CRAWFORD-EL V. BRITTON: THE SUPREME COURT RE-EXAMINES THE QUALIFIED IMMUNITY DEFENSE WITHIN THE CONFINES OF THE FEDERAL RULES OF CIVIL PROCEDURE

The American public has a strong interest in holding government employees accountable for their conduct and in providing a remedy to individuals whose civil rights have been violated by government officials.[1] The American public also has a strong interest in ensuring that these same government employees have sufficient freedom and discretion to perform their duties effectively[2] without fear of a deluge of costly and time-consuming lawsuits resulting from their work-related conduct.[3] These competing interests often clash in law-

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[1] *See* Brief of William G. Moore, Jr. as Amicus Curiae In Support of Petitioner at 6-7, Crawford-El v. Britton, 118 S. Ct. 1584 (1998 No. 96-827) (arguing that the public has a compelling interest in holding government employees liable for their tortious actions and that holding government employees accountable helps to clarify their proper role in the American constitutional system); *see also* Elder v. Holloway, 510 U.S. 510, 515 (1994) (explaining that imposing liability on government officials serves to deter unlawful conduct); Butz v. Economou, 438 U.S. 478, 506 (1978) (asserting that holding government officials liable for their wrongful conduct is an important way to vindicate constitutional guarantees and that the American system of jurisprudence is premised on the theory that all citizens, regardless of their government position, are subject to federal law); Brief of the American Civil Liberties Union and the American Civil Liberties Union of the National Capital Area as Amici Curiae in Support of Petitioner at 7-8, *Crawford-El* (No. 96-827) (arguing that Congress enacted a damages remedy for violations of individual rights because the protection of such rights is the essence of the American constitutional system and that damages provide relief to individuals whose constitutional rights have been violated while also deterring government employees from engaging in unconstitutional behavior).

[2] *See* Cory T. Way, Note, *In Defense of Executive Branch Defendants: The Case for Heightened Production Requirements in Actions for Damages Against Public Servants*, 83 VA. L. REV. 1225, 1225 (1997) (explaining that the American public expects that government employees will provide a wide array of services in order to satisfy societal needs).

[3] *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). The *Harlow* Court noted that claims against government officials impose heavy costs not only on the individual defendant, but on society as a whole. *See id.* These social costs include expenses associated with litigation, the diversion of public employees' focus away from important public issues, and the likely result that capable individuals will be deterred from pursuing careers in public office. *See id; see also* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) ("To submit all officials, the innocent as well as the guilty, to the

suits, especially 42 U.S.C. § 1983 suits[4] and *Bivens* actions[5] in which government employees are named as defendants in their individual capacities.[6]

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burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties."); Brief for the United States as Amicus Curiae Supporting Respondent at 10, *Crawford-El* (No. 96-827) (arguing that the possibility of trial and personal monetary liability discourages public employees from acting with the decisiveness and judgment needed to serve the public good and that permitting plaintiffs to engage in discovery leads to broad inquiries, which disrupt effective government); Brief of the States of Missouri, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and the Territories of Guam and the Virgin Islands at 4, *Crawford-El* (No. 96-827) (claiming that personal liability for their official actions can lead to distractions for government employees and the inefficient functioning of government); 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, 1144 (1996) (stating that a constitutional tort lawsuit "can annoy, harass, or even terrorize defendants to the point that they are afraid of effectively performing their duties"). Many commentators have addressed the escalating number of civil rights cases filed against government officials, especially those filed by prisoners. *See generally* Edmund L. Carey, Jr., Note, *Quick Termination of Insubstantial Civil Rights Claims: Qualified Immunity and Procedural Fairness*, 38 VAND. L. REV. 1543 (1985); Eric Harbrook Cottrell, Note, *Civil Rights Plaintiffs, Clogged Courts, and the Federal Rules Of Civil Procedure: The Supreme Court Takes a Look at Heightened Pleading Standards in* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 72 N.C. L. REV. 1085 (1994); Christine Kuhn, Note, *Between Scylla and Charybdis: Can the Supreme Court Rescue the Qualified Immunity Doctrine?*, 43 DRAKE L. REV. 681 (1995).

[4] 42 U.S.C. § 1983 (1994) provides:

> 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 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 . . . .

Id. The main goal of § 1983 claims is to provide compensation to an individual whose constitutional rights have been violated. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Section 1983 provides an explicit cause of action to individuals whose civil rights have been violated by a public employee acting under the color of state law. *See* Cottrell, *supra* note 3, at 1086. In order to state a § 1983 claim, a plaintiff must allege that he was deprived of a federal right and that the individual who deprived him of such a right acted under the color of law. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980). Initially, § 1983 was in the Civil Rights Act of 1871 and was passed by Congress because state law enforcement officials were reluctant to combat the widespread violence in the South following the Civil War. *See* Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 311, 317 (1995). Prior to 1961, few § 1983 cases were decided by the federal courts. *See* Mary A. McKenzie, Note, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 SUFFOLK U. L. REV.

The affirmative defense of qualified immunity, which is available to public officials performing discretionary tasks and which serves to shield such officials from civil liability provided that their actions do not violate an individual's clearly established rights, has been developed by the Supreme Court in order to achieve a proper balance between the competing interests of civil rights plaintiffs and government officials.[7] In this regard, the Supreme Court has repeatedly

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673, 677 (1991). In *Monroe v. Pape*, 365 U.S. 167 (1961), the Supreme Court held that citizens have a cause of action against state officials acting under the color of state law, whether such conduct was authorized or unauthorized, and that the relief provided by the statute was supplemental to state law remedies. *See Monroe*, 365 U.S. at 171-72, 183. Following *Monroe*, the use of § 1983 by civil rights plaintiffs greatly increased. *See* Carey, *supra* note 3, at 1544. Section 1983 has been praised as one of the most important federal statutes of modern jurisprudence. *See* Bonnie L. Hemenway, Babb v. Dorman: *The Fifth Circuit Requires Heightened Pleading in Section 1983 Cases Against Municipal Defendants Who Plead Qualified Immunity*, 69 TUL. L. REV. 1719, 1721 (1995).

[5] A *Bivens* action, which is derived from *Bivens v. Six Unknown Named Defendants*, 403 U.S. 388 (1971), is defined as a type of action for damages to remedy a violation of an individual's constitutional right when such a right has been violated by a federal government employee. *See* BLACK'S LAW DICTIONARY 169 (6th ed. 1990). This type of action is available to a prospective plaintiff when no equally effective remedy is present, no explicit congressional declaration prohibits recovery, and no unique factors counsel hesitation. *See id. Bivens* provided that a plaintiff could invoke the federal courts' jurisdiction in a suit for damages to remedy a violation of his rights. *See Butz*, 438 U.S. at 486; *see also* Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 338 (1989) (explaining that the *Bivens* Court created this new cause of action to remedy deficiencies in congressional civil rights legislation because it was unfair that an individual whose constitutional rights had been violated could be deprived of a remedy due to the fact that the offender was a federal official); H. Allen Black, Note, *Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity for Federal Officials*, 32 WM. & MARY L. REV. 733, 733 (1991) (noting that in *Bivens*, the Supreme Court originated a new cause of action, "the *Bivens* suit," for situations in which a citizen's constitutional rights were violated by federal government employees).

[6] *See* Crawford-El v. Britton, 93 F.3d 813, 829 (D.C. Cir. 1996) (Silberman, J., concurring) (observing that *Bivens* actions asserted against federal officers and § 1983 claims brought against state officials are the types of cases that most frequently implicate qualified immunity concerns); *see also* Michael T. Jilka, *Immunity Under Section 1983*, 65 J. KAN. B. ASS'N 30, 31 (June/July, 1996) (explaining that when government officials face a claim in their individual capacity, such defendants are generally entitled to assert a defense of qualified immunity).

[7] *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 3 (1997) (explaining that although the Supreme Court has recognized that damage actions are an important means by which to enforce constitutional rights and are therefore a key component of the American legal system, the Court has developed, for policy reasons, the defense of qualified immunity to reduce the potential liability of government officials). Qualified immunity is defined as an "[a]ffirmative defense which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." BLACK'S LAW DICTIONARY 752 (6th ed. 1990). Qualified

refined the doctrine of qualified immunity in an attempt to allow plaintiffs the opportunity to vindicate their constitutional rights, while at the same time protecting government officials from frivolous lawsuits.[8] The tension between the competing interests is especially

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immunity is a complex and difficult issue for both the judiciary and attorneys. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 187 (1993). The broad concept of qualified immunity was designed in an effort to ensure that government officials could reasonably predict if their conduct would cause them to be held liable for damages. *See* Anderson v. Creighton, 483 U.S. 635, 646 (1987). Because qualified immunity is an affirmative defense, the pleading burden rests with the defendant. *See Gomez*, 446 U.S. at 640. Generally, executive officials are entitled to a defense of qualified immunity. *See Harlow*, 457 U.S. at 807. The theory that government officials should be immune from personal liability is based on the same reasons on which the doctrine of sovereign immunity is premised. *See* Scheuer v. Rhodes, 416 U.S. 232, 239 (1974). In determining the proper scope of a government official's immunity, courts examine the common-law tradition for guidance. *See Anderson*, 483 U.S. at 644. Originally, immunity was provided to government officials because of two main reasons: the unfairness, especially when bad faith was not involved, of holding liable a government official who must exercise discretion in his position, and the undesirable possibility that such liability would prevent a government official from fully performing his duties decisively and capably for the public good. *See Scheuer*, 416 U.S. at 240. The concept that government officials should receive some degree of immunity recognizes that government officials err but assumes that it is preferable for government officials to act decisively and possibly err than not to act at all. *See id.* at 242. Absolute immunity is total protection from suit for certain public officials whose unique functions or status demands such complete protection. *See Harlow*, 457 U.S. at 807. Examples of individuals or groups who are entitled to absolute immunity for conduct within the scope of official duties include: the President, *see* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982), specified members of the executive branch of government, including prosecutors and comparable officials, *see Butz*, 438 U.S. at 494-500, executive officers performing adjudicative functions, *see id.* at 513-17, members of the legislative branch of government, *see* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975), and judges, *see* Bradley v. Fisher, 80 U.S. 335, 351 (1871).

[8] *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 498 (1992) (observing that the Supreme Court has rendered multiple decisions regarding the issue of qualified immunity and that the Court's decisions have frequently revised the standard for determining the availability of an immunity defense). The Supreme Court has stated that resolving questions involving immunity requires a balancing of alternatives and their inherent evils. *See Harlow*, 457 U.S. at 813. While recognizing that an action for damages might be the only possible vindication for an individual who has suffered a violation of his constitutional rights by a government employee, the Court has also maintained that such claims impose costs against both society and the individual government employee. *See id.* at 814; *see also* Elliot v. Thomas, 937 F.2d 338, 344 (7th Cir. 1991) (questioning whether it is realistic to provide redress to civil rights plaintiffs while simultaneously protecting government officials from burdensome discovery or trial in cases that the officials are bound to win because of the qualified immunity defense). The balance that the Court has struck regarding qualified immunity has been both criticized and praised, although a majority of commentators have disapproved of the Court's development of the doctrine. *See* Chen, *supra* note 7, at 11 (suggesting that the Supreme Court has had difficulty balancing the interests of individuals whose constitutional rights have been violated

acute when a defendant asserting a qualified immunity defense moves for dismissal of the case before the plaintiff has engaged in discovery.[9] The tension is magnified because plaintiffs, including those with meritorious claims, will frequently not have a sufficient amount of evidence to withstand such a motion and, thus, the defendant's motion will be granted.[10] However, if the motion is denied, or

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against societal concerns regarding the potential liability of government officials); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 81 (1989) (describing qualified immunity as an overbroad, imperfect tool used in attempting to balance the strong competing interests implicated when individuals seek to hold government officials accountable for their conduct); Stephen J. Shapiro, *Public Official's Qualified Immunity in Section 1983 Actions Under* Harlow v. Fitzgerald *and its Progeny: A Critical Analysis*, 22 U. MICH. J.L. REFORM. 249, 280 (1989) (arguing that qualified immunity has been unduly extended to undeserving officials); Black, *supra* note 5, at 778 (claiming that the Supreme Court has been unable to strike the proper balance between an injured individual and effective government through its creation of a flawed qualified immunity doctrine); McKenzie, *supra* note 4, at 704 (asserting that the Supreme Court's qualified immunity decisions have elevated efficient government above constitutionally protected individual rights); *cf.* Jilka, *supra* note 6, at 35 (observing that qualified immunity helps to reduce the significant societal costs related to § 1983 claims); Charles T. Putnam and Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense In Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665, 668 (1992) (defending qualified immunity as an effective doctrine that promotes federalism, reduces the caseload of the overcrowded federal courts, prevents the overdeterrence of government officials, and helps to avoid trivialization of the Constitution); Peggy Ward Corn, Comment, Anderson v. Creighton *and Qualified Immunity*, 50 OHIO ST. L.J. 447, 448 (1989) (explaining that the doctrine of qualified immunity was developed by the Court in response to the difficulties faced by defendant government officials who were confronted by a proliferation of constitutional tort actions).

[9] *See* Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985). In justifying the imposition of heightened pleading requirements on plaintiffs asserting claims against public officials who are entitled to a defense of qualified immunity, the court argued that the "notice pleading" regime established by the Federal Rules of Civil Procedure (FRCP) was in conflict with the policy goals of the qualified immunity defense. *See id.* Specifically, the court stressed that to permit plaintiffs to engage in even limited discovery would undercut the substantive rights afforded to public officials by the defense of qualified immunity, namely, protection from the burdens and stresses associated with discovery and trial. *See id.* Discovery is defined as

> [t]he pre-trial devices that can be used by one party to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Under the Federal Rules of Civil Procedure . . . tools of discovery include: depositions upon oral and written questions, written interrogatories, production of documents or things, permission to enter upon land or other property, physical and mental examinations and requests for admissions.

BLACK'S LAW DICTIONARY 466 (6th ed. 1990).

[10] *See* Cottrell, *supra* note 3, at 1110 (noting that when a defendant government official moves for summary judgment in the beginning phases of a lawsuit, the plaintiff will frequently not know specific facts that would play a crucial role in surviving such a motion); *see also* Chen, *supra* note 7, at 86 (explaining that in response to the

if the plaintiff is permitted to engage in discovery, the substance of the qualified immunity defense will be eviscerated.[11]

Recently, the Supreme Court re-examined the doctrine of qualified immunity and its role in the operation of the Federal Rules of Civil Procedure (FRCP),[12] specifically a motion for summary judgment pursuant to Rule 56,[13] in *Crawford-El v. Britton*.[14]

In *Crawford-El v. Britton*, the Supreme Court held that, in suits wherein a plaintiff prisoner asserts a constitutional claim against a government employee, in which improper motive is an element, the plaintiff does not have to produce clear and convincing evidence[15] of

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Supreme Court's mandate that qualified immunity issues be resolved quickly, lower federal courts have prohibited plaintiffs from engaging in discovery).

[11] *See* Siegert v. Gilley, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring). Although Justice Kennedy acknowledged that heightened pleading requirements were a departure from the FRCP, he argued that the imposition of such a heightened requirement was appropriate to ensure that the policy goals of *Harlow* were protected. *See id.* at 235-36. Justice Kennedy conceded that the increased burden could restrict the ability of plaintiffs to engage in discovery, but stressed that dismissal could still be appropriate because the qualified immunity defense was designed to shield public officials from such burdensome discovery. *See id.*; *see also Elliot*, 937 F.2d at 344-45 (agreeing with Justice Kennedy that the best way to remain faithful to *Harlow*'s directive that immunity be resolved as quickly as possible is to require a plaintiff to produce factually specific allegations that establish the defendant's unconstitutional mental state).

[12] *See* Gary T. Lester, Comment, Schultea II – *Fifth Circuit's Answer to* Leatherman — *Rule 7 Reply: More Questions than Answers in Civil Rights Cases?*, 37 S. TEX. L. REV. 413, 419-20 (1996) (noting that the FRCP were adopted in 1938, were intended to move from code pleading to broad notice pleading, and were designed to resolve lawsuits on their merits and not procedural technicalities).

[13] Summary judgment is defined as a

> [p]rocedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only a question of law is involved .... Federal Rule of Civil Procedure 56 permits any party to a civil action to move for summary judgment on a claim, counterclaim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law.

BLACK'S LAW DICTIONARY 1435 (6th ed. 1990); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (explaining that summary judgment is a vital component of the FRCP that was designed "'to secure the just, speedy and inexpensive determination of every action.'") (quoting FED. R. CIV. P. 1); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 521 (1997) (observing that the Supreme Court has mandated the increased use of summary judgment to weed out non-meritorious claims).

[14] 118 S. Ct. 1584 (1998); *see also* Colston v. Barnhart, 146 F.3d 282, 296 (5th Cir. 1998) (DeMoss, J., dissenting) (indicating that in *Crawford-El*, the Supreme Court revisited the doctrine of qualified immunity and the policy goals on which the defense is premised).

[15] The function of the standard of proof in a particular case is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in

the improper motive in order to defeat a motion for summary judgment.[16]

The petitioner, Leonard Rollon Crawford-El, is an outspoken inmate in the District of Columbia's prison system.[17] The circumstances that gave rise to Crawford-El's claim transpired in 1988 and 1989 when the petitioner, along with several other prisoners, was transferred from the District of Columbia's prison and moved to a number of correctional facilities across the country.[18] Crawford-El's possessions were shipped separately during the course of his transfers, and there was a delay in the receipt of his property at his ulti-

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the correctness of factual conclusions for a particular type of adjudication." *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The applicable standard allocates the risk of error among the parties to the litigation and hints at the importance society attaches to the final decision. *See* Addington v. Texas, 441 U.S. 418, 423 (1979). In the usual civil case involving a dispute over money between private litigants, the preponderance of the evidence standard is applied because the public has only a slight concern with the result of such private lawsuits. *See id.* As a standard of proof, preponderance of the evidence is evidence that carries greater weight or is more persuasive than the evidence offered against it. *See* BLACK'S LAW DICTIONARY 1182 (6th ed. 1990). The clear and convincing evidentiary standard is not as commonly applied in civil cases as is the preponderance of the evidence standard, but it is typically utilized in cases in which fraud or quasi-criminal conduct is alleged against a defendant. *See Addington*, 441 U.S. at 424. In such cases, the implicated interests are more significant than the loss of money and, therefore, courts may reduce the possibility of erroneous reputational damage to a defendant by enhancing the claimant's burden of proof. *See id.* The Supreme Court has utilized the clear and convincing evidentiary standard to protect very important individual interests in certain civil actions. *See id.*; *see also, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (applying the clear and convincing evidentiary standard in situations involving the possible termination of parental rights); *Addington*, 441 U.S. at 432-33 (utilizing the clear and convincing evidentiary standard in civil commitment proceedings); Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 286 (1966) (using the clear and convincing standard of evidence for deportation proceedings); Schneiderman v. United States, 320 U.S. 118, 123 (1943) (utilizing the clear and convincing standard of evidence for denaturalization proceedings). Clear and convincing evidence is evidence that indicates that the truth of the facts claimed is highly probable, and such proof also provides reasonable certainty regarding the truth of the disputed fact. *See* BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

[16] *See Crawford-El*, 118 S. Ct. at 1596.

[17] *See id.* at 1587. Crawford-El is serving a life sentence for a murder conviction. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 2, *Crawford-El* (No. 96-827). In the past, the petitioner aided fellow prisoners with their lawsuits and filed several of his own. *See Crawford-El*, 118 S. Ct. at 1587. Additionally, Crawford-El granted interviews about prison conditions to media members who wrote news stories about those conditions. *See id.*

[18] *See Crawford-El*, 118 S. Ct. at 1587. Originally located in the District of Columbia's Lorton, Virginia prison, the petitioner was transferred to the Spokane, Washington jail due to overcrowding. *See id.* Subsequently, Crawford-El was moved to a Washington State prison, then to a Cameron, Missouri facility, then back to Lorton, next to Petersburg, Virginia, and finally to the Marianna, Florida federal prison. *See id.*

mate destination in Florida.[19] Britton, the respondent, was the District of Columbia correctional officer responsible for shipping the petitioner's property to him.[20]

Crawford-El filed suit under 42 U.S.C. § 1983 against both Britton and the District of Columbia.[21] In the petitioner's original complaint, his primary theory was that Britton had diverted his property, specifically his legal materials, in an effort to interfere with his right of access to court.[22] Before discovery,[23] Britton made a motion seeking either dismissal of the complaint or summary judgment.[24] The motion was denied and Britton appealed.[25] The United States Court

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[19] *See id.* The petitioner's belongings included his papers regarding certain federal civil actions, papers consisting of facts involving other possible federal actions, a photograph that he believed to be important to post-conviction proceedings in his criminal case, clothing, and various other personal articles. *See* Crawford-El v. Britton, 844 F. Supp. 795, 797 (D.D.C. 1994).

[20] *See Crawford-El,* 844 F. Supp. at 797. When the petitioner and other District of Columbia inmates were being moved from the Washington State facility, Britton had the Washington authorities ship all the inmates' belongings to her in Washington, D.C. *See id.* at 797-98. Rather than shipping Crawford-El's property directly to him at his ultimate destination in Marianna, the respondent asked Jessee Carter, the petitioner's brother-in-law and a District of Columbia correctional official, to pick up the petitioner's property. *See id.* at 798. Carter picked up the petitioner's property, although Crawford-El never gave his permission for such a release. *See id.* At the petitioner's request, Carter tried to return the property to the respondent so the petitioner's possessions could be sent to him through prison channels. *See id.* The respondent did not accept the return of the materials, so Carter gave the property to Crawford-El's mother. *See id.* As per his request, Crawford-El's mother then mailed the materials to the petitioner at his expense. *See id.* Once the materials reached the Marianna facility, Crawford-El was not allowed to receive his boxes due to the fact that they had been sent to him outside of prison channels. *See id.* In order to retrieve his property, Crawford-El had to complete an administrative complaint. *See id.* Approximately six months after relinquishing his property to the Washington State prison authorities, Crawford-El received his possessions. *See id.*

[21] *See Crawford-El,* 118 S. Ct. at 1587-88; *see also* Brief of Respondent at 2 n.1, *Crawford-El* (No. 96-827) (explaining that the District of Columbia was named as a defendant on the theory that it had assigned policy-making authority to Britton).

[22] *See Crawford-El,* 118 S. Ct. at 1588.

[23] *See supra* note 9 (defining discovery and identifying the tools that can be utilized during the discovery process). Crawford-El served the respondent with several discovery requests, including interrogatories and a request for document production, which sought information about her professional history and her private life. *See* Brief of Respondent at 5 n.5, *Crawford-El* (No. 96-827).

[24] *See* Brief of Respondent at 5, *Crawford-El* (No. 96-827). The respondent attached her affidavit to her motion. *See id.* In her affidavit, Britton listed her reasons for transferring the petitioner's belongings in the manner that she did, maintaining that she did so to prevent the loss of his property and that she followed a similar procedure with other similarly situated inmates. *See id.* at 5-6. In making her motion, Britton relied partially on a defense of qualified immunity. *See Crawford-El,* 118 S. Ct. at 1588.

[25] *See Crawford-El,* 118 S. Ct. at 1588. Britton argued that Crawford-El's complaint

of Appeals for the District of Columbia found that Crawford-El's right of access was well-established at the time of the alleged violation of his rights and that the complaint contained sufficiently specific allegations to survive the circuit's heightened pleading standard.[26] The court concluded, however, that Crawford-El's allegations regarding the actual injury inflicted on his ability to litigate were not sufficient under the heightened standard and, therefore, Crawford-El's complaint should have been dismissed.[27] While Crawford-El's case was on appeal, the pleading standard was clarified.[28] Accordingly, the court of appeals reversed and remanded the case, concluding that Crawford-El should be given the opportunity to replead his case.[29]

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did not include an allegation of a violation of any clearly established constitutional right and that Crawford-El's complaint failed to meet the heightened pleading standard utilized by the Court of Appeals for the District of Columbia in damage actions asserted against government officials. *See id.*

[26] *See id.* The Court of Appeals for the District of Columbia explained that, prior to Britton's alleged tortious activities, it was clearly established that an official who interfered with a transfer of an inmate's legal papers with the intention of thwarting the prisoner's litigation violated the prisoner's right of access to court. *See* Crawford-El v. Britton, 951 F.2d 1314, 1318 (D.C. Cir. 1991) (citing Simmons v. Dickhaut, 804 F.2d 182, 183 (1st Cir. 1986); Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986); Carter v. Hutto, 781 F.2d 1028, 1031-32 (4th Cir. 1986); Tyler v. "Ron" Deputy Sheriff, 574 F.2d 427, 429 (8th Cir. 1978); *cf.* Jackson v. Procunier, 789 F.2d 307, 310-11 (5th Cir. 1986); Washington v. James, 782 F.2d 1134, 1138-39 (2d Cir. 1986)). The court found that although several of Crawford-El's allegations of specific facts that suggested an intention on the part of Britton to interfere with his legal claims appeared to be hearsay, they, along with the petitioner's claims of disparate treatment and other supporting evidence, were sufficient to satisfy the heightened pleading requirement. *See Crawford-El*, 951 F.2d at 1320. The court noted that Crawford-El was able to identify specific statements made by Britton that indicated her hostility to Crawford-El and also her knowledge that his possessions contained legal papers. *See id.*

[27] *See Crawford-El*, 118 S. Ct. at 1588. The Court of Appeals for the District of Columbia noted the general principle that a showing of injury is a requirement for a constitutional tort action. *See Crawford-El*, 951 F.2d at 1321-22 (citing Butz v. Economou, 438 U.S. 478, 486 (1978); Ingraham v. Wright, 430 U.S. 651, 674 (1977); Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)). Observing that Crawford-El's only tangible legal injury was the dismissal of a pro se action which had been filed in Maryland's federal district court, the court concluded that Crawford-El was unable to link his deprivation of legal papers to an adverse litigation effect. *See Crawford-El*, 951 F.2d at 1322.

[28] *See* Hunter v. District of Columbia, 943 F.2d 69, 75, 79 (D.C. Cir. 1991) (revising the Court of Appeals for the District of Columbia's pleading standard).

[29] *See Crawford-El*, 118 S. Ct. at 1588. Despite holding that Crawford-El failed to meet the heightened pleading standard, the court of appeals remanded the case so that Crawford-El would have the opportunity to add non-conclusory allegations showing an actual injury, which was needed to maintain his claim. *See Crawford-El*, 951 F.2d at 1322. The court also indicated that the decision regarding whether to grant permission for Crawford-El to supplement his complaint with additional amendments was within the sound discretion of the lower court. *See id.*

On remand, Crawford-El amended his complaint, again alleging several of the same injuries as well as supplying more details to buttress his court-access claim.[30] Crawford-El also alleged that the defendants had systematically deprived him and other prisoners of their legal materials.[31] The court dismissed Crawford-El's court-access claim because he failed to allege an actual injury to himself and did not sufficiently allege systematic injury.[32]

In his amended complaint, Crawford-El added several new claims,[33] including a due process claim[34] and a claim that Britton had intentionally diverted his property to retaliate against him because he had previously exercised his First Amendment rights.[35] In addition to

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[30] *See Crawford-El*, 118 S. Ct. at 1588. Crawford-El again pleaded the same three injuries he had previously alleged. *See Crawford-El*, 844 F. Supp. at 799. Specifically, Crawford-El alleged pecuniary losses associated with having his packages shipped to himself and replacing some clothing. *See id.* Also, the petitioner alleged that he suffered mental distress resulting from

> "the stressful communications with officials and family members, the deprivation of pictures of loved ones, worry that his property might permanently or indefinitely be withheld from him, worry that his pending legal proceedings would be prejudiced, and worry that his pursuit of the administrative complaint in FCI Marianna [to be allowed to receive the packages as mailed from his mother] would adversely affect his relationship with FCI Marianna staff."

Id. (quoting Fourth Amended Complaint, at ¶ 45). The court reiterated that the court of appeals had already observed that these injuries did not result from a denial of the petitioner's court access right; therefore, the court rejected these injuries as insufficient to support his claim that was premised on one instance of improper interference. *See id.*

[31] *See Crawford-El*, 844 F. Supp. at 799. Accordingly, Crawford-El argued that he did not have to show actual injury because the systematic failure was, by itself, a sufficient injury. *See id.* The court then rejected Crawford-El's theory that the defendants consistently interfered with prisoners' court access rights. *See id.*

[32] *See id.* at 801.

[33] *See id.* In addition to the due process and First Amendment claims, Crawford-El alleged that the defendants violated District of Columbia law by transferring his property to an unauthorized individual outside of prison channels. *See id.* This claim was ultimately dismissed by the court due to a lack of jurisdiction. *See id.* at 807.

[34] *See id.* at 801. The petitioner made both procedural and substantive due process claims. *See id.*

[35] *See Crawford-El*, 118 S. Ct. at 1587. Crawford-El also alleged that Britton had diverted his property in an attempt to deter him from exercising his rights in the future. *See id.* Besides general allegations that Britton was hostile toward him, Crawford-El also offered specific instances in which his constitutional speech provoked her. *See id.* The petitioner frequently granted members of the press interviews regarding prison conditions and was quoted in newspaper stories about prison conditions. *See id.* Crawford-El claimed that in 1986, he invited a Washington Post writer to visit the Lorton prison. *See id.* at 1587 n.1. The petitioner procured a visitor application for the reporter, and the reporter ultimately wrote a front-page story about the prison's overcrowding. *See id.* Britton had approved the application for the re-

dismissing his access-to-the-courts claim, the district court also dismissed the due process claim because it was legally insufficient and the free speech-retaliation claim because it failed to allege "direct evidence of unconstitutional motive."[36] Subsequently, the district court denied Crawford-El's motion to reconsider the dismissal of his complaint.[37]

The United States Court of Appeals for the District of Columbia affirmed the dismissals of Crawford-El's due process and court-access claims, but declared that the entire court should examine Crawford-El's dismissed First Amendment retaliation claim.[38] The en banc proceeding resulted in five separate opinions, with a majority of the

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porter, which had not revealed the reporter's relation to the newspaper. *See id.* Crawford-El alleged that Britton had accused him of deceiving her and threatened to make his life "'as hard as possible for him.'" *Id.* (quoting Application to Petition for Certification at 178a). Furthermore, Crawford-El claimed that in 1988 he complained about invasions of privacy, and Britton allegedly told him, "'You're a prisoner, you don't have any rights.'" *Crawford-El*, 118 S. Ct at 1587 n.1 (quoting Application to Petition for Certification at 179a). Also in 1988, following another front-page newspaper story in which the petitioner was quoted, Britton allegedly referred to the petitioner as a "'legal troublemaker.'" *See id.* (quoting Application to Petition for Certification at 180a-181a). The respondent denied any retaliatory motive, rather, she suggested that she gave Crawford-El's property to his brother-in-law to guarantee its prompt and safe delivery. *See Crawford-El*, 118 S. Ct. at 1587.

[36] *Crawford-El*, 118 S. Ct. at 1588 (quoting *Crawford-El*, 844 F. Supp. at 802). The district court explained that in order to state a First Amendment claim, the petitioner had to establish that the respondent's acts actually injured him in the exercise of his free speech rights, and the petitioner also had to satisfy the circuit's heightened pleading standard. *See Crawford-El*, 844 F. Supp. at 801. The court noted that Crawford-El had to show that the respondent's retaliatory conduct would deter a "person of ordinary firmness" from exercising First Amendment rights in the future. *See id.* The court found that Crawford-El made such a showing because the monetary losses that he sustained, namely the costs associated with shipping and replacing his clothing, actually harmed him. *See id.* Although conceding that the monetary loss was slight, the court recognized that such an imposition could chill an individual of ordinary firmness from exercising his constitutional rights in the future for fear of being financially injured. *See id.* at 801-02. However, Crawford-El's free speech claim was ultimately rejected by the court because it failed to satisfy the heightened pleading standard. *See id.* at 802; *see also* Siegert v. Gilley, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd* on other grounds, 500 U.S. 226 (1991) (noting that the Court of Appeals for the District of Columbia required a plaintiff to satisfy the heightened pleading standard in order to overcome a qualified immunity defense asserted by a government official named in a constitutional claim in which the employee's motive is a required component); Kimberlin v. Quinlan, 6 F.3d 789, 793 (D.C. Cir. 1993) (explaining that the heightened pleading standard forces plaintiffs to plead "specific *direct* evidence of intent"). Because Crawford-El's allegations were completely circumstantial and unable to satisfy the heightened pleading requirement, the court dismissed his First Amendment claim. *See Crawford-El*, 844 F. Supp. at 802-03.

[37] *See* Crawford-El v. Britton, 863 F. Supp. 6, 8 (D.D.C. 1994).

[38] *See Crawford-El*, 118 S. Ct. at 1588.

judges agreeing on four central propositions.[39] The primary opinion of the en banc proceeding was authored by Judge Williams[40] and promulgated two main principles.[41] First, Judge Williams declared that a government official asserting a qualified immunity defense could have that issue resolved, including questions regarding the official's state of mind, prior to the plaintiff's being allowed to proceed with discovery on that issue.[42] Second, Judge Williams announced that judgment should be granted in favor of a government official defendant unless the plaintiff produces clear and convincing evidence as to the defendant's illicit state of mind.[43] In applying these

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[39] *See id.* at 1589. First, a majority of the judges agreed that the case should be remanded for further proceedings. *See id.* Second, the judges determined that a plaintiff was not required to satisfy a heightened pleading standard and that the plaintiff could rely on direct and circumstantial evidence. *See id.* Third, the majority concluded that in an illicit motive case, a plaintiff would have to produce clear and convincing evidence in order to prevail. *See id.* Fourth, a majority of the judges agreed that *Harlow* required special procedures to shield government officials from the burdens of litigation in such cases. *See id.*

[40] *See* Crawford-El v. Britton, 93 F.3d 813, 815 (D.C. Cir. 1996). First, the court analyzed *Harlow* and that case's emphasis on social costs, the burdens of discovery for a government official, and the Supreme Court's elimination of the subjective component of the qualified immunity defense. *See id.* at 816. The court proceeded to examine federal case law interpreting *Harlow*, in particular its own prior decisions. *See id.* at 817-18. For example, the court noted a deviation from the FRCP in *Martin v. District of Columbia Metropolitan Police*, 812 F.2d 1425 (D.C. Cir. 1986), whereby a direct evidence rule, which required a plaintiff to produce such evidence of a defendant's improper motive in order to proceed to trial, was imposed on plaintiffs. *See Crawford-El*, 93 F.3d at 817-18 (citing *Martin*, 812 F.2d at 1435). Continuing its review of previous decisions, the court recounted that *Siegert* held that before a plaintiff could obtain discovery, he had to plead unconstitutional motive "'with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of intent.'" *Id.* (quoting *Siegert*, 895 F.2d. at 802). Despite its previous application of a direct evidence rule, the court found that the rule was deficient because the differentiation between direct and circumstantial evidence did not have a correlation with the merits of a plaintiff's case and the distinction did not truly advance the objectives identified by *Harlow*. *See id.* at 818. Therefore, the court decided to overrule its previous cases that had established the direct evidence rule. *See id.* at 819.

[41] *See Crawford-El*, 118 S. Ct. at 1589.

[42] *See id.* The plurality contended that the most burdensome aspects of litigation transpire during discovery and trial and that if a plaintiff could delay summary judgment while utilizing discovery to gather evidence about a defendant's motivation, *Harlow*'s fear that government officials would be subjected to costly discovery would be realized in constitutional tort cases alleging unconstitutional motive. *See Crawford-El*, 93 F.3d at 819. Therefore, Judge Williams proclaimed that the best way to adhere to *Harlow*'s objective was to allow a defendant to be granted summary judgment prior to discovery unless the plaintiff could produce the requisite showing. *See id.* The plurality buttressed its conclusion by claiming that qualified immunity is a substantive right that could not be abridged by the FRCP. *See id.* at 820.

[43] *See Crawford-El*, 118 S. Ct. at 1589. The plurality cited two principal factors that

principles to the specific facts of *Crawford-El*, Judge Williams declared that a reasonable jury could not have found that the petitioner's allegations regarding Britton's unconstitutional intent satisfied the clear and convincing evidentiary standard.[44] Therefore, the court vacated the dismissal of the petitioner's complaint and remanded the case so that the district court could consider Crawford-El's claim under the revised standard.[45]

In a concurring opinion, Judge Silberman denounced Judge Williams's opinion as confusing and opined that *Harlow v. Fitzgerald*[46] demanded a more direct solution.[47] Judge Silberman suggested that, if a defendant asserted a legitimate reason for his conduct, only an objective examination into the pretextuality of that reason should be permitted.[48]

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led to its determination that the standard operation of the FRCP was inadequate to protect government officials in the manner that *Harlow* intended. *See Crawford-El*, 93 F.3d at 821. First, the plurality observed that an improper motive is "easy to allege and hard to disprove." *Id.*; *see also* Bower v. Jones, 978 F.2d 1004, 1012 (7th Cir. 1992) (noting that promissory fraud is not a favored cause of action because fraud is not difficult to allege but is hard to disprove) (citing Hollymatic Corp. v. Holly Sys., Inc., 620 F. Supp. 1366, 1369 (N.D. Ill. 1985)). Second, Judge Williams argued that *Harlow* considered the costs of error in granting or denying the relief sought in such cases as asymmetrical. *See Crawford-El*, 93 F.3d at 821. The plurality explained that the best solution to this problem was to alter the standard of proof and that the clear and convincing evidentiary standard was the most appropriate standard to utilize. *See id.* at 822-23; *see also supra* note 15 and accompanying text (defining the clear and convincing evidentiary standard and providing examples of its application). Judge Williams also observed that heightened proof standards apply both at trial and summary judgment. *See Crawford-El*, 93 F.3d at 823.

[44] *See Crawford-El*, 93 F.3d at 824-29. Prior to concluding that Crawford-El did not meet the clear and convincing standard, the plurality found that retaliatory action taken against Crawford-El for exercising his First Amendment rights would have been a violation of an established right of which a reasonable prison employee would have been aware and that the district court was correct in finding that Crawford-El had suffered an actual injury. *See id.* at 826.

[45] *See id.* at 829.

[46] 457 U.S. 800 (1982); *see also infra* notes 92-99 (detailing the Supreme Court's holding in *Harlow*).

[47] *See Crawford-El*, 118 S. Ct. at 1589. After reviewing the judicial development of § 1983 and *Bivens* actions and suggesting that those decisions be overruled, Judge Silberman indicated that *Martin*'s direct evidence rule had precluded many *Bivens* actions from proceeding to discovery and trial and that *Harlow* had contemplated such a result. *See Crawford-El*, 93 F.3d at 829-33 (Silberman, J., concurring). While conceding that Judge Williams's approach might make it more difficult for plaintiffs to engage in discovery and proceed to trial, Judge Silberman criticized Judge Williams's approach as confusing because it was unclear as to exactly what a plaintiff would have to produce in order to make a sufficient showing and because it was not apparent how the standard differed from other similar approaches. *See id.* at 833. Judge Silberman also disparaged Judge Ginsburg's approach as even more confusing than Judge Williams's. *See id.*

[48] *See Crawford-El*, 118 S. Ct. at 1589. Judge Silberman stated that if the facts es-

Judge Ginsburg, concurring, agreed that a clear and convincing evidentiary standard was appropriate for the improper motive issue,[49] but disagreed with Judge Williams's suggestion that summary judgment must be granted before discovery unless a plaintiff could meet the clear and convincing standard.[50] Judge Ginsburg described this rule as an infringement on a district court's ability to manage the fact-finding process, which the judge argued would lead to the dismissal of valid claims and an increase in the number of violations of individuals' constitutional rights committed by government officials.[51] Instead, Judge Ginsburg indicated that the court should permit a plaintiff to engage in some discovery on a proper showing prior to granting summary judgment.[52] Judge Ginsburg also commented,

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tablished that the proffered reason for a defendant's conduct was reasonable, the government employee should receive qualified immunity. *See Crawford-El*, 93 F.3d at 836 (Silberman, J., concurring). After observing that his approach was a logical extension of *Harlow*, Judge Silberman detailed the other deterrents that discouraged government officials from engaging in unconstitutional behavior. *See id.* Judge Silberman noted that disciplinary sanctions, damage to reputation, moral values, professional advancement, and a variety of federal statutes served to restrain government officials from violating the constitutional rights of citizens. *See id.* at 836-37 (Silberman, J., concurring). Judge Silberman speculated that it would be best for Congress to enact legislation in order to resolve the entire matter. *See id.* at 838 (Silberman, J., concurring).

[49] *See Crawford-El*, 118 S. Ct. at 1589. Judge Ginsburg agreed with Judge Williams that a plaintiff would have to satisfy the clear and convincing evidentiary standard both at trial and when attempting to withstand a defendant's motion for summary judgment. *See Crawford-El*, 93 F.3d at 838-39 (Ginsburg, J., concurring).

[50] *See Crawford-El*, 118 S. Ct. at 1589.

[51] *See id.* Judge Ginsburg declared that in addition to a compensatory function, constitutional tort liability also served a deterrent purpose. *See Crawford-El*, 93 F.3d at 839 (Ginsburg, J., concurring). Judge Ginsburg criticized Judge Williams for overlooking this deterrent function. *See id.* Furthermore, Judge Ginsburg rejected Judge Silberman's suggestion that there were other equally effective deterrents to unconstitutional behavior by government officials. *See id.* While conceding that it was impossible to ascertain how much more unconstitutional behavior Judge Williams's or Judge Silberman's approaches would encourage, Judge Ginsburg argued that a wiser and more effective approach would be to provide more direction to district judges with regard to the qualified immunity defense. *See id.* at 840 (Ginsburg, J., concurring).

[52] *See Crawford-El*, 118 S. Ct. at 1589. Judge Ginsburg suggested that, if at the time a government official defendant moved for summary judgment the plaintiff was unable to produce evidence that would allow a jury to find that the defendant was improperly motivated when acting, the district judge should grant the defendant's motion unless the plaintiff could establish, through the evidence he had gathered prior to discovery and facts to which he could testify, a reasonable probability that by proceeding with discovery, he would be able to accumulate a sufficient amount of evidence to buttress his specific factual allegations concerning the defendant's improper motive. *See Crawford-El*, 93 F.3d at 841 (Ginsburg, J., concurring). Judge Ginsburg maintained that this approach was superior to those of Judge Williams and Judge Silberman because it allowed a plaintiff an opportunity to engage in discovery,

however, that when a government official asserts a defense of qualified immunity, a district court would abuse its discretion if it evaluated only the parties' interests without considering the attendant social costs that are present when a government official is subjected to discovery.[53] In applying these principles, Judge Ginsburg concluded that if Crawford-El could not demonstrate that discovery would produce more evidence than he had already brought forth, summary judgment in favor of Britton would be appropriate without proceeding to discovery.[54]

Judge Henderson, concurring, enthusiastically supported the clear and convincing evidentiary standard.[55] Despite that support, Judge Henderson felt Crawford-El's claim was clearly frivolous, and, therefore, unworthy of an en banc hearing.[56]

Chief Judge Edwards, concurring in the judgment to remand and joined by four other judges, condemned the plurality's activist approach to the problem of qualified immunity in relation to a motion for summary judgment.[57] The judge criticized the new eviden-

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it protected the public from unneeded social costs, and it did not intrude on a district judge's discretion. *See id.*

[53] *See Crawford-El*, 118 S. Ct. at 1589-90.

[54] *See id.* at 1590. After reviewing Crawford-El's allegations, Judge Ginsburg found that in utilizing the clear and convincing evidentiary standard, no reasonable jury would be able to conclude that Britton had acted with an improper motive and that Crawford-El had failed to produce an expectation that further evidence could be discovered. *See Crawford-El*, 93 F.3d at 844 (Ginsburg, J., concurring). Judge Ginsburg commented that, if on remand Crawford-El did not produce any more evidence, discovery should be denied and Britton's summary motion should be granted. *See id.*

[55] *See Crawford-El*, 118 S. Ct. at 1590; *see also Crawford-El*, 93 F.3d at 844 (Henderson, J., concurring) ("It is high time that we scuttle the awkward direct/circumstantial evidence distinction and I fully endorse the clear and convincing standard the plurality adopts in its stead."). Judge Henderson also expressed confusion regarding why the other judges elected to revise the evidentiary standard in Crawford-El's case, because his case should have been dismissed much earlier in the litigation proceedings. *See id.* at 844-45 (Henderson, J., concurring).

[56] *See Crawford-El*, 118 S. Ct. at 1590.

[57] *See id.* Chief Judge Edwards admonished the plurality for ignoring the FRCP in fashioning the clear and convincing evidentiary standard. *See Crawford-El*, 93 F.3d at 847 (Edwards, C.J., concurring). Chief Judge Edwards fully endorsed the plurality's rejection of the direct evidence rule but argued that it was folly to create another unjust standard. *See id.* at 848 (Edwards, C.J., concurring). Rather, Chief Judge Edwards suggested that plaintiffs should be able to overcome a summary judgment motion prior to discovery if they could produce "nonconclusory allegations of evidence" regarding a defendant's improper motive. *See id.* at 849; *see also* Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984) (in establishing the "nonconclusory allegations of evidence" requirement, the court suggested that such allegations did not have to be extensive, but had to be sufficiently clear so as to alert defendants to the nature of the case, to allow defendants the ability to prepare a response, or, if appropriate, to prepare a summary judgment motion). Furthermore,

tiary standard as lacking either statutory[58] or precedential support[59] and speculated that a government official's qualified immunity defense would be impossible to overcome for an entire group of constitutional tort claims.[60]

The Supreme Court granted certiorari,[61] although the majority later characterized the facts of the case as trivial.[62] In justifying the grant of certiorari, the Court emphasized that the widely divergent views contained in the court of appeals' opinions highlighted the significance of the underlying issue.[63] The Court also suggested that it was imperative to clarify how *Harlow*'s holding[64] was to be construed with regard to a plaintiff's burden when recovery was predicated on proof of a government official's unconstitutional motive.[65] The Court held that when a plaintiff prisoner files a claim against a public official in which unconstitutional intent is an element of the claim and the defendant invokes a qualified immunity defense, the plaintiff does not have to produce clear and convincing evidence of the defendant's improper intent in order to withstand a defendant's motion for summary judgment.[66] In so holding, the Court rejected the notion that courts of appeals could create specific procedural rules in

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Chief Judge Edwards observed that district judges should apply this standard cautiously to ensure that legitimate claims would not be dismissed. *See Crawford-El*, 93 F.3d at 849 (Edwards, C.J., concurring).

[58] *See Crawford-El*, 118 S. Ct. at 1590. Chief Judge Edwards insisted that the FRCP, especially summary judgment following *Celotex*, provide adequate protection to ensure that insubstantial suits are separated from meritorious suits. *See Crawford-El*, 93 F.3d at 849-50 (Edwards, C.J., concurring).

[59] *See Crawford-El*, 118 S. Ct. at 1589. Chief Judge Edwards emphasized that no other circuit had adopted a similar evidentiary standard. *See Crawford-El*, 93 F.3d at 851 (Edwards, C.J., concurring). In addition, Chief Judge Edwards argued that the Supreme Court had never supported such an evidentiary standard in qualified immunity cases, nor had *Harlow* implied that such a standard was necessary. *See id.* at 852 (Edwards, C.J., concurring). Chief Judge Edwards declared that Crawford-El's complaint was sufficient to withstand a summary judgment motion in every other circuit in the United States. *See id.* at 853 (Edwards, C.J., concurring).

[60] *See Crawford-El*, 118 S. Ct. at 1590. Chief Judge Edwards declared that such a result was "both unfathomable and astonishing." *See Crawford-El*, 93 F.3d at 847 (Edwards, C.J., concurring).

[61] 117 S. Ct. 2451 (1997).

[62] *See Crawford-El*, 118 S. Ct. at 1590.

[63] *See id.* at 1590-91.

[64] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that in performing discretionary tasks, government officials would not be held liable for civil damages as long as their conduct did not violate the clearly established rights of an individual); *see also infra* notes 92-99 and accompanying text (detailing *Harlow*'s holding).

[65] *See Crawford-El*, 118 S. Ct. at 1592.

[66] *See id.* at 1598.

such cases to shield government officials from the burdensome costs associated with trial and discovery.[67]

The Supreme Court has repeatedly revised and refined the doctrine of qualified immunity.[68] One of the earliest and most important cases involving qualified immunity was *Pierson v. Ray*,[69] in which the Court considered whether police officers[70] could assert a "good faith and probable cause"[71] defense to a § 1983 action[72] for unlawful arrest.[73] The Court held that police officers can assert a "good faith

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[67] *See id.*

[68] Many commentators have lamented the Supreme Court's approach to the doctrine of qualified immunity. *See, e.g.*, Achtenberg, *supra* note 8, at 499 (criticizing the Supreme Court's interpretive approach for creating instability in the qualified immunity doctrine); Chen, *supra* note 7, at 3 (terming the Court's approach as paradoxical because the Court seems to encourage prompt resolution on summary judgment but the Court's development of the doctrine nearly guarantees a factual inquiry that prevents such a prompt resolution); Rudovsky, *supra* note 8, at 36 (disparaging the Court's development of qualified immunity as being plagued by ad hoc decision-making, clashing rationales, and severe doctrinal manipulation); Kuhn, *supra* note 3, at 708 (asserting that the Court's convoluted development of the doctrine of qualified immunity failed to give proper consideration to the costs imposed on defendants in relation to violated constitutional rights).

[69] 386 U.S. 547 (1967). *See* Shapiro, *supra* note 8, at 255 (terming *Pierson* "the seminal case" for immunity defenses, both absolute and qualified, for § 1983 claims).

[70] Police officers are members of the executive branch who are constantly and closely involved with citizens and, therefore, are repeatedly exposed to potential liability under § 1983. *See* Scheuer v. Rhodes, 416 U.S. 232, 244-45 (1974).

[71] *Pierson*, 386 U.S. at 554. The police officers argued that "they should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid." *Id.* at 554.

[72] *See supra* note 4 and accompanying text (explaining the history, elements, and goals of § 1983).

[73] *See Pierson*, 368 U.S. at 548, 550. The plaintiffs were clergymen arrested by the defendant police officers for attempting to use segregated facilities in Jackson, Mississippi. *See id.* at 549. Although originally convicted, the plaintiffs were ultimately vindicated in court, and they subsequently brought a false arrest and imprisonment action and an action for damages against the defendants under § 1983. *See id.* at 549-50. The statute pursuant to which the defendants arrested the plaintiffs was subsequently found unconstitutional. *See id.* at 550; *see also* Thomas v. Mississippi, 380 U.S. 524, 524 (1965) (holding, without argument or opinion, that the statute pursuant to which the defendants in *Pierson* acted was unconstitutional). In addition to the immunity issue regarding police officers, the *Pierson* Court also considered whether a judge could be held liable under § 1983 for being involved in an unconstitutional conviction. *See Pierson*, 386 U.S. at 551. Finding a strong common-law tradition in favor of immunity for judges and concluding that § 1983 did not abolish common-law immunities, the Court held that the judge was immune from liability. *See id.* at 553-55. The Court explained that it was incumbent upon judges to adjudicate all matters within their jurisdiction fearlessly, including contentious cases that could engender strong feelings among the parties, and that the possibility of liability might unnecessarily deter and intimidate judges from effectively performing their duties. *See id.* at 553-54.

and probable cause" defense so long as the officers reasonably believed, at the time of arrest, that the statute pursuant to which they acted was lawful, even if the statute was later found to be unconstitutional.[74]

Following *Pierson*, the Court addressed the qualified immunity defense in the context of high level executive branch officials exercising their discretion in *Scheuer v. Rhodes*.[75] In *Scheuer*, the plaintiffs claimed that the Governor of Ohio's[76] use of armed forces at Kent State University led to the death of the plaintiffs' decedents.[77] The Court held that a qualified immunity defense can be asserted by executive officials, with the scope of the defense depending on the specific official's amount of responsibility and discretion as well as the circumstances surrounding the act for which liability is sought.[78]

In *Butz v. Economou*,[79] the Court extended *Scheuer*'s holding to federal officials.[80] The Court rejected the argument that federal offi-

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[74] *See Pierson*, 386 U.S. at 557, 555. The Court found that in enacting § 1983, Congress did not intend to eradicate common-law immunities. *See id.* at 554. The Court explained that neither § 1983 nor its decision in *Monroe* precluded a "good faith and probable cause" defense. *Id.* at 556-57.

[75] 416 U.S. 232 (1974). The Court suggested that an immunity inquiry regarding high level executive officials is more complex than a corresponding immunity examination involving lower level executive employees because high level executive officials are confronted with an infinite number of choices. *See id.* at 246-47. The decisions made by these officials must frequently be made swiftly and decisively during periods of confusion and turmoil, and because these officials have a great amount of responsibility imposed upon them and are presented with such a broad range of options, they broadly exercise their discretion in performance of their official duties. *See id.*

[76] Other officials against whom the claim was asserted included the Adjutant General, his assistant, members of the Ohio National Guard, and the President of Kent State University. *See id.* at 234.

[77] *See id.* The plaintiffs asserted that the defendants "intentionally, recklessly, willfully, and wantonly" deployed the Ohio National Guard on the campus of Kent State and that the orders given to the Ohio National Guard led to the deaths. *Id.* at 235.

[78] *See id.* at 247-48; *see also* Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369, 372 (1989) (suggesting that *Scheuer* articulated a subjective and objective aspect to qualified immunity).

[79] 438 U.S. 478 (1978).

[80] *See id.* at 507. In *Butz*, the plaintiff, whose company was a former commodity futures commission merchant registered with the Department of Agriculture, filed a claim against a number of Department of Agriculture officials, alleging that they had conducted a retaliatory investigation and an administrative proceeding against him and his company based on his criticism of the Department. *See id.* at 480. Accordingly, the Court was confronted with the issue of what type of immunity federal officials were entitled to with regard to claims asserted against them resulting from their violation of an individual's constitutional rights. *See id.*

cials were entitled to absolute immunity for their unconstitutional actions and reviewed previous immunity decisions regarding the liability of state officials pursuant to § 1983.[81] The Court ultimately held that federal officials are entitled to a defense of qualified immunity with a scope equivalent to that provided to state officials.[82]

In so far as *Scheuer* and *Butz* stood for the proposition that qualified immunity had both a subjective and an objective component, this view was validated[83] by *Wood v. Strickland.*[84] In *Wood,* the plaintiffs were expelled students who asserted a § 1983 claim alleging that their federal constitutional rights had been violated by the defendants.[85] Based on both common-law tradition[86] and public policy concerns,[87]

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[81] *See id.* at 500-04. The Court also held that federal officials could be entitled to absolute immunity under extraordinary circumstances. *See id.* at 507. Acknowledging the general rule of qualified immunity, the Court also recognized that its prior decisions provided absolute immunity for certain officials whose position and attendant duties required full protection from suit. *See id.* at 508; *see, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 424 (1976) (explaining that prosecuting attorneys are entitled to absolute immunity under § 1983); Bradley v. Fisher, 80 U.S. 335, 351 (1871) (holding that judges, so long as acting in their judicial function, are immune from liability in civil actions). The Court pronounced that federal officials seeking absolute immunity bear the burden of establishing that public policy demands such protection. *See Butz,* 438 U.S. at 506.

[82] *See Butz,* 438 U.S. at 507. In concluding that federal and state officials are entitled to the same degree of protection under *Bivens* and § 1983 suits, respectively, the Court found that equivalent injuries were made actionable by *Bivens* and § 1983, and that state and federal officials faced similar pressures and uncertainties. *See id.* at 500. The Court also noted that in determining that a distinction should not be drawn between the immunity afforded state and federal officials, it had considered that Congress had not authorized a contrary result. *See id.* at 504. Relying on the rationale of *Scheuer,* the Court explained that although government officials who exercise their discretion require a certain degree of protection from suit, it is proper to hold them liable for damages when they know or should know that their conduct violates the law. *See id.* at 507. Additionally, the Court speculated that the qualified immunity doctrine would work equally well with regard to federal officials as it did with regard to state officials. *See id.*

[83] *See* Wood v. Strickland, 420 U.S. 308, 321 (1975); *see also* Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions,* 23 GA. L. REV. 597, 602 (1989) (asserting that *Wood* confirmed the theory that qualified immunity was comprised of objective and subjective elements).

[84] 420 U.S. 308 (1975).

[85] *See id.* at 309-10. The defendants were members of the local school board and school administrators who were responsible for expelling the plaintiffs. *See id.* at 309. The expulsion was based on the plaintiffs' violation of a school regulation that prohibited the use or possession of alcohol at school or school activities. *See id.* at 310.

[86] *See id.* at 318. The Court listed a number of decisions in which state courts found that school officials should be shielded from liability for good faith, nonmalicious actions taken pursuant to their official responsibilities. *See id.* at 318 n.9.

[87] *See id.* at 318. The Court explained that school officials often act in legislative or adjudicative roles, and that their decisions "involve the exercise of discretion, the

the *Wood* Court found that the defendants were entitled to a qualified immunity defense.[88] Though limiting the ruling specifically to the issue of school discipline,[89] the Court held that a school board member is liable for damages arising from a § 1983 claim if the member knew or rationally should have known that the actions taken within the parameters of the position's official duties would violate the rights of a student.[90] The Court also held that liability could be imposed on an official if the official acted with the malicious purpose of causing a deprivation of constitutional rights or some other type of injury to a student.[91]

Although *Wood* clearly established that qualified immunity had both objective and subjective components, the Court revamped the defense in *Harlow v. Fitzgerald*.[92] In *Harlow*, the plaintiff alleged, in a civil damages suit, that the defendants[93] were members of a conspiracy that sought to violate his constitutional and statutory rights.[94] After acknowledging that presidential aides are entitled to assert a defense of qualified immunity,[95] the Court noted that the subjective

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weighing of many factors, and the formulation of long-term policy." *Id.* at 319. The Court determined that the heavy costs associated with the potential imposition of extensive liability on school officials would deter them from acting forcefully and in the best interests of the school and the students and would also deter capable individuals from seeking such positions. *See id.* at 319-20.

[88] *See id.* at 321.

[89] *See id.* at 322.

[90] *See Wood*, 420 U.S. at 322. In explaining that the appropriate immunity standard contained both subjective and objective components, the Court proclaimed that an official must act with the belief that his action is lawful, but that if a student's rights are violated, the official's conduct cannot be excused by his ignorance of established law, especially considering the important supervisory role the official holds. *See id.* at 321. The Court elaborated that in order to receive immunity, an official would be held to a standard based not only on his intentions, but also premised on knowledge of the student's constitutional rights. *See id.* at 322. The Court proclaimed that such a standard is not unduly burdensome considering that a school board position requires an official to be intelligent and that civil rights occupies a cherished position in the American legal system. *See id.*

[91] *See id.*; *see also* Rudovsky, *supra* note 8, at 41 (explaining that the *Wood* Court's primary concern was to protect government officials whose conduct occurs in an area where the law is unsettled).

[92] 457 U.S. 800 (1982); *see* Kinports, *supra* note 83, at 597 (asserting that *Harlow* altered the qualified immunity defense in § 1983 cases); Carey, Jr., *supra* note 3, at 1547 (claiming that *Harlow* revised the governing substantive law regarding qualified immunity).

[93] The defendants were both presidential aides at the time of their allegedly tortious conduct. *See Harlow*, 457 U.S. at 802.

[94] *See id.* The issue presented to the Court was the degree of immunity to which senior aides to the President are entitled when named as defendants in suits for damages resulting from their official acts. *See id.*

[95] *See id.* at 813. The defendants argued that they were entitled to derivative absolute immunity because the President, who was afforded absolute immunity, dele-

component of the qualified immunity defense had proven to be irreconcilable with the Court's goal of not allowing insubstantial suits to proceed to trial.[96] Accordingly, the Court held that, when government officials performed discretionary tasks, they would not be held liable for civil damages as long as their conduct at the time did not violate an individual's "clearly established statutory or constitutional rights of which a reasonable person would have known."[97] The Court also declared that a defendant's entitlement to immunity is a threshold issue that must be resolved prior to discovery.[98] Although acknowledging the elimination of the subjective component of qualified immunity, the Court asserted that an objective analysis would effectively protect the public from the unlawful conduct of government officials and preserve the ability of individuals to receive compensation for such violations.[99]

Following the reconfiguration of the qualified immunity defense, the Supreme Court attempted to clarify *Harlow*'s standard and reinforce its underlying concerns in *Mitchell v. Forsyth*.[100] Mitchell, a

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gated a great deal of responsibility and power to them. *See id.* at 810. While acknowledging that it was a credible argument, the Court found that it swept too far and was inconsistent with the Court's "functional" approach to immunity law. *See id.* The defendants also argued that, based on the special functions of their positions, they were entitled to absolute immunity, but the Court rejected this argument as well. *See id.* at 811-12. Noting that a government official bears the burden of establishing that he is entitled to absolute immunity, the Court identified a two-part test that an official must satisfy. *See id.* at 812-13. First, an official must demonstrate that "the responsibilities of his office embraced a function so sensitive as to require a total shield from liability." *Id.* at 813. Second, the official must show that "he was discharging the protected function when performing the act for which liability is asserted." *Id.* The Court concluded that, based on the record, the defendants failed to satisfy this test. *See id.*

[96] *See id.* at 815-16. Observing that FRCP 56 precluded the granting of summary judgment when there are disputed factual issues, the Court conceded that many lower courts treated the issue of an official's subjective good faith as a factual question. *See id.* at 816. The Court noted that when officials perform discretionary tasks, their decisions are affected by their experiences, values, and emotions, and these factors contribute to the fact that subjective intent can infrequently be decided on a motion for summary judgment. *See id.* Furthermore, the Court acknowledged that inquiry into such subjective motivation results in broad-ranging discovery, which is not conducive to effective government. *See id.* at 817.

[97] *Id.* at 818.

[98] *See id.*

[99] *See Harlow*, 457 U.S. at 819. By eliminating the subjective portion of the qualified immunity standard, the Supreme Court afforded more protection to government officials. *See* Gildin, *supra* note 78, at 370 (arguing that *Harlow* was a departure from the immunity developed by the common law and supplied public officials with substantially broader protection from liability); Way, *supra* note 2, at 1241 (noting that *Harlow* increased the amount of protection afforded to government officials by the qualified immunity defense).

[100] 472 U.S. 511 (1985); *see* McKenzie, *supra* note 4, at 687 (declaring that *Mitchell*

former United States Attorney General, was sued for damages resulting from a warrantless wire tap that he had authorized when he was the Attorney General.[101] Although the Court conceded that the Attorney General performed several vital tasks for the President and for the American people,[102] the Court rejected the argument that the Attorney General should be afforded absolute immunity for his official actions.[103] Additionally, the Court held that when a district court denies a defendant's qualified immunity claim based on an issue of law, the defendant is entitled to an immediate appeal as a final decision under 28 U.S.C. § 1291.[104] Furthermore, the Court found that, although the disputed wire tap violated the Fourth Amendment,[105] Mitchell was allowed to assert a qualified immunity defense because when he authorized the wire tap, the question of whether such a tap was unconstitutional had not been definitively decided.[106] The Court interpreted *Harlow* as dictating that government officials should not

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furthered the goal of promoting effective government).

[101] *See Mitchell*, 472 U.S. at 513. The Attorney General argued that the wiretap was used to gather information for the purpose of protecting national security. *See id.* The Court noted that the taped conversations involving the plaintiff were never used against him. *See id.*

[102] *See id.* at 520.

[103] *See id.* The Court supported its conclusion by noting the absence of an analogous common-law absolute immunity for officials performing similar functions to Mitchell and that performing national security duties markedly differed from the judicial responsibilities that normally serve as the basis for absolute immunity. *See id.* at 521. The Court observed that the judicial process is conducted openly and that the resolution of judicial matters frequently results in bitter parties eager to blame judges, prosecutors, or witnesses. *See id.* at 521-22. The Court contrasted the judicial process with national security tasks, explaining that national security tasks are routinely performed secretly and that there is a lesser threat that an official such as the Attorney General would be subjected to litigation for his official actions. *See id.* at 522. The Court also emphasized that while officials who are granted absolute immunity have other deterrents that serve to prevent them from engaging in unconstitutional behavior, no such restraints existed for the Attorney General with regard to national security measures. *See id.* at 522-23.

[104] *See id.* at 530. The Court reasoned that the immunity that *Harlow* provided, especially in light of the burdensome costs imposed on defendants, was an immunity from suit and that if a case was mistakenly permitted to proceed to trial, the defense and its protections would be effectively lost. *See id.* at 526.

[105] *See* United States v. United States District Court for the Eastern District of Michigan, Southern Division, 407 U.S. 297, 323-24 (1972) [hereinafter referred to as *Keith*] (holding that the Fourth Amendment does not permit warrantless wiretaps in situations involving domestic threats to national security).

[106] *See Mitchell*, 472 U.S. at 530. The Court observed that prior to *Keith*, there was confusion and uncertainty regarding the constitutionality of warrantless wire tapping for national security purposes. *See Mitchell*, 472 U.S. at 533 (discussing *Keith*, 407 U.S. at 323-24); *see also* Rudovsky, *supra* note 8, at 45 (suggesting that *Mitchell* established that the presence of general legal principles was insufficient to demonstrate that a legal rule was clearly established).

be subjected to liability when their actions were later deemed to be unlawful.[107]

The Court clarified the "clearly established" language utilized by *Harlow* in *Anderson v. Creighton.*[108] The plaintiffs in *Anderson* asserted a *Bivens*[109] claim against the defendant as a result of a warrantless search of their home conducted by the defendant.[110] In examining whether a plaintiff's right was "clearly established" for qualified immunity purposes, the Court advocated a narrow, specific approach, which essentially requires that the parameters of the right be sufficiently evident so that a reasonable government official would know that his conduct violated the right.[111] The Court held that, in deciding if an official had violated a clearly established right, the key question is whether a reasonable official could have believed that his conduct was actually lawful, giving full consideration to clearly established law and the relevant facts of which he was aware.[112]

An issue somewhat analogous to the one posed by *Crawford-El* was presented to the Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.*[113] In *Leatherman*, the Court examined the departure from the normal pleading requirements of the FRCP by the lower federal courts in applying "heightened pleading standards."[114] Particularly, the Court questioned the permissibility of

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[107] *See Mitchell*, 472 U.S. at 535.

[108] 483 U.S. 635 (1987); *see* Shapiro, *supra* note 8, at 260 (declaring that *Anderson* refined the *Harlow* standard).

[109] *See supra* note 5 and accompanying text (explaining that a *Bivens* cause of action is generally available to individuals whose constitutional rights have been violated by federal officials).

[110] *See Anderson*, 483 U.S. at 637. The defendant was a Federal Bureau of Investigation agent who erroneously believed that a criminal suspect was in the plaintiffs' home. *See id.*

[111] *See id.* at 640. The Court stressed that a general approach would emasculate the qualified immunity defense and would effectively lead to unlimited liability for government officials. *See id.* at 639. Furthermore, the Court emphasized that based on pre-existing law, the unlawfulness of a defendant's conduct must be obvious. *See id.* at 640.

[112] *See id.* at 641. The Court refuted the argument that *Anderson* reintroduced subjective factors into the qualified immunity analysis, a result which the Court conceded would have been contrary to *Harlow*'s elimination of such subjective considerations. *See id.*; *see also* Rudovsky, *supra* note 8, at 49-50 (criticizing the Court's treatment of qualified immunity in *Anderson*).

[113] 507 U.S. 163 (1993); *see also* Kesterson v. Moritsugu, 1998 WL 321008, at *9 (slip op. 6th Cir. 1998) (Moore, C.J., dissenting) (stating that in *Crawford-El*, the Supreme Court built on the holding in *Leatherman* by disapproving of the imposition of increased standards on plaintiffs by the lower federal courts).

[114] *See Leatherman*, 507 U.S. at 166-67. The Court defined such a standard as "a more demanding rule for pleading a complaint under [§] 1983 than for pleading other kinds of claims for relief." *Id.*; *see also* Lester, *supra* note 12, at 414

the lower federal courts deviating from the rules in cases alleging municipal liability pursuant to § 1983.[115] The Court found that, because "heightened pleading standards" cannot be reconciled with the "notice pleading" regime established by the FRCP,[116] they are impermissible.[117] Significantly, the Court refused to comment on whether a heightened pleading standard could be required in situations in which a qualified immunity defense is asserted by individual government officials.[118]

(maintaining that the federal judiciary imposed these standards in an effort to reduce the amount of access to the courts afforded to a plaintiff asserting a civil rights claim).

[115] *See Leatherman*, 507 U.S. at 164.

[116] *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1918 (1998) (explaining that FRCP 8 was crafted to eliminate fact pleading and replace it with notice pleading, whereby a plaintiff is only required to provide the defendant with a basic idea regarding the legal grounds of the lawsuit).

[117] *See Leatherman*, 507 U.S. at 168. The Court stressed that FRCP 8(a)(2) merely requires that a complaint include "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)); *see also Conley*, 355 U.S. at 47 (stating that the FRCP do not demand that a plaintiff produce specific facts about a claim, but merely require that a plaintiff's statement of his claim provide a defendant with fair notice regarding the nature of the case). The Court acknowledged that municipalities were faced with a deluge of § 1983 claims and conceded that if the FRCP were to be revised, such claims might be subjected to an additional specificity requirement; however, the Court concluded that federal courts could not rewrite the FRCP through judicial interpretation and must instead rely on other procedural devices to dispose of non-meritorious cases. *See Leatherman*, 507 U.S. at 168-69.

[118] *See Leatherman*, 507 U.S. at 166-67. The Court justified this refusal by observing that municipalities were not entitled to either absolute or qualified immunity. *See id.* at 166. Because the Supreme Court refused to address the issue of heightened pleadings with regard to individual government officials, the lower federal courts were forced to confront the issue and responded in a number of ways, with a majority of the circuits adopting a variation of either a heightened pleading or a heightened production burden. *See generally*, Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Cottrell, *supra* note 3; Lester, *supra* note 12; Clay J. Pierce, Note, *The Misapplication of Qualified Immunity: Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent*, 62 FORDHAM L. REV. 1769 (1994); Way, *supra* note 2. For example, in *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1995), the court considered the appropriateness of a heightened pleading standard when a defendant government official invokes a qualified immunity defense. *See Veney*, 70 F.3d at 921. The court argued that if a heightened pleading burden was not imposed on a plaintiff, the substantive rights to which a government official is entitled as part of the qualified immunity defense would be eviscerated. *See id.* at 922. Accordingly, the court concluded that such a heightened burden was proper because, without it, plaintiffs would be able to survive a dismissal motion with mere notice pleading, a result that the court stressed was contrary to the policy goals of the qualified immunity defense. *See id.*; *see also* Edgington v. Missouri Dept. of Corrections, 52 F.3d 777, 779 (8th Cir. 1995) (noting that plaintiffs asserting a claim against public officials who invoked a qualified immunity defense were subject to a heightened pleading standard, which required a plaintiff to notify defendants regarding the nature of the claim in specific detail).

Similar to *Leatherman*, the Court, in *Johnson v. Jones*,[119] refused to create a qualified immunity exception to the established principles of interlocutory appellate procedure.[120] In *Johnson*, the defendants sought an immediate appeal of the denial of their motion for summary judgment.[121] The *Johnson* Court distinguished *Mitchell*, explaining that *Mitchell* permitted an immediate appeal related to an issue of law,[122] while *Johnson* involved a summary judgment decision based on factual issues.[123] The Court rejected the argument that the policies on which qualified immunity are premised require the availability of interlocutory appeals for questions of evidentiary sufficiency.[124] Rather, the Court held that a defendant who is entitled to assert a qualified immunity defense cannot appeal a trial court's summary judgment decision regarding the question of whether the pre-trial record presented a triable issue of fact.[125]

Against this background of precedent, in *Crawford-El v. Britton*[126] the United States Supreme Court rejected the imposition of a

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[119] 515 U.S. 304 (1995).

[120] *See id.* at 307. The Court explained that interlocutory appeals, which are appeals prior to a final judgment by a district court, are an exception to normal appellate procedure. *See id.* at 309. The Court noted that interlocutory appeals are generally disfavored because they interfere with a district judge's management of the proceedings and cause delay and additional costs. *See id.* Additionally, the Court claimed that interlocutory appeals also pose the risk of imposing additional and unnecessary work on appellate courts. *See id.* The Court also identified certain positive effects associated with interlocutory appeals, namely the quick rectification of a trial court's error and that the appeal could serve to guide the proceedings. *See id.* at 309-10. The Court observed that Congress authorized certain immediate appeals, but found that none of the congressionally authorized statutory provisions applied to its case. *See id.* at 310. *See* Kathyrn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 11 (1998) (examining situations in which appellate courts, through the use of interlocutory orders, gain jurisdiction over cases that involve the qualified immunity defense).

[121] *See Johnson*, 515 U.S. at 308. The defendants were police officers accused by the plaintiff of violating § 1983 due to their use of excessive force in arresting him. *See id.* at 307-08.

[122] *See id.* at 313-16.

[123] *See id.* at 316.

[124] *See id.* at 317. The Court also contended that trial courts are more capable of resolving factual issues than appellate courts and that permitting interlocutory appeals of this nature would lead to great delay and unnecessary work for appellate courts. *See id.*

[125] *See id.* at 319-20; *see* Nicole B. Lieberman, Note, *Post* Johnson v. Jones *Confusion: The Granting of Back-Door Qualified Immunity*, 6 B.U. PUB. INT. L.J. 567, 568 (1997) (arguing that *Johnson* did not provide the necessary guidance and direction to appellate courts in determining when to allow collateral orders).

[126] 118 S. Ct. 1584 (1998). The Court identified two main issues that *Crawford-El* presented. *See id.* at 1587. The Court explained that the general question was

heightened burden at the summary judgment stage on a plaintiff asserting a constitutional tort claim against a government official[127] in which proof of the official's improper motive is a prerequisite to recovery.[128] In doing so, the Court also repudiated the ability of the federal courts to rewrite the FRCP.[129] The Court determined that previous qualified immunity decisions do not dictate that special procedural burdens be imposed on plaintiffs asserting such claims and that the imposition of such a burden on plaintiffs is unjustified and unfair.[130] Furthermore, the Court concluded that the existing procedures available pursuant to the FRCP provide federal courts with the tools necessary to protect government officials from the burdens of discovery and trial resulting from frivolous litigation.[131]

Writing for the majority, Justice Stevens noted that the clear and convincing standard promulgated by the Court of Appeals for the District of Columbia was an attempt to resolve the troubling problems associated with claims asserted against government officials that involve improper motivation — namely, the fact that non-meritorious claims that implicate improper motivation are more difficult to resolve early in litigation than other claims.[132] The Court observed that such claims can impose substantial social costs as a result of government officials having to endure discovery, trial, and liability for damages.[133] Before reviewing *Harlow* and its relation to *Crawford-El*, the

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whether, in cases in which a constitutional claim that requires proof of an unconstitutional motive is asserted against a government official, the federal courts of appeals have the power to design special procedural rules to shield such officials from the burdensome costs associated with trial and discovery. *See id.* The Court recognized that such costs could have a detrimental effect on the ability of officials to perform their official responsibilities effectively. *See id.* In addition, the Court remarked that the more specific question was whether, with regard to lawsuits filed by prisoners, a plaintiff would have to produce clear and convincing evidence of an official's unconstitutional motive in order to withstand a motion for summary judgment. *See id.*

[127] The Court limited its consideration to plaintiffs who were prisoners. *See id.*

[128] *See id.*

[129] *See id.* at 1598.

[130] *See id.* at 1591-94.

[131] *See id.* at 1596-98.

[132] *See Crawford-El*, 118 S. Ct. at 1590. The Court also alluded to the fact that the other courts of appeals throughout the nation had addressed this problem, but that none had applied a heightened burden of proof. *See id.* Additionally, the Court mentioned that the rule adopted by the Court of Appeals for the District of Columbia applied to all types of plaintiffs asserting damage claims against all types of government officials and that the heightened proof standard also applied to the various federal law claims in which a government official's illicit motivation is a required element. *See id.*

[133] *See id.*

Court remarked that the issue presented by *Crawford-El* had not been definitively resolved by *Harlow*.[134]

After reiterating the holding in *Harlow*, the Court emphasized that the qualified immunity standard is shaped by three main principles.[135] First, the Court acknowledged that a defendant has the burden of pleading the affirmative defense of qualified immunity.[136] Second, the Court emphasized that, in actions wherein state officials are defendants pursuant to a § 1983 claim, the scope of the qualified immunity defense is identical to that for federal officials named as defendants in claims asserted under the Federal Constitution.[137] Finally, the Court declared that all executive officials who perform discretionary tasks are entitled to the presumption that they can invoke the qualified immunity defense.[138]

Continuing, Justice Stevens repeated the objective standard that *Harlow* established for qualified immunity[139] and stressed that a gov-

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[134] *See id.* In fact, the Court declared that *Harlow* had not even addressed any issues pertaining to a plaintiff's affirmative case. *See id.* at 1590-91.

[135] *See id.* at 1591. The Court recognized that *Harlow* held that presidential aides are not permitted to invoke an absolute immunity defense, but, rather, that they are entitled to a qualified immunity defense that would serve to defeat non-meritorious claims without having the litigation proceed to trial. *See id.; see also* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (holding that the President is entitled to absolute immunity from liability for acts performed within the context of his official duties).

[136] *See Crawford-El*, 118 S. Ct. at 1591; *see also* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (holding that a defendant has the burden of pleading the affirmative defense of qualified immunity).

[137] *See Crawford-El*, 118 S. Ct. at 1591; *see also* Butz v. Economou, 438 U.S. 478, 507 (1978) (holding that the scope of qualified immunity is the same for federal and state officials). Additionally, the Court indicated that the scope of the qualified immunity defense had been previously discussed in *Wood*. *See Crawford-El*, 118 S. Ct. at 1590 (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)). The Court stated that *Wood* held that a school board member is liable for damages arising from a § 1983 claim if the member knew or rationally should have known that the actions taken within the parameters of the position's official duties would violate the rights of the student, or if the official acted with the malicious purpose of causing a deprivation of constitutional rights or some other type of injury to the student. *See id.* (citing *Wood*, 420 U.S. at 322).

[138] *See Crawford-El*, 118 S. Ct. at 1590. The Court also observed that the presumption was rebuttable. *See id.*; *see also* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (holding that the qualified immunity defense is presumed available to all executive officials who perform discretionary tasks).

[139] *See Crawford-El*, 118 S. Ct. at 1591-92. The *Harlow* Court stated:

> "Consistently with the balance at which we aimed in *Butz*, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

ernment official's subjective motivation is completely irrelevant to the qualified immunity defense.[140] Despite this observation, the Court acknowledged that such improper motivation can still be a required element of a plaintiff's constitutional claim.[141] Therefore, the Court concluded that *Harlow* does not provide support for altering a plaintiff's burden in establishing a constitutional violation.[142] Noting that the clear and convincing evidentiary standard utilized by the court of appeals applied to a plaintiff's proof of a defendant's improper motivation,[143] but not to the question of whether the official's actions violated clearly established law,[144] the Court criticized the court of appeals' ruling as illogical and unnecessary.[145]

Having determined that the court of appeals' ruling was not mandated by *Harlow*, the Court analyzed the factors that had been relied on in reformulating the defense of qualified immunity.[146] First, the Court recognized the strong public interest in shielding government officials from costs related to defending themselves in damage actions.[147] Second, the Court reiterated that non-meritorious cases can be shielded from summary judgment by an allegation of a defendant's illicit motivation.[148] Finally, the Court maintained that focusing on the objective legal reasonableness of a defendant's conduct is fairer and more equitable to a government official than imposing liability based on conduct that the official could not have known was

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would have known."

Id. at 1592 (quoting *Harlow*, 457 U.S. at 817-18).

[140] *See id.* The Court declared that even if a plaintiff produced evidence that a defendant official's actions were motivated by malice or some other improper intent, such evidence would not rebut the qualified immunity defense. *See id.*

[141] *See id.*

[142] *See id.* The Court emphasized that *Harlow*'s holding only addressed the proper scope of the qualified immunity defense. *See id.*

[143] *See id.* The Court attested that this type of proof was a factual issue. *See id.*

[144] *See id.* The Court averred that such questions are essentially legal questions. *See id.*

[145] *See Crawford-El*, 118 S. Ct. at 1592.

[146] *See id.* at 1592-93.

[147] *See id.* The Court speculated that this interest was most effectively served by permitting government officials to invoke a defense that was designed to terminate non-meritorious claims quickly. *See id.* at 1593. In a footnote, the Court identified the social costs associated with the liability of government officials, including the expenses related to litigation, the fact that official energy would be diverted away from important public issues, and the likelihood that capable and talented individuals would be discouraged from pursuing careers as government officials. *See id.* at 1593 n.12 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[148] *See id.* at 1593. The Court noted the objective standard's effect, whereby questions related to "the state of the law at the time of the challenged conduct" could be resolved early in the litigation, normally at the summary judgment stage. *Id.*

unlawful.[149] While acknowledging that fairness was an important contributing factor in the decision to revise the standard for qualified immunity, the Court refuted the notion that a fairness rationale alone could justify the imposition of increased burdens on plaintiffs who allege wrongdoing by government officials that was clearly unlawful when it occurred.[150]

The Court conceded that the first two factors that had helped to shape the qualified immunity defense could be interpreted to provide support for imposing increased burdens on a plaintiff attempting to withstand a motion for summary judgment when the plaintiff's claim involved improper motivation.[151] However, Justice Stevens opined that there were also countervailing concerns that had to be evaluated before applying the balance achieved in the qualified immunity defense to the elements of a plaintiff's claim.[152] The Court concluded that a number of reasons demonstrate that a judicial revision of the law, which would effectively bar claims that were dependent on proof of an official's improper motive, is inappropriate.[153]

In support of this conclusion, the Court indicated that there is an important distinction between "bare allegations of malice," which could have defeated a qualified immunity defense under the *Wood* standard, and allegations of motivation, which are required components of certain constitutional claims.[154] Justice Stevens reasoned that

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[149] *See id.* The Court conceded that such unfairness could be present even in situations in which an improper intention motivated an official's conduct. *See id.* The Court argued that although fairness is an important factor justifying immunity, fairness alone does not provide a sufficient basis for an immunity defense. *See id.* at n.13; *see also* Wyatt v. Cole, 504 U.S. 158, 168-69 (1992) (refusing to extend an immunity defense to private parties).

[150] *See Crawford-El*, 118 S. Ct. at 1593. The Court elaborated that although it is unfair to impose liability on a defendant whose conduct was objectively reasonable when it transpired, there is no unfairness in imposing liability on an official who knew or should have known that his conduct violated an individual's rights. *See id.*

[151] *See id.*

[152] *See id.* Accordingly, the Court concluded that the social costs that supported the abolition of the subjective portion of the qualified immunity defense do not necessarily justify the imposition of severe limits on an individual's only opportunity to remedy a violation of his constitutional rights. *See id.*

[153] *See id.*

[154] *See id.* at 1593-94. The Court observed that under *Wood*, an allegation of intent to cause "other injury" would have authorized a broad inquiry into an official's subjective motivation. *See id.* at 1594. In contrast, the Court proclaimed that when intent is a required component of a constitutional violation, the main focus is not on any hostility felt by an official toward a plaintiff, but rather the focus is more specific. *See id.* For example, the Court cited *Washington v. Davis*, 426 U.S. 229, 239-48 (1976), where the improper intent was found to disadvantage an entire class of individuals that included the plaintiff. *See Crawford-El*, 118 S. Ct. at 1594 (citing *Washington*, 426 U.S. at 239-48). The Court speculated that in the present case, proof that

existing law already prevented the narrower element of improper motive from automatically authorizing a plaintiff to proceed to trial.[155] Therefore, the Court determined that, under normal circumstances, an unconstitutional intent component, which is required by a number of causes of action, does not prevent summary disposition of non-meritorious claims.[156] Furthermore, the Court stated that *Harlow*'s rationale did not warrant "a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved."[157]

The Court also criticized the court of appeals for crafting a unique rule for constitutional claims that include proof of unconstitutional motivation.[158] Elaborating, the Court chastised the lower court for refashioning the burden of proof to be imposed on an entire class of plaintiffs because such action went beyond the scope of judicial power.[159] Continuing, the Court noted that previous refusals

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Britton had intentionally diverted the plaintiff's possessions because she despised him would not necessarily indicate that she acted in response to the plaintiff's public comments, but that under *Wood*, similar evidence might have rebutted an official's qualified immunity defense. *See id.*

[155] *See Crawford-El*, 118 S. Ct. at 1594. Elaborating, the Court stressed that the qualified immunity standard developed in *Harlow* terminates motive-premised claims in which a defendant's actions did not violate clearly established law. *See id.* Continuing, the Court emphasized that even in situations in which the law was clearly established, the legal doctrine on which a plaintiff relied could expedite summary judgment. *See id.* First, the Court speculated that there could be uncertainty about whether a defendant's conduct was definitely illegal. *See id.* Second, the Court noted that improper motivation alone was not sufficient to demonstrate a constitutional violation for many types of federal claims. *See id.* The Court observed that causation was also an element of many such claims. *See id.* For example, the Court declared that when a government employee demonstrates that his constitutionally protected speech was a "motivating factor" related to an adverse employment decision, a defendant employer could still triumph by demonstrating that the same decision would have been reached even without the existence of the protected conduct. *See id.; see also* Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that even when the constitutionally protected actions of an employee play a significant role in an employer's decision not to rehire the employee, such proof would not automatically lead to the conclusion that a constitutional violation occurred, for the employer could still be found not liable if the employer could demonstrate, by a preponderance of evidence, that such a result would have been reached regardless of the protected conduct). Additionally, the Court asserted that a variety of procedural tools are available to federal judges to weed out frivolous claims that contain a subjective component. *See Crawford-El*, 118 S. Ct. at 1594.

[156] *See Crawford-El*, 118 S. Ct. at 1594.

[157] *Id.*

[158] *See id.* at 1594-95.

[159] *See id.* at 1595. The Court criticized the Court of Appeals for the District of Columbia's ruling because the FRCP, federal statutes, including § 1983, and judicial case law do not support the court of appeals' application of the clear and convincing evidentiary standard. *See id.* Although the Court conceded that a valid argument

to revise or depart from the FRCP occurred in cases wherein the qualified immunity defense was involved.[160] While acknowledging that the court of appeals' ruling was intended to reduce the likelihood of discovery in claims requiring proof of improper motive, the Court declared that disputed procedural issues are most effectively and appropriately resolved by the rulemaking or legislative process.[161] The Court also admonished the court of appeals for developing a rule that imposed on all plaintiffs, even those with meritorious constitutional claims, an increased standard of proof at trial.[162]

The Court demonstrated its disapproval of judicial rulemaking by the manner in which it addressed the need for new procedural rules to protect government officials from frivolous civil rights claims, especially those filed by prisoners.[163] The Court highlighted the recent congressional enactment of the Prison Litigation Reform Act,[164] which includes provisions intended to deter prisoners from filing lawsuits,[165] and the Court referred to statistics indicating that the leg-

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could be advanced that the defense of qualified immunity lacked precedential support, the Court defended its treatment and development of this defense by insisting that its immunity jurisprudence was premised on the traditional common law. *See id.* The Court contrasted its actions with that of the Court of Appeals for the District of Columbia, whereby the Court argued that the court of appeals' ruling lacked any common-law support and drastically altered a § 1983 claim in such a manner that the policy behind § 1983 was effectively undermined. *See id.*

[160] *See id.*; *see also Johnson*, 515 U.S. at 319-20 (declining the opportunity to endorse an exception to interlocutory appellate procedure with regard to factual sufficiency and the defense of qualified immunity); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (rejecting the imposition of heightened burdens on plaintiffs alleging municipal liability); Gomez v. Toledo, 446 U.S. 635, 639-40 (1980) (refusing to force plaintiffs to anticipate a defendant's assertion of qualified immunity by holding that the defendant has the burden of pleading the affirmative defense of qualified immunity). The Court suggested that the rationales that supported the decisions in those cases also applied to the issue of whether a clear and convincing evidentiary standard should be imposed in cases in which improper motive is alleged. *See Crawford-El*, 118 S. Ct. at 1595.

[161] *See Crawford-El*, 118 S. Ct. at 1595. The Court listed procedural issues such as pleading, discovery, and summary judgment. *See id.*

[162] *See id.*

[163] *See id.* at 1595-96.

[164] *See id.* at 1596. The Act was enacted in April 1996. *See id.* Before proceeding further with its analysis, the Court announced that it was assuming that the perceived problem with the number of lawsuits filed by prisoners justified special procedural rules. *See id.*

[165] *See id.* The Court listed several of the relevant portions of the Act that were designed to deter the filing of non-meritorious civil suits. *See id.* The Act

> requires all inmates to pay filing fees; denies *in forma pauperis* status to prisoners with three or more prior "strikes" (dismissals because a filing is frivolous, malicious, or fails to state a claim upon which relief may be granted) . . . ; bars suits for mental or emotional injury unless there is a showing of physical injury; limits attorney's fees; directs district courts

islation is having its desired effect.[166] The Court asserted that concerns regarding prisoner lawsuits had been addressed sufficiently by Congress in the Prison Litigation Reform Act and any further problems would be addressed by Congress in future legislation if necessary.[167]

Although rejecting the court of appeals' imposition of a clear and convincing evidentiary standard,[168] the Court noted a sensitivity to the concerns cited by the lower court and elaborated on the procedural devices available to the federal courts in managing cases that involve the examination of a defendant's state of mind.[169] The Court stressed that, when a government official is named as a defendant and improper motive is an element of the claim, district judges must exercise their discretion in a manner that protects the essence of the qualified immunity defense and shields government officials from needless and burdensome discovery or trial.[170] The Court identified two main options available to trial courts during the period before a plaintiff is authorized to proceed with discovery.[171] First, the Court recognized that the lower federal courts could require a plaintiff to file a reply pursuant to FRCP 7(a)[172] or could grant a defendant's motion for "a more definite statement" pursuant to FRCP 12(e).[173] Sec-

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> to screen prisoners' complaints before docketing and authorizes the court on its own motion to dismiss "frivolous," "malicious," or meritless actions . . . .

Id. The Court stressed that the Act did not differentiate between constitutional claims involving proof of improper motive and constitutional claims that do not. *See id.*

[166] *See id.*; *see also* L. MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 1997 REPORT OF THE DIRECTOR 131-32 (Table C-2A) (indicating a 31% decline in the number of civil rights lawsuits filed by prisoners in federal courts from fiscal year 1996 to fiscal year 1997).

[167] *See Crawford-El*, 118 S. Ct. at 1596.

[168] *See id.* Instead, the Court advocated a "'firm application of the Federal Rules of Civil Procedure.'" *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 820 n.35 (1982)).

[169] *See Crawford-El*, 118 S. Ct. at 1596-98.

[170] *See id.* at 1596.

[171] *See id.*

[172] *See id.*; *see also* Schultea v. Wood, 47 F.3d 1427, 1433 (5th Cir. 1995) (explaining that when a defendant government official asserts a qualified immunity defense, a plaintiff can be required to reply to that defense in detail and address the assertion of qualified immunity); FED. R. CIV. P. 7(a) (providing that a district court can order a plaintiff to file a reply to a defendant's answer).

[173] *See Crawford-El*, 118 S. Ct. at 1596. The Court suggested that trial courts could require plaintiffs, in order to withstand a pre-discovery motion for either dismissal or directed verdict, to "'put forward specific, nonconclusory allegations,'" which demonstrate that the government official acted with an unconstitutional motive in causing a cognizable injury to the plaintiff. *Id.* at 1596-97 (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). The Court observed that this op-

ond, the Court also suggested that if a qualified immunity defense is pleaded, a trial court should resolve that threshold issue prior to permitting discovery.[174] The Court explained that the first option might be more appealing to a district court because it does not impose a burden on the defendant government official and because it is less complicated to resolve than the latter option.[175]

Continuing to advise the lower federal courts, Justice Stevens observed that a plaintiff may be entitled to engage in some discovery if the claim survives the aforementioned procedures.[176] The Justice stressed, however, that district courts possess broad discretion[177] to tailor discovery narrowly[178] and have many options[179] available to them to manage the discovery process in a manner that expedites the efficient resolution of the case.[180] The Court also indicated that, as evi-

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tion is available to a district court even if a government official does not assert a qualified immunity defense. *See Crawford-El*, 118 S. Ct. at 1597; *see also* FED. R. CIV. P. 12(e) (providing that if a pleading is too vague, a trial court, upon a motion by the party served with a vague pleading, can order the pleading party to provide a more definite statement).

[174] *See Crawford-El*, 118 S. Ct. at 1597. In order to make this decision, the Court declared that the trial court must determine whether, assuming the veracity of a plaintiff's allegations, the defendant's actions violated clearly established law. *See id.*

[175] *See id.*

[176] *See id.*

[177] *See id.*; *see also* FED. R. CIV. P. 26(b)(2), which provides that a court, on its own motion

> may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of the use of the discovery methods otherwise permitted under these rules . . . shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive . . . (iii) the burdens or expense of the proposed discovery outweigh its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issue.

Id. Furthermore, the Court highlighted Rule 26(c), which permits a court to limit the time, place, and manner in which discovery is to be conducted, or even to bar discovery completely on certain subjects if necessary "'to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Crawford-El*, 118 S. Ct. at 1597 (quoting FED. R. CIV. P. 26(c)). The Court also noted that pursuant to Rule 26(d), a trial court can dictate discovery's timing and sequence. *See Crawford-El*, 118 S. Ct. at 1597.

[178] *See Crawford-El*, 118 S. Ct. at 1597.

[179] *See id.* For example, the Court suggested that a district court could authorize a plaintiff to take only a deposition of a government official prior to any further discovery, or the court could delay any inquiry into the defendant's subjective motive until discovery on objective factors was conducted. *See id.*

[180] *See id.*

dence is accumulated, a defendant might choose to seek partial summary judgment on potentially dispositive objective questions, which lend themselves more readily to summary disposition than do issues regarding the defendant's intent.[181] The Court strongly urged trial judges to give priority to discovery issues related to the qualified immunity defense.[182]

Furthermore, the majority stressed the importance of summary judgment in terminating insubstantial claims.[183] Additionally, the Court encouraged the lower federal courts to utilize FRCP 11[184] and 28 U.S.C. § 1915(e)(2)[185] to protect government officials from unjustified harassment.[186]

In conclusion, the Court recognized the capability of trial courts to manage claims in which a government official's improper motive is an element.[187] Because trial courts possess such wide-ranging experience with these types of claims, the Court suggested that providing them with broad discretion in managing such cases might be more equitable for all parties than imposing a strict categorical rule.[188] Accordingly, the Court vacated the court of appeals' judgment and remanded the case for further proceedings consistent with its opinion.[189]

In a concurring opinion, Justice Kennedy professed that lawsuits brought under § 1983 by prisoners underscore the strengths and weaknesses of the American legal system.[190] Justice Kennedy ex-

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[181] *See id.*

[182] *See id.* The Court reiterated that such issues should be resolved as soon as possible. *See id.*

[183] *See id.* at 1598. The Court explained that at the summary judgment stage, if a government official files a proper motion, the plaintiff cannot respond with broad attacks on the official's credibility. *See id.* Instead, the Court observed that a plaintiff would have to produce affirmative evidence on which a jury could conclude that the plaintiff satisfied his burden of proof regarding the improper motive. *See id.*

[184] *See Crawford-El*, 118 S. Ct. at 1598. The Court explained that FRCP 11 permits the imposition of sanctions in cases in which frivolous or factually deficient papers are filed or in which papers are filed for an improper purpose. *See id.*

[185] *See id.* The Court described how 28 U.S.C.A. § 1915(e)(2) (1988) permits dismissal of *in forma pauperis* lawsuits that are malicious or frivolous in nature. *See id.*

[186] *See id.*

[187] *See id.* The Court conceded that trial judges have more experience in managing these cases than appellate judges. *See id.*

[188] *See id.*

[189] *See id.*

[190] *See Crawford-El*, 118 S. Ct. at 1598 (Kennedy, J., concurring). Justice Kennedy elaborated on this notion by observing that such suits illustrated the legal system at its best because the government was always bound to obey the United States Constitution, even with regard to prisoners; while such cases also illustrated the legal system at its worst because many of these prisoner lawsuits invoked the Constitution to

pressed the need to protect the judicial system from disdain, but ultimately agreed with the majority that it is the legislative branch's responsibility to create far-reaching solutions to the problems engendered by cases such as *Crawford-El*.[191]

In a dissenting opinion, Chief Justice Rehnquist, joined by Justice O'Connor, criticized the majority's failure to address the second question on which the Court granted certiorari.[192] In addressing that question directly, Chief Justice Rehnquist concluded that, when a government official is confronted by a claim that requires proof of an improper motive, he is entitled to immunity if he can present a legitimate reason for his challenged conduct and if the plaintiff is not able to establish, through objective evidence, that the defendant's proffered reason is pretextual.[193]

After reviewing *Harlow*'s abolition of the subjective component of the qualified immunity defense, Chief Justice Rehnquist stressed that government official defendants in motive-based tort lawsuits should be entitled to qualified immunity and that application of the

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support non-meritorious claims and consequently fostered disrespect for the laws of the United States. *See id.* Accordingly, Justice Kennedy warned that it was incumbent upon the federal judiciary to protect the judicial system from the contempt of the American public engendered by the frequency of such lawsuits. *See id.*

[191] *See id.* (Kennedy, J., concurring).

[192] *See id.* at 1599 (Rehnquist, C.J., dissenting). The petition on which the Court granted certiorari presented two questions. *See id.* at 1598. The first question asked:

> "In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by 'clear and convincing' evidence?"

Id. (quoting the Petition for Certification at i). The second question presented inquired:

> "In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would have been a reasonable basis for the act, even if evidence — no matter how strong — shows the official's actual reason for the act was unconstitutional?"

Id. at 1598-99 (quoting the Petition for Certification at i). While conceding that the majority extensively examined the first question in ultimately concluding that the Court's qualified immunity jurisprudence did not demand an enhanced evidentiary standard, Chief Justice Rehnquist lamented the majority's failure to consider the second question because immunity is a threshold issue that must be determined before consideration of a plaintiff's claim. *See Crawford-El*, 118 S. Ct. at 1598-99 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that by assuming the correct answer to the second question was no, the majority established a precedent contrary to *Harlow*. *See id.* at 1599 (Rehnquist, C.J., dissenting).

[193] *See id.* at 1599 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that this approach was the only standard that was truly faithful to *Harlow* and consistent with the goals of the qualified immunity defense. *See id.*

defense in a given case should depend completely on objective considerations.[194] Continuing, the Chief Justice denounced the majority's approach to motive-based tort suits as inconsistent with *Harlow* because it fails to ensure that non-meritorious claims will be dismissed quickly and because it fails to protect government officials from the burdensome costs associated with protracted litigation.[195] Additionally, Chief Justice Rehnquist opined that through astute pleading, a plaintiff could convert any adverse decision by a government official into an unconstitutional motive case.[196] The dissent also stressed that its test provides more protection to government officials through its focus on objective evidence and is more consistent with *Harlow* than the majority's approach.[197]

Chief Justice Rehnquist suggested that there were two reasons for the majority's failure to extend *Harlow* logically.[198] First, the dissent stated that the majority appeared to be concerned that an extension of *Harlow*'s qualified immunity to unconstitutional-motive torts would result in some meritorious claims not being redressed.[199] After

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[194] *See id.* at 1599-1600 (Rehnquist, C.J., dissenting).

[195] *See id.* at 1600 (Rehnquist, C.J., dissenting).

[196] *See Crawford-El*, 118 S. Ct. at 1600 (Rehnquist, C.J., dissenting).

[197] *See id.* After acknowledging that this analysis of *Harlow* did not differ from the majority's, Chief Justice Rehnquist expressed bewilderment about why the majority did not logically extend *Harlow*'s principles in a similar fashion. *See id.*

[198] *See id.*

[199] *See id.* at 1600. Chief Justice Rehnquist conceded that this was a likely result, but argued that this was an insufficient reason to decline to apply the qualified immunity doctrine properly. *See id.* at 1600-01 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist contended that whenever an immunity or a privilege is created or extended, it is assumed that some meritorious claims that previously would have been heard will instead be dismissed. *See id.* at 1601 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist opined that legislatures and courts craft immunities because it is believed that their societal benefit will outweigh whatever cost they impose with regard to unremedied meritorious claims. *See id.* Furthermore, Chief Justice Rehnquist expressed a need to address the specific type of First Amendment claims present in *Crawford-El*. *See id.* Chief Justice Rehnquist suggested that Britton's act did not appear to be a First Amendment violation and that Crawford-El's claim of improper motive converted a standard prison administrative task into a constitutional tort. *See id.* After reviewing other types of First Amendment claims, the dissent maintained that a majority of claims involving freedom of speech would not be affected by its qualified immunity test. *See id.* Instead, the dissent explained that its approach would most directly affect cases like *Crawford-El*, whereby a government official performs a standard work-related task but is charged with acting with an improper motive. *See id.* at 1601-02 (Rehnquist, C.J., dissenting). The dissent speculated that in *Crawford-El*, there must have been a legitimate reason for Britton's actions, that there was no evidence that such a reason was pretextual, and that if its test were to be applied, the defendant would be entitled to qualified immunity. *See id.* at 1602 (Rehnquist, C.J., dissenting). In analyzing the societal costs associated with the qualified immunity doctrine, the dissent declared that § 1983's purpose, which it

arguing that the policies on which *Harlow* was premised supported an extension of qualified immunity, the Chief Justice asserted that the second reason that the majority rejected such an extension was because the lower federal courts can adequately protect government officials through "judicious and skillful manipulation of the Federal Rules of Civil Procedure."[200] Although the Chief Justice acknowledged the capability of the federal courts, the opinion argued that the scope of the qualified immunity defense should not depend upon a trial court's willingness or ability to apply the FRCP in the manner contemplated by the majority.[201] The dissent stressed that its proposed rule would provide government officials with the consistency that *Harlow* envisioned without eliminating unconstitutional motive claims.[202]

Justice Scalia, dissenting, joined by Justice Thomas, argued that the Court's historical treatment of qualified immunity pursuant to § 1983 was unfaithful to the common-law immunities which existed when § 1983 was passed and which § 1983 intended to include.[203] Because Justice Scalia felt that the Court had forced itself into an essentially legislative role in designing a sensible scheme with regard to qualified immunity under § 1983, Justice Scalia reluctantly, but fully, endorsed Circuit Judge Silberman's approach.[204] Justice Scalia announced that the appropriate test should provide that once a district court determines that the asserted reason for an official's conduct is

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defined as an attempt to "'deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such relief fails,'" would not be advanced if Crawford-El's case was permitted to proceed because he had already exercised his rights and that providing him with compensation, assuming that his claim was meritorious, would not have an actual deterrent effect. *Id.* (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)). Accordingly, the dissent concluded that its qualified immunity test would result in minor costs and substantial benefits. *See id.*

[200] *Id.* at 1602.

[201] *See id.* Chief Justice Rehnquist stressed that one reason why *Harlow* purged qualified immunity of a subjective aspect was because of the district courts' inconsistency in applying the *Wood* test. *See id.* at 1602-03 (Rehnquist, C.J., dissenting).

[202] *See Crawford-El*, 118 S. Ct. at 1603 (Rehnquist, C.J., dissenting).

[203] *See id.* (Scalia, J., dissenting). Justice Scalia argued that *Monroe v. Pape*, 365 U.S. 167 (1961), drastically and inappropriately altered the scope of § 1983. *See Crawford-El*, 118 S. Ct. at 1603 (Scalia, J., dissenting) (citing *Monroe*, 365 U.S. at 183). Justice Scalia noted that the *Monroe* decision resulted in a substantial increase in the number of § 1983 claims that were filed in the federal courts and which "engage[d] this Court in a losing struggle to prevent the Constitution from degenerating into a general tort law. (The present suit . . . is a good enough example.)". *Id.*

[204] *See id.*; *see also supra* notes 47-48 (detailing Judge Silberman's theory and test). Justice Scalia acknowledged that Chief Justice Rehnquist's approach was similar to Judge Silberman's, but claimed that it involved a more subjective analysis than *Harlow* intended. *See Crawford-El*, 118 S. Ct. at 1603 (Scalia, J., dissenting).

objectively valid, no further proof could be admitted except for evidence that something other than the asserted grounds was the actual motive of the official.[205]

In *Crawford-El*, the Supreme Court confronted the intractable problem of balancing the rights of civil rights plaintiffs against the interests of government officials who seek to be free of the burdens associated with non-meritorious and harassing litigation.[206] Contributing to this difficult situation are the conflicting interests of the American public, which has an interest in providing vindication to individuals whose rights have been violated,[207] but which also has a strong interest in protecting government officials from unduly burdensome litigation so as to ensure the effective functioning of the government.[208] Although its effort was valiant, the Supreme Court ultimately failed to resolve this seemingly unsolvable problem.

While the capability and talent of the federal judiciary is beyond dispute,[209] *Crawford-El* grants the lower federal courts too much freedom in resolving the operation of the qualified immunity defense. By outlining the various options available to the district judges,[210] the majority invited discord and inconsistency among the federal courts, whereby the effectiveness of the qualified immunity defense will vary by jurisdiction.[211] Following *Leatherman*, the lower federal courts sought ways to impose heightened burdens on civil rights plaintiffs,[212] and such a result is likely to follow *Crawford-El*.[213] Accordingly, federal

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[205] *See Crawford-El*, 118 S. Ct. at 1604 (Scalia, J., dissenting). While conceding that such a result would severely restrict intent-based constitutional torts, Justice Scalia was not bothered by such a result based on the belief that intent-based constitutional claims would not have been actionable under Congress's original enactment of § 1983. *See id.*

[206] *See id.* at 1590.

[207] *See supra* note 1 and accompanying text (detailing the American public's interest in providing individuals with the ability to recover for a violation of their rights by government officials).

[208] *See supra* note 3 and accompanying text (explaining the American public's interest in protecting government officials from frivolous litigation).

[209] *See Crawford-El*, 118 S. Ct. at 1598 (highlighting the vast experience of trial judges in adjudicating cases involving a government official's intent); *id.* at 1602 (Rehnquist, C.J., dissenting) (expressing confidence in the ability of district court judges to apply the FRCP); Clinton v. Jones, 117 S. Ct. 1636, 1651-52 (1997) (emphasizing that federal judges are fully capable of managing unique and nationally important issues arising in litigation involving the President).

[210] *See Crawford-El*, 118 S. Ct. at 1596-98.

[211] *See id.* at 1602 (Rehnquist, C.J., dissenting).

[212] *See supra* note 118 and accompanying text (discussing the federal courts' reaction to *Leatherman*).

[213] *See* Ross v. State of Alabama, 15 F. Supp. 2d 1173 (M.D. Ala. 1998). The court acknowledged that *Crawford-El* raised questions about the appropriateness of the

judges, depending on their own views of qualified immunity and the merits of a specific case, can utilize the procedural tools identified by Justice Stevens to circumvent *Crawford-El*'s holding that heightened burdens not be imposed on plaintiffs.[214] Although plaintiffs may no longer have to satisfy specifically identified burdens, it is likely that they will still be forced to confront strict and burdensome requirements when asserting a claim against a government official that involves the official's improper intent.[215]

The foregoing criticism is not meant as a blanket indictment of the majority's approach. It is conceded that the majority presumed that its freedom to decide this case was limited by the explicit commands of the FRCP[216] and that to endorse the court of appeals' ruling would invite further judicial rulemaking among the federal courts. However, because the lower federal courts will likely seek ways to avoid *Crawford-El*'s mandate,[217] a more definitive and absolute solution is desirable.[218] Two such alternatives, congressional legislation or revision of the FRCP, were identified by the majority[219] and may be appropriate at this time due to the inconsistent application of the qualified immunity defense. Therefore, although it appears that *Crawford-El* is a significant victory for civil rights plaintiffs, such victory may actually prove to be more theoretical than practical, as they will continue to face onerous, if less obvious, burdens in the federal

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Eleventh Circuit's increased pleading requirement in § 1983 lawsuits, but argued that it was appropriate to read *Crawford-El* very narrowly. *See id.* at 1191 n.10. The court asserted that because *Crawford-El* did not directly address factually specific pleading in § 1983 cases, it would be improper to abandon the Eleventh Circuit's heightened pleading standard. *See id.*

[214] *See Crawford-El*, 118 S. Ct. at 1602 (Rehnquist, C.J., dissenting).

[215] *See* Wald, *supra* note 116, at 1925-26. Although *Crawford-El* restricted the use of one specific heightened proof standard, there remain a number of informal mechanisms federal courts can utilize to achieve the same result. *See id.* at 1925-26. Some of these informal tools include interpreting the procedural rules in a manner that prejudices plaintiffs, altering substantive standards to make it more difficult for plaintiffs to establish the elements of their cause of action, and scrutinizing plaintiffs' evidence in a manner that precludes a conclusion that genuine issues of material fact were raised. *See id.*

[216] *See Crawford-El*, 118 S. Ct. at 1595.

[217] *See Ross*, 15 F. Supp. 2d at 1191 n.10.

[218] *See Crawford-El*, 118 S. Ct. at 1598 (Kennedy, J., concurring) (noting that the legislative branch is equipped to provide more far-ranging solutions to such problems); *see also* Crawford-El v. Britton, 93 F.3d 813, 838 (D.C. Cir. 1996) (Silberman, J., concurring) (observing that congressional legislation could end the confusion surrounding this subject).

[219] *See Crawford-El*, 118 S. Ct. at 1595.

courts and may be forced to endure unfavorable rulemaking or legislative action in the future.

Brian Patrick Sharkey