS LAWSUITS, *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998).

In *Crawford-El v. Britton*,[1] the Supreme Court missed a great opportunity to clarify the common law doctrine of qualified immunity. Instead of addressing the issue, the Court deferred to Congress in an area in which the legislative branch has no institutional competence and, so far, has shown no willingness to meddle. The result is a decision that will only encourage more frivolous lawsuits against public officials, which consume vast judicial and societal resources and trivialize the dignity of our constitutional protections.

I. FACTS AND PROCEDURAL HISTORY

The petitioner, Leonard Rollon Crawford-El, "is a litigious and outspoken prisoner" serving a life sentence for murder.[2] Because of overcrowding in the District of Columbia prison system in 1988, Crawford-El and a number of other inmates were transferred from the District of Columbia prison at Lorton, Virginia to other correctional facilities.[3] Before finally ending up in 1989 in a federal prison in Marianna, Florida, Crawford-El was moved from Lorton to a county jail in Spokane, Washington; then to a Washington state prison; next to Cameron, Missouri; back to Lorton again; and then to Petersburg, Virginia.[4] During all of this shuffling about, "[t]hree boxes containing his personal belongings, including legal materials, were transferred separately."[5] Crawford-El filed suit under 42 U.S.C. §1983[6] alleging that Patricia Britton, a guard at

---

1. 118 S. Ct. 1584 (1998).
2. *Id.* at 1587. *See also* Crawford-El v. Britton, 93 F.3d 813, 815 (D.C. Cir. 1996).
3. *See Crawford-El*, 118 S. Ct. at 1587.
4. *See id.*
5. *Id.*
6. 42 U.S.C. §1983 states, in relevant part, that
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

the Lorton facility, intentionally "misdirected the boxes to punish him for exercising his First Amendment rights and to deter similar conduct in the future."[7] Crawford-El alleged that, as a result of Britton's actions, he suffered injuries from the delay, including the expense of having the boxes forwarded to him, purchasing new clothes and other materials during the period in which the boxes were "misdirected," and mental and emotional distress.[8] Britton denied any retaliatory motive.[9] Instead, she argued that she gave the property to Crawford-El's brother-in-law, a District of Columbia corrections employee, "in order to ensure its prompt and safe delivery."[10]

The events leading up to this alleged retaliation are relatively straightforward. In 1986, Crawford-El invited a *Washington Post* reporter to the Lorton prison.[11] In accordance with prison regulations, he completed a visitor application form on which he correctly listed the visitor's address but strategically failed to disclose that the listed address was that of the *Post*.[12] Based on the information given her, Britton approved the application.[13] As a result of the *Washington Post* reporter's visit, a front-page article was printed in the *Post* under the headline "Jail Crisis Spills into Occoquan Unit."[14] The article, subtitled "Crowding, Anger Grow as D.C. Inmates are Shifted to Va. Facility," quoted Crawford-El's description of a correctional officer finding a pair of pants for him shortly after his arrival at Occoquan by searching the lockers of other prisoners for a spare pair.[15] The day after the article appeared in the *Post*, Crawford-El alleged that Britton summoned him to her office "and told him he had 'tricked' her and that 'so long as [Crawford-El] was incarcerated

---

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

7. *Crawford-El*, 118 S. Ct. at 1587.
8. *See id.*
9. *See id.*
10. *Id.*
11. *See id.* at n.1.
12. *See Crawford-El*, 93 F.3d at 826-27.
13. *See id.* at 827.
14. *See id.*
15. *See id.*

she was going to do everything she had to make it as hard for him as possible.'"[16] In December of 1988, Crawford-El and a number of other inmates were transferred to the Spokane County Jail in Washington state.[17] On December 18, 1988, another front-page article appeared in the *Post* entitled "Sudden Move Severs Inmates' Ties to D.C.; Isolation of Spokane County Jail Puts Prisoners 'In a Firecracker Mood.'"[18] Again, Crawford-El was quoted in the article and was credited with the "firecracker metaphor."[19] He also alleged that litigious prisoners were "handpicked" for the transfer so that lawsuits initiated while they were housed in the District of Columbia system would be dismissed for procedural reasons.[20] According to Crawford-El's account, shortly after this article was published, Britton referred to him as "a legal troublemaker," meaning "a prisoner who asserts her or his legal rights, or seeks administrative redress of grievances."[21] The alleged intentional misdelivery of Crawford-El's belongings occurred during the course of his numerous reassignments which ultimately resulted in his incarceration at the Marianna, Florida facility.[22]

This case has a long and tortured procedural history. When Crawford-El first filed suit under 42 U.S.C. §1983 based on the events discussed above, he alleged that Britton's "misdelivery of his legal papers . . . was an intentional interference with his constitutional right of access to the courts."[23] Britton defended by asserting a qualified immunity defense under *Harlow v. Fitzgerald*[24] and by arguing that Crawford-El failed to meet the heightened pleading standard required at the time by the D.C. Circuit Court of Appeals.[25] Specifically, Britton contended that Crawford-El's allegations failed to support the violation of any "clearly established statutory or constitutional rights of which a

16. *Id.*
17. *See id.*
18. *See id.*
19. *Id.*
20. *See Crawford-El*, 118 S. Ct. at 1587, n.1.
21. *Crawford-El*, 93 F.3d at 827.
22. *See id.*
23. Crawford-El v. Britton, 951 F.2d 1314, 1316 (D.C. Cir. 1991).
24. 457 U.S. 800, 818 (1982) (holding "that government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").
25. *See Crawford-El*, 951 F.2d at 1316.

reasonable person would have known"[26] when the actions in question occurred.[27] The district court denied Britton's motion for dismissal and she appealed.[28]

The Court of Appeals found that a prisoner's right of access to law libraries or legal assistance was a clearly established constitutional right in 1989.[29] The court also held that Crawford-El's allegations and supporting evidence of unconstitutional motive were "specific and concrete enough to enable [Britton] to prepare a response, and a motion for summary judgment based on qualified immunity."[30] The court noted that Crawford-El had

> identified specific statements by Britton to him and others showing awareness that his boxes contained litigation papers and that she was hostile; and he has identified specific persons also involved in documented legal conflict with Britton and (according to him) subjected to adverse treatment of their property, in contrast with others. For summary judgment purposes Britton would be able to meet these asertions with specific affidavits.[31]

Nevertheless, the court concluded that Crawford-El had offered no evidence demonstrating that Britton's actions did in fact deprive him of his constitutionally protected right of access to the courts and thus failed to satisfy the heightened standard recognized in the District of Columbia.[32] However, because the court's decision in *Hunter v. District of Columbia*[33], which came down after the district court proceedings, clarified the scope of the heightened pleading requirement, the court remanded the case for repleading.[34] Permission to file amendments to the complaint, such as the one ultimately added alleging the First Amendment violation[35], was left to the discretion of the district

---

26. *Harlow*, 457 U.S. at 818.

27. *See Crawford-El*, 951 F.2d at 1316.

28. *See id.*

29. *See id.* at 1318.

30. *Id.* at 1320 (quoting Whitacre v. Davey, 890 F.2d 1168, 1171 (D.C. Cir. 1989)).

31. *Id.* at 1321.

32. *Id.*

33. 943 F.2d 69, 75 (D.C. Cir. 1991)(requiring "that a complaint alleging conduct by a government official performing a discretionary function meet a 'heightened pleading' standard").

34. *See Crawford-El*, 951 F.2d at 1322.

35. In his brief before the court in this case, 951 F.2d 1314, Crawford-El argued that Britton retaliated against him because he exercised his First Amendment rights. However, the complaint itself made no reference to the First Amendment claim and the

court.[36]

On remand, Crawford-El filed his fourth amended complaint.[37] In addition to adding more detail to his court access claim, he pleaded four new claims—a First Amendment claim, a procedural due process claim, a substantive due process claim, and a common law claim of conversion.[38] The court dismissed all four claims; the due process claims and the court access claims were legally insufficient,[39] the First Amendment claim did not meet the heightened pleading standard because it did not offer "direct evidence that Britton was motivated by a desire to punish Crawford-El for his exercise of his First Amendment rights,"[40] and the common law conversion claim was dismissed for lack of jurisdiction.[41] As the Supreme Court noted, the dismissal of the First Amendment claim was "mandated by prior decisions of the Court of Appeals holding that allegations of circumstantial evidence of such a motivation were insufficient to withstand a motion to dismiss."[42]

Crawford-El appealed the judgment of the district court, and a three-judge panel of the D.C. Circuit affirmed dismissal of his court access claim and his due process claims.[43] However, the court reserved his First Amendment claim for resolution by the en banc court and noted that supplemental jurisdiction over the common law conversion claim depended on the court's disposition of this final federal claim.[44] On rehearing, the en banc court vacated the dismissal of Crawford-El's First Amendment claim and the pendant common law conversion claim and remanded the case to the district court.[45] In doing so, the court of appeals discarded its former requirement that a plaintiff "allege 'direct' evidence of unconstitutional motive" in

---

district court "quite reasonably" did not believe that it did raise such a claim. *See id.* at 1316.

36. *See id.* at 1322.

37. Crawford-El v. Britton, 844 F.Supp. 795, 799 (D. D.C. 1994).

38. *Id.* at 801.

39. *See Crawford-El*, 118 S. Ct. at 1588.

40. *Crawford-El*, 844 F.Supp. at 803.

41. *See id.* at 807.

42. *Crawford-El*, 118 S. Ct. at 1588 (citing Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1435 (D.C. Cir.1987); Siegert v. Gilley, 895 F.2d 797, 800-802 (D.C. Cir.1990), aff'd on other grounds, 500 U.S. 226 (1991)).

43. *See* Crawford-El v. Britton, 72 F.2d 919 (D.C. Cir. 1995).

44. *See id.*

45. *See Crawford-El*, 93 F.3d at 829.

damage actions for unconstitutional torts[46] and held that "withholding Crawford-El's property in retaliation for exercise of his First Amendment speech rights would indeed be a violation of clearly established law" if such allegations were proven.[47] Although the entire court agreed on the ultimate disposition, the court was highly fragmented on other issues.

Judge Williams' plurality opinion, joined by Judges Buckley and Sentelle, determined that "unless the plaintiff offers clear and convincing evidence on the state-of-mind issue at summary judgment and trial, judgment or directed verdict (as appropriate) should be granted for the individual defendant."[48] In reaching this conclusion, Judge Williams examined the policy goals of *Harlow*. He noted that the *Harlow* court "held that the plaintiff can prevail only by showing not just that there was a violation, but that the defendant's acts violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[49] The *Harlow* Court also explicitly discussed the reasons for adopting this standard—that such constitutional tort claims were often pursued against innocent officers, that "the 'social costs' of such suits included 'the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office,"[50] and that "the fear of being sued would 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[51]

In his concurrence, Judge Silberman argued for what he termed a "more straightforward solution."[52] Under his formulation, once a "defendant asserts a legitimate motive for his or her action, only an objective inquiry into the pretextuality of the assertion is allowed. If the facts establish that the purported motivation would have been reasonable, the defendant is entitled to qualified immunity."[53]

---

46. *Id.* at 815.
47. *Id.* at 825.
48. *Id.* at 815.
49. *Id.* at 816 (quoting *Harlow*, 457 U.S. at 818).
50. *Id.* at 816 (quoting *Harlow* at 814).
51. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).
52. *Id.* at 834 (Silberman, J., concurring).
53. *Id.*

Judge Henderson's concurrence endorsed the clear and convincing evidence standard but found herself "at a loss to understand . . . why [her] colleagues chose this case" to implement that approach.[54] In her opinion, Crawford-El's claims were meritless and should have been disposed of much earlier.[55]

Judge Ginsburg, in his concurrence, agreed with the court's adoption of the clear and convincing evidence standard.[56] However, he did not agree with the part of the opinion requiring the trial court to grant summary judgment before discovery unless the plaintiff already has "evidence of the defendant's motive that a reasonable jury could find 'clear and convincing.'"[57] Judge Ginsburg believed that such a rule would have two negative consequences. "First, Judge Williams' proposal would put compensation beyond the reach of even the plaintiffs with the most meritorious claims," an outcome he found inconsistent with *Harlow*.[58] Secondly, the plurality approach "would invite an increase in the number of constitutional torts that are committed—a consequence more difficult to square with *Harlow*."[59] Judge Ginsburg argued that the social costs of litigation against public officials and *Harlow*'s admonition against burdensome discovery should limit the district court's discretion to continue summary judgment motions while discovery proceeds to the following extent:

> If, when the defendant moves for summary judgment, the plaintiff cannot present evidence that would support a jury in finding that the defendant acted with an unconstitutional motive, then the district court should grant the motion for summary judgment unless the plaintiff can establish, based upon such evidence as he may have without the benefit of discovery and any facts to which he can credibly attest, a reasonable likelihood that he would discover evidence sufficient to support his specific factual allegations regarding the defendant's motive.[60]

The Supreme Court, "[d]espite the relatively unimportant

54. *Id.* at 844 (Henderson, J., concurring).
55. *See id.* at 846.
56. *See id.* at 838 (Ginsburg, J., concurring).
57. *Id.* at 839.
58. *Id.*
59. *Id.*
60. *Id.* at 841.

facts of this particular case," granted certiorari to clarify the relationship between the holding in *Harlow* and "the plaintiff's burden when his or her entitlement to relief depends on proof of an improper motive."[64] The Court, in an opinion by Justice Stevens, noted that the circuit court's holding was not limited to prisoner suits against public officials, but also applied to all plaintiffs bringing damages actions against any federal, state, or local government official.[65] Equally as important, the heightened burden of proof also applied

> to the wide array of different federal law claims for which an official's motive is a necessary element, such as claims of race and gender discrimination in violation of the Equal Protection Clause, cruel and unusual punishment in violation of the Eighth Amendment, and termination of employment based on political affiliation in violation of the First Amendment, as well as retaliation for the exercise of free speech or other constitutional rights.[66]

The majority observed that "although evidence of an improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case."[67] *Harlow*, Justice Stevens noted, only involved the scope of an affirmative defense and thus "provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation."[68]

Having decided that the holding in *Harlow* did not mandate the outcome reached by the Court of Appeals, the majority then considered whether the reasoning in *Harlow* nonetheless supported the appellate court's decision. The Court noted that two explicit reasons, together with one implicit reason, provide ample justification for *Harlow*'s reformulation of the qualified immunity defense.[69]

> First, there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated. Second, allegations of subjective motivation might have been

64. 118 S. Ct. at 1590.
65. *See id.*
66. *Id.* (footnotes omitted).
67. *Id.* at 1592.
68. *Id.*
69. *See id.*

> used to shield baseless lawsuits from summary judgment. . . . Third, focusing on 'the objective legal reasonableness of an officials acts' avoids the unfairness of imposing liability on a defendant who 'could not reasonably be expected to anticipate subsequent legal developments, nor . . . fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.'[70]

Justice Stevens wrote that although the last reason does not justify the creation of special burdens for plaintiffs who allege misconduct on the part of government officials that was clearly unlawful when it occurred, the first two reasons do support a procedural rule that makes it more difficult for any plaintiff, particularly one whose constitutional claim necessitates proof of improper motive, to survive summary judgment.[71] However, he noted that there are offsetting concerns that must be taken into consideration before determining "that the balance struck in the context of defining an affirmative defense is also appropriate when evaluating the elements of the plaintiff's cause of action."[72] The Court concluded that the social costs that militate in favor of the elimination of the subjective element of an affirmative defense "do not necessarily justify serious limitations upon 'the only realistic' remedy for the violation of constitutional guarantees."[73]

The Court explained that a number of reasons made judicial revision of the law—in an attempt to bar claims that depend on an official's motive—less attractive in this case than in *Harlow*. Under *Wood v. Strickland*, the case that governed qualified immunity defenses before *Harlow*, "bare allegations of malice" would have provided grounds for rebutting a qualified immunity defense and the mere allegation of an intent to cause any injury, not just an intent to deprive the plaintiff of a constitutional right, would have been enough to justify an open-ended inquiry into the defendant's subjective motivation.[74] In *Harlow*, however, the main focus is not on any potential hostility directed at the plaintiff, but rather the focus is more specific.[75] For example, proof that Britton diverted

70. *Id.* at 1592-93 (quoting Harlow, 457 U.S. at 818-19) (citations omitted).
71. *See id.*
72. *Id.*
73. *Id.*
74. 420 U.S. 308, 321 (1975).
75. *See Crawford-El*, 118 S. Ct. at 1594.

Crawford-El's boxes because she hated him "would not necessarily demonstrate that she was responding to his public comments about prison conditions, although under *Wood* such evidence might have rebutted the qualified immunity defense."[76]

Furthermore, the majority noted, the existing case law already prevents a plaintiff from automatically getting to trial on unconstitutional motive. Under *Harlow*, all claims are barred in which the defendant's conduct did not violate clearly established law.[77] Even if the general rule is clearly established, the legal doctrine upon which the plaintiff's case is based may allow summary judgment in two ways.

> First, there may be doubt as to the illegality of the defendant's particular conduct (for instance, whether a plaintiff's speech was on a matter of public concern). Second, at least with certain types of constitutional claims, proof of an improper motive is not sufficient to establish a constitutional violation—there must also be evidence of causation.[78]

In other words, even if protected speech is a motivating factor for an adverse decision, the defendant will still win if he shows that he would have made the same decision absent the protected conduct.[79]

Additionally, procedural mechanisms available to trial judges allow them to eliminate unfounded claims that contain a subjective element.[80] Prior to permitting any discovery at all, the district judge "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment" even if the official decides not to plead qualified immunity as an affirmative defense.[81] If the defendant does raise qualified immunity as an affirmative defense, the court must, viewing the plaintiff's allegations in the light most favorable to the plaintiff, determine whether the defendant's conduct violated

---

76. *Id.*

77. *See id.*

78. *Id.* (citations omitted).

79. *See id.*

80. *See id.*

81. *Id.* at 1596-97 (discussing alternatives available under FED. R. CIV. P. 7(a) and 12(e)).

clearly established law. In doing so, the district judge may demand more specific allegations of intent from the plaintiff.[82] If the plaintiff gets past these barriers, some discovery will ordinarily be allowed, as trial judges are allowed broad discretion in managing discovery.[83] Summary judgment will still be available to the defendant prior to trial. If the defendant makes a summary judgment motion, the plaintiff may not respond merely by attacking the defendant's credibility, but instead must "identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive."[84] Finally, Stevens noted, federal trial judges may use Rule 11 to penalize those who file frivolous claims and may also turn to "28 U.S.C.A. 1915(e)(2)(Supp. 1997), which authorizes dismissal 'at any time' of in forma pauperis suits that are 'frivolous or malicious.'"[85]

Most importantly, the Court found that neither its opinion in *Harlow* nor the policy considerations contained therein warranted "the wholesale change in the law" that the Court of Appeals endorsed.[86] The Court continued, "[w]ithout such precedential grounding, for the courts of appeal or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority."[87] In fact, neither the Federal Rules of Civil Procedure nor any other federal statute supports the requirement that the plaintiffs meet a clear and convincing burden of proof either at trial or at summary judgment.[88] In contrast, *Harlow* presented a situation in which the Court had long found itself competent—a process of adjudication upon an examination of the level of immunity traditionally accorded to government officials at common law.[89] The Court found that "[t]he unprecedented change made by the Court of Appeals in this case . . . lacks any common law pedigree and alters the cause of action itself in a way that undermines the very purpose of §1983—to provide a remedy for the violation of

82. *See id.* at 1597.
83. *See id.*
84. *Id.* at 1598.
85. *Id.*
86. *See id.* at 1595.
87. *Id.*
88. *See id.*
89. *See id.*

federal rights."[90]

Next, the Court pointed out that the need for judicial alteration of the statutory and common law standards was obviated by the Prison Litigation Reform Act ("PLRA").[91] Among the provisions which should reduce the amount of prisoner litigation against public officials,

> the statute requires all inmates to pay filing fees; denies in forma pauperis status to prisoners with three or more prior [dismissals because a filing is frivolous, malicious, or fails to state a claim upon which relief may be granted] unless the prisoner is 'under imminent danger of serious physical injury,' §804(d); bars suits for mental or emotional injury unless there is a prior showing of physical injury; limits attorney's fees; directs district courts to screen prisoners' complaints before docketing and authorizes the court on its own motion to dismiss 'frivolous,' 'malicious,' or meritless actions; permits the revocation of good time credits for federal prisoners who file malicious or false claims; and encourages hearings by telecommunications or in prison facilities to make it unnecessary for inmate plaintiffs to leave prison for pretrial proceedings.[92]

Pointing to government statistics, the Court noted that the PLRA is perhaps having its desired effect. The number of prisoner civil rights suits decreased from 41,215 in fiscal year 1996 to 28,635 in fiscal year 1997 despite a rise in federal and state prisoner populations.[93] Most significantly, according to the Court, Congress made "no distinction between constitutional claims that require proof of an improper motive and those that do not."[94] If there had been a need for such a distinction the Court reasoned, Congress would have addressed it in the PLRA or will do so in future legislation.[95]

Justice Kennedy filed a concurrence in which he recognized that "[w]e must guard against disdain for the judicial system" which manifests itself in prisoner suits, many of "which fall somewhere between the frivolous and the farcical . . . ."[96] Although he was sympathetic with Chief Justice Rehnquist's

90. *Id.* (footnote omitted).
91. Pub. L. No. 104-134, 110 Stat. 1321 (1996).
92. *Crawford-El*, 118 S. Ct. at 1596 (citations omitted).
93. *See id.* at n.18.
94. *Id.* at 1596.
95. *See id.*
96. *Id.* at 1599.

analysis discussed below, Justice Kennedy maintained that "the authority to propose those far-reaching solutions lies with the Legislative Branch . . . ."[97]

Chief Justice Rehnquist, in a dissent joined by Justice O'Connor, argued that the only result consistent with *Harlow* and the policies behind the qualified immunity doctrine would be a holding along the lines of Judge Silberman's concurrence in the Court of Appeals. Rehnquist contended that "a government official who is a defendant in a motive-based tort suit is entitled to [qualified] immunity from suit so long as he can offer a legitimate reason for the action that is being challenged, and the plaintiff is unable to establish, by reliance on objective evidence, that the offered reason is actually a pretext."[98] Rehnquist recognized that his interpretation of *Harlow* did not differ from that of the Court. However, he argued that the Court did not carry *Harlow*'s principles to their logical extension.[99]

Although the Court did not discuss the issue explicitly, Rehnquist offered two possible reasons why the Court did not carry *Harlow* to its logical ends. First, Rehnquist guessed that the Court was worried that some meritorious claims would go unredressed.[100] While acknowledging this possibility, Rehnquist argued that that is the logical outcome any time a privilege is recognized or extended. The extension of the doctrine he proposed would not, in his opinion, affect "the great body of our cases involving freedom of speech . . . ."[101] However, it would allow defendants to get summary judgment in cases such as the one under consideration where "there was surely a legitimate reason for [the defendant's] action, and there is no evidence in the record . . . that shows it to be pretextual."[102] Secondly, Rehnquist hypothesized that the Court may have thought that the extension of the qualified immunity doctrine might be unnecessary because district court judges would be competent to "protect defendants by judicious and skillful manipulation of the Federal Rules of Civil

97. *Id.*
98. *Id.*
99. *See id.*
100. *See id.*
101. *Id.* at 1601.
102. *Id.* at 1602.

Procedure."[103] Rehnquist found this potential solution unacceptable because, under such a formulation, the scope of protection would vary from district to district.[104]

Justice Scalia filed a dissent, in which Justice Thomas joined, adopting Judge Silberman's approach "in undiluted form."[105] Under this approach, "once the trial court finds that the asserted grounds for the official action were objectively valid (e.g., the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (e.g., the incompetent person fired was a Republican)."[106] Justice Scalia recognized that this formulation would have a more restrictive impact on intent-based torts, but found that outcome acceptable because, under his understanding of §1983 as enacted by Congress, no intent-based constitutional tort would have been actionable.[107] Instead, Justice Scalia wrote, *Monroe v. Pape*[108]

> converted an 1871 statute covering constitutional violations committed *'under color of any statute, ordinance, regulation, custom, or usage of any State,'* into a statute covering constitutional violations committed without the authority of any statute, ordinance, regulation, custom, or usage of any State, and indeed even constitutional violations committed in stark violation of state civil or criminal law.[109]

II. ANALYSIS

Of all the varied formulations proposed by different courts and different members of the same court, Chief Justice Rehnquist's position is the one that should have been adopted. His approach achieves the goals recognized by *Harlow* and the majority in *Crawford-El* in a clear and direct fashion without substantially modifying *Harlow* or engaging in judicial activism. Adopting such a standard would merely be a

---

103. *Id.*

104. *See id.*

105. *Id.* at 1603 (Scalia, J., dissenting).

106. *Id.* at 1604.

107. *See id.*

108. 365 U.S. 167, 172 (1961)(recognizing that 42 U.S.C. §1983 applies to those situations where a plaintiff is "deprived of constitutional rights, privileges and immunities by an official's abuse of his position").

109. 118 S. Ct. at 1603 (citations omitted).

clarification of the existing judge-made doctrine promulgated in *Harlow*.

A. The Practical Problems Resulting from *Crawford-El*

The decision in *Crawford-El* applies not only to actions under §1983, but also "to the wide array of different federal law claims for which an official's motive is a necessary element . . . ."[110] Litigating officials' motives imposes great social costs on society. Public officials need the flexibility to be able to make discretionary decisions without having their motives constantly second guessed by courts which are often unfamiliar with the environments in which the officials operate and are far removed from the context in which the decision was made. The constant threat of suits that seek to determine an official's underlying motive behind a particular discretionary act deters qualified people from entering public service, makes those who do serve more hesitant to perform their duties, and distracts those who are sued from focusing on their responsibilities at work.

Increased exposure to the threat of lawsuits makes qualified people more hesitant to serve. Suits probing an official's motive do not just apply to upper level management and executive employees. Instead, practically all public employees—that is, any employee who ever takes a discretionary action which impacts another person—is potentially liable. The lower the defendant's position and, presumably, the lower the defendant's wealth, the more averse he will be to the risk of suit.[111] Yet these are the very officials who are increasingly sued in their individual capacities.[112] The risk of suit makes a job where the possibility of suit is great less attractive than one in which the possibility of suit is low. Lawsuits not only require officials to engage in discovery, cross-examination, and other bothersome events, but these motive-based lawsuits also carry a stigma. As a result, people will be even more hesitant to enter public service occupations that have an increased threat of suit.

A further problem is that those persons who do choose to

110. 118 S. Ct. at 1590.

111. *See* William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1160 (1996).

112. *See id.*

serve as public officials and who are exposed to the constant threat of suit will likely demand increased compensation to offset the personal costs associated with being named a defendant in a lawsuit. Lower-level officials are often in positions that lend themselves well to risk-avoidance strategies such as delay, inaction, and avoiding situations that are more likely to lead to confrontation.[113] Assuming that strategic risk avoidance does not totally eliminate the possibility of suit and recognizing that there are some jobs which are such that the possibility of suit cannot realistically be avoided,[114] the market will likely demand that these officials be paid a risk premium. Robert Cooter uses a simple example, in a somewhat different context, to explain why a defendant might demand a risk premium.[115] Suppose both a defendant and a plaintiff agree that the plaintiff will win a $9,000 judgment against the defendant with 2/3 probability. The defendant's probability-discounted cost is thus $6,000 plus litigation costs. Assume that the defendant will bear $2,000 in litigation costs win or lose. Thus the defendant will certainly lose $2,000, may lose up to $11,000, and has an expected loss of $8,000. If the defendant is also risk averse, he may be willing to pay more than $8,500 to get out of this uncertainty. Assuming a risk premium of $500, the defendant would just as soon pay $8,500 as face the gamble of standing trial.[116] However, he would not pay more than $8,500 to settle the case. Taking this argument a step further, it stands to reason that a worker in a position that carries with it a high risk of suit will demand this risk premium to compensate for the stigma, inconvenience, and disruption caused by litigation even though the defendant will suffer no personal financial loss.

Even if the official is assured of being indemnified or receiving free legal representation, the defendant will be hesitant to settle because he cannot spread the non-monetary risks across a wide range of cases.[116] For example, a suit which carries negative personal implications about one's character is

113. *See id.*

114. Such jobs include policemen, jailers, prison guards, and prosecutors.

115. *See* Robert Cooter, *Towards a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 407 (1989).

116. *See id.*

117. Kratzke at 1161.

not merely a business decision. There is still a social stigma attached to being named a defendant in a lawsuit, especially if one is accused of violating someone's constitutional rights. Discovery may well bring out embarrassing facts unrelated to the lawsuit. Furthermore, the disruption, prying, and other aggravation makes the job more stressful. As the non-monetary costs shouldered by the individual defendant increase, the costs borne by taxpayers, both for compensating officials for the unpleasant work environment and for defending against motive-based suits, grows. In summary, it is unlikely that the public will support a regime which results in increasing social costs like those caused by motive-based suits. These costs include officials failing to perform their duties in an optimal manner, a market requiring increased remuneration for public officials to compensate for the possibility of being sued, and the increasing costs of insuring against such suits.

In addtion, the decision in Crawford-El will have the unfortunate effect of increasing the number of motive-based suits against public officials, thus consuming an increasing amount of already scarce judicial resources. Nowhere is the burden of motive-based litigation more evident than in cases of §1983 suits against prison officials. The number of such suits has grown from 218 cases in 1966, the first year in which data concerning state prisoner rights cases was kept as a specific category, to 40,569 by 1995, an increase of 18,510 percent.[118] During roughly the same period,[119] "the number of civil lawsuits filed annually in Federal District Courts . . . increased from under 60,000 to about 240,000," a three hundred percent increase, while "the number of federal district judges has increased from 233 to about 650," approximately a 180 percent increase.[120] More than one in every ten civil filings in United States District Courts is now a §1983 suit.[121] There is about one §1983 suit for every thirty inmates in state prisons.[122]

---

118. LYNN S. BRANHAM, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION, LIMITING THE BURDENS OF *PRO SE* INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL 20 (1997).

119. 1960-1995.

120. Clinton v. Jones, 520 U.S. 681, 722 (Breyer, J., concurring).

121. *See* ROGER A. HANSON AND HENRY W.K. DALEY, BUREAU OF JUSTICE STASTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 2 (1995).

122. *See id.*

The majority's opinion also does not achieve the goals of *Harlow*, in which the Court stated that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgement."[123] At summary judgment, the judge may determine both the currently applicable law and whether that law was clearly established at the time the action in question occurred.[124] Until these questions are answered, discovery should not be permitted.[125] Once it is determined that the law was clearly established at the time the offense complained of occurred, the qualified immunity defense should ordinarily fail.[126] However, if the official claiming qualified immunity "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors."[127]

Under Rehnquist's test,

> when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.[128]

Without such a standard, actions taken by government officials will be constantly subjected to judicial scrutiny and the protections offered by *Harlow* will be of little comfort. In 1988 alone, over 40,000 federal civil rights actions were filed against government officials, over half of which were filed by prisoners.[129] The Rehnquist test would screen out most of the frivolous lawsuits, leaving officials free to spend more time doing their job and serving the public. At the same time, meritorious claims in which a plaintiff could offer objective

123. 457 U.S. at 818.
124. *See id.*
125. *See id.*
126. *See id.* at 818-19.
127. *Id.* at 819.
128. *Crawford-El*, 118 S. Ct. at 1600 (Rehnquist, C. J. dissenting).
129. *See Crawford-El*, 93 F.3d at 830 (Silberman, J. concurring).

evidence that the defendant's seemingly legal justification is, in fact, a pretext would be preserved.

B. *Crawford-El* Devalues Important Judicial Protections

The majority's reliance on the Federal Rules, the discretion of the trial court, and the PLRA was misplaced. Although one study found that fully three-quarters of state prisoners' §1983 suits are dismissed on the court's own motion, one should be hesitant to conclude that the burdens borne by officials defending against such suits are overstated.[131] As Chief Justice Rehnquist recognized, reliance on the Federal Rules and the discretion of the trial court will lead to different outcomes in different judicial districts.[132]

"For example, when questioned about the stage at which *pro se* prisoners' civil (nonhabeas) cases filed in the court in 1995 were disposed of, the answers for those disposed of before service of process was issued ranged from a low of 8% to a high of 75%."[133] This evidence clearly suggests that relying on the discretion of the trial court will lead to different outcomes in different judicial districts. Even in districts where the *sua sponte* dismissal rate is high, defendants may still bear considerable burdens before their suits are dismissed. Some courts require correctional officials to conduct their own investigation and to report their findings to the court before the court decides whether to dismiss the complaint *sua sponte*.[134] Other courts require correctional officials, their attorneys, or both to participate in hearings designed to shed more light on a prisoner's complaint before dismissal orders are entered in some cases.[135] Thus, even the cases disposed of relatively quickly often impose a significant burden on prison officials.

There are real social costs to having the outcome of similar litigation *under the same law* depend on the jurisdiction in which

---

131. *See* BRANHAM at 29.

132. *See* 118 S. Ct. at 1602 (Rehnquist, J. dissenting) (observing that "whether a defendant is entitled to protection against the 'peculiarly disruptive' inquiry into subjective intent should not depend on the willingness or ability of a particular district court judge to limit inquiry through creative application of the Federal Rules. The scope of protection should not vary depending on the district in which the plaintiff brings his suit.").

133. *See* BRANHAM at 29.

134. *See id.*

135. *See id.*

the case is filed. Different outcomes in different judicial districts is undesirable for a number of reasons, perhaps the most important being fairness. A prisoner in a district with a low dismissal rate should not be given more protection, assuming an equally meritorious claim, than a prisoner in a district with a high dismissal rate. The legal system should strive for similar outcomes under the same law. Not only will this build more respect for the law as citizens view the law as less arbitrary, but it will also facilitate the efficient administration of government. For example, prison overcrowding often requires that prisoners be transferred from facilities in one state to those in another. Prisoners, who often know the system as well as the best lawyer, will know that they can disrupt transfers in some districts by filing frivolous lawsuits alleging violations of their constitutional rights. Similarly, employees of federal law enforcement and other government agencies operate across many judicial districts. They should be able to expect similar treatment in different districts. Otherwise, as explained earlier, the threat of lawsuits may have a chilling effect on their actions and may require different policy considerations and choices depending on the judicial district in which a particular action is taken.

The majority's reliance on the Prison Litigation Reform Act is similarly misplaced. As previously noted, the number of prisoner civil rights suits decreased from 41,215 in fiscal year 1996 to 28,635 in fiscal year 1997 despite a rise in federal and state prisoner populations.[136] The PLRA is apparently having some effect, but even though the overall number of cases has decreased, prison officials are still subject to distracting motive-based litigation. Although the PLRA might have served to deter this particular lawsuit had it been enacted at the time Crawford-El initiated his case, many motive-based suits still will be allowed to proceed.

Whether a particular prison official is subjected to lengthy litigation should not depend solely on whether a prisoner can meet the technical requirements of the PLRA. The PLRA is structured so that it primarily deters frivolous lawsuits and thus only incidently protects prison officials. In other words, once a prisoner has cleared its hurdles, the lawsuit can go

136. *See supra* note 105.

forward and the official is offered no increased protection. For example, the Act requires that the court

> review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity . . . . On review, the court shall identify cognizable claims or dismiss the complaint, . . . if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted . . . .[137]

Because the terms frivolous and malicious are not defined, this merely grants a trial judge the ability to screen out complaints she *subjectively* believes to be frivolous. Chief Justice Rehnquist's formulation would go one step further. It would protect the defendant by granting immunity and requiring the immediate dismissal of the suit, as long as the defendant can put forward a lawful reason for his actions and the plaintiff cannot show, through *objective* evidence, that the reason is merely a pretext.[138] Congress passed the PLRA with notice, presumably, of the muddled state of qualified immunity case law and did nothing to address the issue. Deference should be shown to the legislative branch, but qualified immunity is a common law doctrine and it is thus left to courts to craft the best solution in the face of legislative inaction.

An additional problem is that the PLRA does not apply to suits other than prisoner litigation. It leaves public officials open to actions brought under §1983 by non-prisoners and "to the wide array of different federal law claims for which an official's motive is a necessary element."[139] As noted above, although prisoner suits accounted for over half of the 40,000 federal civil rights filed against government officials in 1988, that still leaves a substantial number filed each year by non-prisoners.[140] According to one study by federal managers, federal workers file seven times as many civil rights complaints as private sector employees. A preliminary study by the Equal Employment Opportunity Commission found that between 1990 and 1997, a time during which the federal payroll fell by

137. Pub. L. No. 104-134, 110 Stat. 1321 (1996).
138. 118 S. Ct. at 1600 (Rehnquist, J. dissenting).
139. *See supra* note 110 and accompanying text.
140. *See supra* note 132 and accompanying text.

340,000 to 2,700,000, civil rights complaints by federal employees rose from 17,000 cases in 1990 to almost 29,000 cases in 1997.[141] Twice as many federal employees appealed decisions in 1997 as in 1991, with the number of workers appealing layoffs to the Merit System Protection Board rising from 726 in 1996 to 1126 in 1997.[142] These complaints alleging discrimination or other mistreatment cost taxpayers over $866 million between 1990 and 1997, leading some to conclude that "federal workers are supersensitive about their rights, partly because the system makes it easy to seek redress."[143] Although it is not clear how many of these cases actually reach the courts, this data is illustrative of the challenges that motive-based suits pose to public officials.

The confused state of qualified immunity doctrine, which *Crawford-El* did little to alleviate, has a great, and in some cases, long-lasting impact on individual defendants. Three cases illustrate the extreme burden on public officials and the drain on judicial resources that litigation can entail when the standards for qualifying for qualified immunity are unclear.

In *Peppers v. Coates*,[144] Peppers filed a complaint on July 3, 1985, under §1983 alleging that the actions of Secret Service agents in connection with his simulated arrest as part of an undercover operation violated his constitutional rights. The complaint survived both a motion to dismiss and for summary judgment filed by the defendants.[145] *After discovery*, the defendants filed two motions for reconsideration of their motion for summary judgment based on qualified immunity. These, too, were denied.[146] *Four years* after the suit was filed by Peppers, the defendant Coates was found by the Eleventh Circuit to be entitled to qualified immunity.[147]

In *Metlin v. Palastra*, two businessmen whose businesses had been ordered off-limits for military personnel brought actions on July 16, 1981, "seeking injunctive relief and damages for

141. *See* Karen Gullo, *Federal Employee Complaints* Growing, HERALD-SUN, Jan. 19, 1999, B1 (Durham, N.C.).
142. *See id.*
143. *See id.*
144. 887 F.2d 1493, 1495 (11th Cir. 1989).
145. *See id.*
146. *See id.*
147. *See id.* at 1499.

violations of their due process rights and armed forces regulations" against the defendants.[148] The district court denied motions to dismiss the actions against two of the defendants, one a United States Army general in command of Fort Polk and the other the post's Provost Marshall and the president of the Local Board of Armed Forces Disciplinary Control Board.[149] "*After substantial discovery*, [one of the defendant's] filed a new motion to dismiss or for summary judgment on the ground of absolute or qualified immunity."[150] The district court denied the motion on March 14, 1983 without opinion and the defendant appealed.[151] The Fifth Circuit reversed, holding that the plaintiffs had not even identified a violation of any clearly established law.[152]

In *Turner v. Scott*, an arrestee brought a §1983 action in 1994 against a police officer, among other defendants, alleging "that the defendants had used excessive force against her while she was in custody."[153] The district court denied defendant Scott's motion to dismiss in which he asserted, among other things, that he was entitled to qualified immunity.[154] The case was not dismissed by the court of appeals until July, 1997.[155]

The absurdity of these and other cases that are clogging our court systems and diverting the attention of our public officials from their duties strikes a blow at the integrity of our constitutionally protected rights by trivializing the importance of this most sacred of our secular texts. For example, a New York prisoner filed a complaint seeking one million dollars in damages resulting from violations of his civil rights that occurred when he was served melted ice cream.[156] The judge held that "the right to eat ice cream . . . was clearly not within the contemplation" of the Framers.[157] Oregon prisoner Randolf Fritz, a native-born American, sued Attorney General Richard Thornburgh, apparently in an attempt to have the court

148. 729 F.2d 353, 355 (5th Cir. 1984).
149. *See id.* at 354-55.
150. *Id.* at 355 (emphasis added).
151. *See id.*
152. *Id.* at 356.
153. 119 F.3d 425 (6th Cir. 1997).
154. *Id.* at 427.
155. *See id.* at 430.
156. *See Criminal Oversight*, WALL ST. J., June 10, 1996, at A18.
157. *See id.*

"declare that he does not need to work while he is incarcerated."[158] Fritz filed a "'Declaration and Assertion of Fundamental Human Rights' in which he repudiat[ed] his United States citizenship and declar[ed] himself to be a stateless entity. He also . . . filed 'A Manifesto of Vassalage' declaring his 'unrestricted allegiance, fidelity, fealty and vassalage to the infinite dominion, jurisdiction and manus of [His] Patriarch Bobby and [His] Matriarch Frances, who are stateless international merchants . . . .'"[159] Not only do these suits waste valuable judicial resources, they also cheapen the sanctity of our constitutional protections by making constitutional claims out of absurdities and issues that should be left to small claims courts.

These cases illustrate the amount of time and resources that are consumed by such litigation. Each case in which an official's motive is a necessary element should be judged under a uniform standard for qualified immunity and the outcome should not depend upon whether the plaintiff is a prisoner or, more specifically, a prisoner whose suit is prevented by the PLRA. As the Chief Justice's dissent recognizes, similarly situated defendants should be treated the same regardless of the plaintiff's situation.

C. Brief Consideration of Justice Scalia's Formulation

Justice Scalia's dissent is not as consistent with the spirit of prior case law as that of the Chief Justice. Justice Scalia criticized Chief Justice Rehnquist's formulation because "it would allow the introduction of 'objective evidence' that the constitutionally valid reason offered for the complained-of action 'is actually a pretext.'"[160] Justice Scalia's own preference, previously discussed, would not admit any proof that something other than the reasonable grounds asserted by the defendant was the genuine motive for the action once the trial court finds that the grounds put forth by the defendant for the official action complained of were objectively valid. Recognizing that this rule was a more severe restriction on

158. Fritz v. Thornburgh, 1990 WL 174920*1 (D.D.C. 1990). *See also* Laura Blumenfeld, *Case Dismissed! Those Loopy Lawsuits; Nothing Clogs the Wheels of Justice Like a Lost Cause*, WASH. POST, Aug. 30, 1991, at C1.

159. *Fritz*, 1990 WL at *1.

160. 118 S. Ct. at 1603 (Scalia, J. dissenting).

"intent-based" constitutional torts than the rule proposed by the Chief Justice, Justice Scalia wrote, "I am less put off by that consequence than some may be, since I believe that no 'intent-based' constitutional tort would have been actionable under the §1983 that Congress enacted."[161]

That justification is not very persuasive, however. Even though the Court probably did alter §1983 beyond its original scope and intent in *Monroe*, Congress has acquiesced in that decision for over thirty-five years. "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification."[162] Until the Court decides to revisit the issue of the expansion of §1983 presented in *Monroe*, stare decisis requires justices to faithfully interpret the law as it stands.

Similarly, Chief Justice Rehnquist's formulation is superior to that of the D. C. Circuit. The holding of the D. C. Circuit adopting a clear and convincing evidence standard was excessively complicated and unnecessary. Changing the burden of proof would have made it much more difficult for plaintiffs with meritorious claims to get relief. This heightened proof standard would apply across the board and would not be limited to those cases in which the defendant "can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext."[163] In effect, all claims would be subjected at pleading to this heightened standard. Although one might determine that such a heightened pleading standard is good policy because it is desirable to discourage damages actions against public officials in general and to make recovery more difficult in those cases that actually are brought, this route would be an unprecedented departure from earlier decisions. [164]

---

161. *Id.* at 1604.

162. Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

163. 118 U.S. at 1600.

164. *See id.* at 1595 (recognizing that the heightened pleading standard adopted by the court of appeals "lacks any common law pedigree"). *See also Crawford-El*, 118 S. Ct. at 1595 (citing *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980), refusing to change the Federal Rules of Civil Procedure governing pleading by requiring the plaintiff to anticipate an immunity defense, and *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164-69 (1993), declining to require pleadings of heightened specificity in cases in which municipal liability is alleged).

III. SUMMARY

Prisoner lawsuits against public officials consume vast resources. They clog court dockets, divert officials' attention from their duties, and increase the costs to taxpayers of running prisons, courts, and all manner of public agencies and police departments. Although some of these suits serve a hallowed purpose—protecting the constitutional rights of everyone, even criminals—the vast majority of them provide little or no benefit to society or the individuals involved. We must take reasonable measures to ensure that frivolous suits that trivialize our constitutional system are screened out. The PLRA addresses many of these issues, but its goals would be more readily achieved if Chief Justice Rehnquist's position had been adopted in *Crawford-El*. Under his formulation, meritorious claims could still be brought, yet the law would be applied in a more uniform manner across the country and defendant's would be assured of a more homogenous level of protection. Furthermore, this increased level of protection could be achieved without the Court overstepping its authority or engaging in judicial activism. Qualified immunity is a common law doctrine. The fact that Congress did not tamper with the muddled case law in this area when passing the PLRA was probably more a recognition of the limitations of its institutional competence rather than a tacit signal to the Court to refrain from clarifying qualified immunity doctrine. In sum, the Court should have adopted Justice Rehnquist's formulation requiring, when a government official raises the qualified immunity defense, a showing by plaintiffs that the defendant's proffered lawful reason for taking the action complained of was actually pretextual.

James C. Wrenn, Jr.