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# CONFIRMATION AS CONSCIOUSNESS-RAISING: LESSONS FOR THE SUPREME COURT FROM THE CLARENCE THOMAS CONFIRMATION HEARINGS

DONALD P. JUDGES\*

## INTRODUCTION

Justice Thomas's nomination and confirmation as the 106th Justice of the United States Supreme Court, like the Bork hearings, has prompted critical reexamination of the judicial confirmation process. Objections include: that the process has become too politicized and sensationalized; that such intense public scrutiny discourages qualified individuals from seeking the position; that the President's nominees are excessively ideological; that senators either try too hard to obtain commitments from nominees on substantive legal questions or do not try effectively enough; and that insufficient attention is paid to nominees' qualifications.<sup>1</sup> Further, apart from the confirmation process, the Thomas hearings have focused national attention on the issue of sexual harassment. All of these are important issues, and many are ably discussed elsewhere in this colloquium. These comments will address none of them.

Instead, I will discuss the opportunity Justice Thomas's confirmation experience created to provide some much needed consciousness-raising for at least one member of the Supreme Court on the issues of privacy, individual liberty, and fairness. The weight attached by the Justices to such interests assumes considerable importance under the Supreme Court's balancing approach to constitutional interpretation. That approach, which the Court applies at both the right-recognition stage (categorical balancing) and the infringement-determination stage (more ad hoc balanc-

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<sup>1</sup> See Henry Reske, *Confirmation Hearings, Round II*, A.B.A.J., Dec. 1991, at 14.

ing), often involves the weighing of competing interests. An increasingly conservative Court is striking that balance with a correspondingly diminishing concern for the powerful ways in which government affects people's lives. The Court's opinions prompt speculation about the extent to which the Justices' personal insulation from the effects of many such challenged laws shapes their views of the interests at stake. One explanation for the sometimes startlingly insensitive statements of some Justices when disposing of claims of individual liberty, privacy or fairness<sup>2</sup> may be that they have difficulty identifying with the position of the claimant—especially outsiders such as an indigent pregnant woman seeking an abortion or a death-row convict.<sup>3</sup> Consequently, their conception of the factors that weigh in the constitutional balance becomes skewed against claims of individual rights and in favor of governmental interests. And an essential element of fairness—the decision-maker's ability or willingness to appreciate the perspective of both sides—is substantially eroded.

The newest Justice, however, has now publicly stated that he has derived a fresh appreciation for the values of privacy, liberty, and fairness from his experience as a subject of government processes during his confirmation hearings—which inquired in lurid detail into his alleged sexual overtures toward a female subordinate.<sup>4</sup> He has also stated that he believes such inquiries to

<sup>2</sup> See *infra* notes 11, 20, 25-27, 34-36 and accompanying text.

<sup>3</sup> This tendency is at the core of the problem in recent Establishment Clause cases. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 601-02 (1989) (invalidating placement of nativity scene on Grand Staircase of Allegheny Courthouse without camouflage of plastic reindeer; but upholding menorah display outside City-County Building next to Christmas tree and sign saluting liberty); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (sustaining municipal sponsorship of nativity scene in park, accompanied by other Christmas display items such as models of reindeer and Santa Claus house); see also Donald P. Judges, *Keeping the Faith?: The Lower Courts' Dubious Interpretation of Lynch v. Donnelly and Stare Decisis*, 24 U. WYO. LAND & WATER L. REV. 167 (1989) (criticizing *Lynch* as insensitive to perspective of non-Christians, and criticizing "two-plastic reindeer rule" as cynical trivialization of constitutional protection).

<sup>4</sup> The tenor of the controversy is illustrated by the tabloid coverage of the hearings. See, e.g., Chanda Howell, *Sex Harassment Scandal: The Private Life of Anita Hill: A Woman Who Can't Find Love*, NAT'L ENQUIRER, Oct. 29, 1991, at 34 (example of just how lurid spectacle became); Dan McDonald, *Sex Harassment Scandal: Judge Thomas Told One Lie After Another . . . and Anita Hill Is Telling the Truth, Voice Stress Test Proves*, NAT'L ENQUIRER, Oct. 29, 1991, at 31 (same); Joe Mullins, *The Bizarre Cult Past of Thomas' Wife*, NAT'L ENQUIRER, Oct. 29, 1991, at 34 (same).

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be “unAmerican,” and has asserted a right not to have certain areas of his life invaded by government officials. Justice Thomas’s assertion of a new-found concern for privacy, liberty, and fairness is especially significant in view of the apparent decline in judicial empathy on the Court for claimants of such interests.<sup>5</sup> Whether that concern will endure or will go the way of some of Justice Thomas’s other public pronouncements remains to be seen. At the least, however, his comments occasion a glance at the Court’s approach to determining the constitutional moment of various aspects of privacy, liberty, and fairness.

The claims asserted by Justice Thomas during his confirmation hearings resemble in several important respects those asserted by litigants before the Court in recent cases. If Justice Thomas’s new conception of fairness includes the most basic Kantian principle of universality, then perhaps he will display more empathy with the plight of the outsider than his critics predicted. Unless Justice Thomas is prepared to explain why he is more entitled than other individuals to privacy, liberty, and fundamental fairness, simple norms of integrity and consistency in discourse would seem to demand that he strike the constitutional balance further toward respect for such claims than his colleagues have done.

Initially, this Article will set forth briefly the relevant portions of Justice Thomas’s testimony from his confirmation hearings. Second, this Article will review a selection of recent Supreme Court cases involving claims that bear significant parallels to the claims asserted by Justice Thomas during his confirmation hearings, and will contrast the results in those cases with the position taken by Justice Thomas in his own behalf. In short, I argue that in several important respects the claims advanced by the losing individuals in each case were at least as compelling, and often more so, than Justice Thomas’s corresponding claims. Finally, I conclude that several of Justice Thomas’s first votes on the Court already have called into question the strength of his proclaimed commitment to individual rights.

<sup>5</sup> See Don J. DeBenedictis, *Confirmation Conversion?: Thomas Backs Away from Former Stands; Democrats Question Process*, 77 A.B.A. J. 18, 19 (Nov. 1991).

## I. THE HEARINGS

The Thomas confirmation hearings shed far more heat than light on the question of what kind of person Justice Thomas really is, what he believes in and stands for, and what actually transpired between him and Anita Hill. Although the hearings were rich in descriptions of his impoverished childhood in Pin Point, Georgia, Justice Thomas's "unartful dodges" on the issue of privacy and his recanting of earlier strongly expressed views on abortion, interbranch relations, women's rights, and natural law, left the public mystified about his approach to some of the most important constitutional issues of our time. Further, because the Senators' questioning of Justice Thomas concerning Ms. Hill's allegations consisted mainly of speeches and apologies, and because Justice Thomas was perhaps one of the few persons in the entire United States who did not observe her televised testimony and therefore was conveniently positioned to avoid answering her charges in any detail, the October 11-12, 1991 hearings provided more titillating theater than fact-finding.

The one point that emerged forcefully and unambiguously from the proceedings, however, is that Justice Thomas found the hearings deeply offensive and humiliating. A sample of the more than one dozen statements that he made in objection during the October 11-12 hearings illustrates the extent to which Justice Thomas claims to prize "fairness" and his privacy, and his passionate identification of those interests with "fundamental" values that he regards as truly "American":

This [process] is not American; this is Kafkaesque. It has got to stop. It must stop for the benefit of future nominees and for our country. Enough is enough.

I'm not going to allow myself to be further humiliated in order to be confirmed. I am here specifically to respond to allegations of sex harassment in the workplace. I am not here to be further humiliated by this committee or anyone else, or to put my private life on display for prurient interests or other reasons. *I will not allow this committee or anyone else to probe into my private life. This is not what America is all about.*

*To ask me to do that would be to ask me to go beyond fundamental fairness.*

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.....  
I think the country has been hurt by this process. I think we are destroying our country, we are destroying our institutions, and I think it is a sad day when the U.S. Senate can be used by interest groups and hate mongers and people who are interested in digging up dirt to destroy other people, and who will stop at no tactics when they can use our great institutions for their own political ends. We are gone far beyond McCarthyism. This is far more dangerous than McCarthyism. At least McCarthy was elected.

.....  
You are ruining the country. If it can happen to me, it can happen to anybody, anytime, over any issue.<sup>6</sup>

A person enduring Justice Thomas's ordeal might be expected to react in at least one of two ways. He or she probably either would come away a wiser person firmly committed to procedural and substantive fairness and to the vigorous protection of privacy and individual liberty, or would emerge embittered and with scores to settle against "interest groups" (some of whom coincidentally are dedicated to preserving those very same values). One who associates neo-conservatism with victim-blaming would not be surprised to see Justice Thomas take the low road. At the hearings, however, he reassuringly situated himself on the high ground:

The other thing I've learned in the process are things that we discussed in the real confirmation hearings, and that is our rights being protected, what rights we have as citizens of this country, what constitutional rights, what—what is our relationship with our government. And as I sit here on matters such as privacy, matters such as procedures for charges against individuals in the criminal context or civil context, this has heightened my awareness of the importance of those protections, the importance of something that we discussed in theory—privacy, due process, equal protection, fairness

.....  
I have been an accused.

<sup>6</sup> *Thomas Supreme Court Confirmation: Hearings Before the Senate Judiciary Committee*, 102 Cong., 1st Sess. (1991) [hereinafter *Hearings*] (emphasis added).

· · · ·  
[My rights] were violated . . . .<sup>7</sup>

At a time when a reconstituted Court is reweighing the constitutional "protections" of "privacy, due process, equal protection, and fairness," and when the judicial commitment to vigorous preservation of those interests seems very much in doubt, Justice Thomas's statements merit close attention. It is therefore worthwhile to compare the public declarations of a sitting Justice on such interests when his own privacy and liberty were at stake, to the Court's responses to such claims raised by other, less powerfully connected individuals.

## II. "PRIVACY, DUE PROCESS, EQUAL PROTECTION, AND FAIRNESS"

In a number of recent cases, this comparison reveals stark contrasts between the privacy rights claimed by Justice Thomas and those recognized by his colleagues on the Court for everyone else. In many instances, the Court has rejected claims that would seem much more compelling than those asserted by Thomas—and sometimes based on reasoning that could charitably be described as "Kafkaesque."

### A. *Privacy*

One obvious example is *Bowers v. Hardwick*.<sup>8</sup> Michael Hardwick was arrested for engaging in a sexual act with another consenting adult in his own bedroom. The act was entirely private, involved no violence or coercion (as might be the case, for example, in unwelcome sexual advances by a supervisor toward a subordinate), and would have gone largely unnoticed by the community had the police not intruded. Detailed criticism of the Court's rejection of Hardwick's constitutional challenge to the Georgia sodomy statute is beyond the scope of these comments. The point here is that it is difficult to see how the Senate hearings intruded into Clarence Thomas's privacy more than the Georgia police's raid of Michael Hardwick's bedroom invaded Hardwick's.

<sup>7</sup> *Id.*

<sup>8</sup> 478 U.S. 186 (1986).

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Between the two individuals, it would seem that Hardwick had far more justification to feel violated by government than did Thomas. Hardwick was arrested and rudely thrown into jail by police who made a point of informing his cell-mates of the nature of his offense, which, as mentioned, was as private and self-regarding as an act involving more than one person can be. Thomas, on the other hand, was seeking an office of the nation's highest constitutional trust; and the allegations against him involved a possible breach of his official responsibilities and coercive, abusive conduct plainly relevant to his fitness and competence to serve on the Court. Hardwick's "crime" was, at worst, only that of being different in an intensely private way. If the allegations against Thomas are true, he violated the trust of his public office, exploited a position of power to degrade and humiliate a subordinate, flaunted the very laws he subsequently swore to enforce, and perjured himself before Congress. If government's call upon Thomas simply to respond to allegations of such momentous public import treads the outer boundaries of permissible intrusiveness, then surely Hardwick's much more modest claim not to be incarcerated for a far more "private" act ought to lie comfortably within the protected zone.

Thomas's assertion of a privacy claim and the Court's rejection of Hardwick's claim are difficult to reconcile. First, the nature of the government's action with respect to Hardwick was arguably more serious: Thomas was seeking a job to which he could claim no entitlement—not trying to stay out of jail. Second, Thomas's objection is tied to the constitutional issue as the Court framed it in *Bowers* and as his own quondam endorsement of a natural law perspective also would see it: Thomas complained that the intrusion was *unAmerican*. In other words, he seemed to argue that such intrusion into his private sexual life offended liberties that "are 'deeply rooted in this Nation's history and tradition.'"<sup>9</sup> Third, Thomas's invocation of privacy in the circumstances has more in common with the dissenters' than the majority's concep-

<sup>9</sup> *Id.* at 192 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)). In this respect, both Hardwick and Thomas present claims based on the autonomy aspect of the right to privacy.



tion of the constitutional issue. Justice Blackmun objected that the majority had too narrowly described the nature of the interest at stake:

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."<sup>10</sup>

Similarly, giving Justice Thomas the benefit of the doubt, one assumes that he was objecting to the public pawing of his private sexual life, not asserting a right to engage in the secret sexual harassment of subordinates. Surely Michael Hardwick must wonder how his interest in the privacy of his own sexual life is any less "fundamental," and how the constitutional protection of that privacy is any less "American" than is the case for Clarence Thomas's sexual activities.

### *B. Government Overreaching in General*

In a more general sense, Thomas's confirmation hearings temporarily placed him on the underside of government's enormous power. For a time, part of his personal life was subject to the mercies of government officials who could not be assumed to be benevolent, reasonable, fair, or even in control of events. But Thomas's experience was only a shadow of that endured by countless Americans in everyday encounters with their government—especially the poorest Americans who must depend on government for sustenance and necessary services. The Supreme Court, however, has immunized many applications of government power from constitutional review as the result of the Court's paradigmatic conception of negative rights in the liberal legalistic con-

<sup>10</sup> *Id.* at 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (citations omitted).

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stitutional state.<sup>11</sup> Once again, however, it is difficult to see how Justice Thomas's objections to government overreaching stand on stronger ground than the claims rejected by the Court.

The abortion funding cases exemplify the Court's negative rights approach. In *Harris v. McRae*,<sup>12</sup> the Court upheld the Hyde Amendment, which denies federal Medicaid funds to reimburse the cost of all but a tiny number of abortions for women who otherwise would be eligible for such aid, while providing funding for childbirth.<sup>13</sup> The Court concluded that although the Constitution protects the limited negative right to an abortion, that protection "did not translate into a constitutional obligation . . . to subsidize abortions."<sup>14</sup> The Court explained that:

although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.<sup>15</sup>

There are several problems with the Court's reasoning. First, the Court's distinction between state inaction and action is dubious. The state has affirmatively decided—indeed enacted a statute—to exclude from a comprehensive program of publicly funded medical care the one medical procedure entitled to constitutional protection. Surely, poor women who are, in effect, bribed to choose childbirth over abortion could reasonably feel that the

<sup>11</sup> See, e.g., Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. (forthcoming 1992) [hereinafter Judges, *Bayonets for the Wounded*] (examination of impact of that paradigm on perpetuation of economic and political isolation of American underclass); Donald P. Judges, *Light Beams and Particle Dreams: A Reexamination of the Individual Versus Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007, 1039-46 (1991) (consideration of impact of paradigm dominating affirmative action debate on that group). The discussion, *infra*, notes 12-36 and accompanying text of the abortion funding cases and *DeShaney* are taken largely from Judges, *Bayonets for the Wounded*, with the permission of the Hastings Constitutional Law Quarterly.

<sup>12</sup> 448 U.S. 297 (1980).

<sup>13</sup> See *id.* at 326-27.

<sup>14</sup> *Id.* at 315.

<sup>15</sup> *Id.* at 316.

state has "done something" tangible and substantial to them.<sup>16</sup> Second, the Court's conception of the scope of state responsibility is cramped. In other contexts, the law routinely intervenes to preclude *private* parties from exploiting such vulnerabilities and to protect important public policies. For example, recognizing the distorting effect that gross disparities in bargaining power can have on the validity of an ostensible choice and the need to prevent overreaching, to shift the cost of accidents to one who can better bear and spread them, and to deter wrongful and harmful conduct, courts will decline to enforce unconscionable contracts,<sup>17</sup> disclaimers of implied warranties,<sup>18</sup> and express assumption of risk in some situations.<sup>19</sup> In such cases, courts properly reject the argument that the more powerful party is not responsible for the weaker party's vulnerability. Instead, the relation between the parties gives rise to minimal obligations of good faith, fair dealing, and due care. Medicaid recipients and the state are hardly strangers to one another, and it seems anomalous to ignore the realities of the power relationship when one of the parties is the state and the threatened policy is of constitutional stature. The Court's finding that the women's utter dependence on government for their health care is constitutionally irrelevant is therefore unconvincing.<sup>20</sup> Similarly suspect is the Court's conclusion that govern-

<sup>16</sup> See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-10, at 1346-47 (2d ed. 1988).

<sup>17</sup> See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir.1965) ("where the element of unconscionability is present at the time a contract is made, the contract should not be enforced").

<sup>18</sup> See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 404, 161 A.2d 69, 95 (1960) ("attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom is so inimical to the public good as to compel an adjudication of its invalidity").

<sup>19</sup> See, e.g., *Tunkl v. The Regents of the Univ. of Cal.*, 383 P.2d 441, 447 (Cal. 1963) (even though hospital may be selective in admitting patients, it cannot contract to release itself from liability for negligence).

<sup>20</sup> See *Harris v. McRae*, 448 U.S. 297, 316-18 (1980). The Court reaffirmed this principle in *Webster v. Reproductive Health Services*, upholding a prohibition on the use of public facilities or employees to perform abortions not necessary to save the mother's life. 492 U.S. 490, 519, 520 (1989). The Court has also applied this approach in the First Amendment area, reasoning that the First Amendment constitutes only a prohibition on certain kinds of government restrictions on speech, not an entitlement to the means to exercise one's free speech rights. See, e.g., *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548-51 (1983) (sustaining Internal Revenue Code's distinction between nondeductibility of contributions to tax-exempt organizations that engage in lobbying and de-

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ment's decision to fund the course of treatment leading to the irrevocable nonexercise of a constitutional right does not inhibit the exercise of the right.

To be sure, there may be something to the view that a legislative judgment that our society will be insensitive to the plight of its least privileged and most vulnerable citizens is entitled to some deference. But the Court's linear, mechanistic view of the relationship between the individual and the state effectively ignores the pervasive and powerful ways in which government affects the lives of individuals—especially the poor and the vulnerable. After all, the Court bears the ultimate responsibility to ensure that the insensitive—or even purely selfish—dominant faction is not allowed to negate the rights of citizens unable to command political support but no less worthy of protection.<sup>21</sup>

An extreme example of the Court's reasoning is *Rust v. Sullivan*.<sup>22</sup> The regulations upheld in *Rust* prohibit family planning clinics that receive Title X monies from discussing abortion as an option with their clients, even if the client requests abortion information, and even if the provider believes such information to be in the woman's best medical interests.<sup>23</sup> If a client requests abortion information, the provider may respond that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion."<sup>24</sup>

The Supreme Court rejected both a free speech and an abortion rights challenge to the regulations. In the Court's view, the

ductibility of contributions to organizations that do not engage in lobbying). See generally *TRIBE*, *supra* note 16, at 1346-47 (critique of Court's approach in *Harris v. McRae*).

<sup>21</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* 135-36 (1980) (Court's job when detecting law depriving one of constitutional entitlement is to unblock stoppage).

<sup>22</sup> 111 S. Ct. 1759 (1991).

<sup>23</sup> *Id.* at 1778. Instead, the health care providers are required to refer pregnant clients to "appropriate prenatal and/or social services . . ." *Id.* at 1765 (citing 42 C.F.R. § 59.8(a)(2) (1991)). For seventeen years, the Administration had interpreted Title X of the Public Health Service Act to allow "nondirective" counseling and referrals—intended only to inform, not to persuade or to influence—on all courses of action in response to pregnancy, including prenatal care and delivery, infant care, foster care, adoption, and abortion. See *Program Guidelines for Project Grants for Family Planning Services*, Public Health Services of HHS, 1981, at 12-13 (requiring Title X projects to provide information on all options of family planning). In February 1988, however, the Secretary of Health and Human Services issued the regulations upheld in *Rust*. See *Rust*, 111 S. Ct. at 1762.

<sup>24</sup> 42 C.F.R. § 59.8(b)(5).

administration had simply defined the Title X program as limited to family planning and reproductive health exclusive of abortion.<sup>26</sup> In disposing of the First Amendment claim, Chief Justice Rehnquist, writing for the Court, reasoned that the regulations "do not significantly impinge upon the doctor-patient relationship," because "[t]he program does not provide post-conception medical care, and therefore *a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.*"<sup>28</sup>

The Court concluded that the regulations do not infringe a woman's reproductive freedom because: (1) the woman is left "in no different position than she would have been if the government had not enacted Title X"; and (2) "a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."<sup>27</sup> In short, in the Court's eyes, the government's Title X program under the 1988 regulations is like a canoe quietly slipping across a placid lake, leaving hardly a ripple in its wake.

The Court's analysis provides important insights into the Court's vision of the relationship between government, its programs, and citizens' lives. Only someone insulated from the effects of the regulations could accept the Court's view of government's role in women's health care. Title X is not a quiet canoe, it is a monstrous battleship.<sup>28</sup> These regulations and the Court's decision will unquestionably have an enormous impact, especially on the health care received by low-income women: the dependency that everyone has on his or her health care provider is magnified

<sup>26</sup> See *Rust*, 111 S. Ct. at 1772. Thus, the Court reasoned, the regulations involve "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of its scope." *Id.* at 1772-73. The Court observed that providers remain free to speak out on abortion outside the scope of Title X projects. *Id.* at 1774.

<sup>26</sup> *Id.* at 1776 (emphasis added).

<sup>27</sup> *Id.* at 1777.

<sup>28</sup> Title X is the largest single source of federal funding of family planning services, and reaches an estimated 14.5 million women. *Id.* *State of New York v. Sullivan*, 889 F.2d 401, 415 n.1 (2d Cir. 1989) (Cardamone, J., concurring), *aff'd sub nom. Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

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for these women because of their poverty.<sup>29</sup> It therefore is disingenuous—indeed, “Kafkaesque”—to contend that women are in the same position they would have occupied had there been no Title X. Once government has provided ideologically slanted medical information for Title X clients to rely upon, it has substantially intruded into and had a major impact on their lives.<sup>30</sup> Yet by asserting a distinction between indirect encouragement and outright prohibition, a distinction made possible by the negative-rights paradigm, and by positing a largely hypothetical alternative avenue to the exercise of the right, the Court manages to deny that the administration is doing something tangible and drastic to the lives of these women and their health care providers’ ability to provide care.<sup>31</sup>

<sup>29</sup> See *id.* (Cardamone, J., concurring) Approximately one-third of those women are adolescents and ninety percent of all women served have incomes below 150% of the poverty level. *Id.* For many women, their first visit to the Title X grantee is for pregnancy testing, not for contraception. *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53, 56 (1st Cir. 1990). Federal funds account for approximately one-half of the money received by Title X clinics. *Id.* at 73 n.11.

<sup>30</sup> These women are going to Title X clinics for medical assistance concerning reproductive matters. Like anyone, they depend upon their health care providers to give them candid and complete advice in the provider’s best judgment, including referral for appropriate treatment. Doctors are ethically and legally obligated to do no less. When the physician remains silent concerning abortion or, what is worse, recites the Administration’s dogma, any reasonable person would be grossly misled “into thinking that the doctor does not consider abortion an appropriate option for her.” As Justice Blackmun observed in dissent:

The undeniable message conveyed by this forced speech . . . is that abortion nearly always is an improper medical option. Although her physician’s words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the Regulations’ mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

*Rust*, 111 S. Ct. at 1785 (Blackmun, J., dissenting).

It therefore is perverse to suggest that government has not interfered with the doctor-patient relationship when it censors doctors in the treatment room, and prescribes an orthodox litany to be recited when patients request medically pertinent information. Neither expressive nor reproductive freedom are protected when health care providers are allowed to speak everywhere and to everyone except where and to whom it matters most.

<sup>31</sup> It comes as no surprise that Chief Justice Rehnquist would take this position. Although even pro-abortion rights advocates must admit that *Roe v. Wade* is not without its doctrinal difficulties, then-Justice Rehnquist’s dissent in that case revealed an obdurate refusal to acknowledge that abortion implicates privacy at all. He disagreed that the notion of privacy had any application to the abortion decision, which he characterized as a mere

Another, especially tragic, application of the Court's model to the condition of the vulnerable is *DeShaney v. Winnebago County Dept. of Social Services*.<sup>32</sup> While little Joshua DeShaney was in his abusive father's lawful custody, the county maintained an administrative network that funneled all child-abuse information into itself, purported to exercise exclusive jurisdiction over such matters, and actively monitored and dutifully recorded numerous indications that Joshua was being badly abused. In fact, on one occasion the county actually obtained temporary custody when Joshua was admitted to the hospital with multiple bruises and abrasions; but the county shortly thereafter persuaded the juvenile court to dismiss the child protection case and return Joshua to his tormentor.

Despite such indicia of government involvement, the Court invoked its negative rights paradigm to conclude that the county could not be held constitutionally accountable for its failure to intervene before Robert DeShaney savagely—but all too predictably—beat his four-year-old son into a state of permanent brain damage.<sup>33</sup> In the Court's view, “the Due Process Clauses generally

“transaction” between the pregnant woman and her physician. *See Roe v. Wade*, 410 U.S. 113, 172-74 (1973) (Rehnquist, J., dissenting). One wonders whether he, or any man would feel the same way about a prostate examination.

<sup>32</sup> 489 U.S. 189 (1989).

<sup>33</sup> *DeShaney*, 489 U.S. at 196. Another compelling example of government's role in child abuse is Yaakov Riegler's fate at the hands of New York's child welfare system. *See Celia W. Dugger, As Mother Kills Her Son, Protectors Observed Her Privacy*, N.Y. TIMES, Feb. 10, 1992, at A1. Yaakov's case illustrates the painful emptiness of the Supreme Court's analysis in *DeShaney*.

Yaakov, a retarded eight-year-old boy who stood a full three feet eight inches and weighed all of forty-eight pounds, was beaten to death in 1990 by his mother, Shulamis Riegler. Shulamis had beaten Yaakov's brother Israel into a coma in 1986, but both boys were returned to their mother after spending several years in foster care. State supervision of the family was terminated November 27, 1989, notwithstanding the fact that school officials showed Yaakov's bruises that very same day to a city child abuse investigator, who was “shocked.” In March 1990, the city's Probation Department terminated its supervision of Shulamis, uninformed about additional reports that she might again be abusing her children. Over the next seven months, Yaakov was examined and sometimes treated for numerous cuts, gashes, bruises, and trouble with his elbow that an autopsy later revealed had been fractured. Yaakov's teachers made repeated, “frantic” appeals for Yaakov's protection to the child abuse investigator, the investigator's supervisor, and the state child abuse hot line. On September 27, 1990, another investigator visited the Riegler home, found burn marks on Yaakov, and was told by the boy that both his father and mother hurt him but that his mother hurt him more. Two days later, Shulamis beat Yaakov into the coma from which he never recovered.

It is difficult to conceive of a coherent system of constitutional accountability that could

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confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”<sup>34</sup> Thus, Robert DeShaney, not the county, ruined Joshua’s life; and government’s role in placing Joshua in harm’s way, faithfully recording his numerous injuries and “suspicions that someone in the DeShaney household was physically abusing Joshua,”<sup>35</sup> and monopolizing his one avenue to relief, are constitutionally irrelevant to establishing the kind of relationship that would impose even a minimal duty of care.<sup>36</sup>

In other contexts, apart from cases directly raising the negative rights problem, members of the Court have also demonstrated a remarkable capacity to discount substantially or to overlook the real-world impact of government action. Examples can again be found in recent abortion rights cases. In *Hodgson v. Minnesota*,<sup>37</sup> Justices Kennedy, White, Scalia, and the Chief Justice disregarded uncontested findings of fact concerning the detrimental impact of Minnesota’s two-parent notification requirement in voting to sustain the provision.<sup>38</sup> As the lower court found, almost all judicial

conclude, as *DeShaney* apparently would, that the city did not participate significantly in the taking of little Yaakov’s life. According to the New York Times account,

[w]hen Mrs. Riegler pleaded guilty . . . Judge Francis X. Egiito condemned the city’s child protection system—a system whose goal is, where possible, to reunite children with their natural parents—and the boy’s doctor for not saving Yaakov’s life. “It’s not just Mrs. Riegler who is guilty of the death of Yaakov,” the judge said.

*Id.* at A16.

<sup>34</sup> *DeShaney*, 489 U.S. at 196.

<sup>35</sup> *Id.* at 193.

<sup>36</sup> Only in limited circumstances of actual confinement has the Court recognized the kind of relationship that creates such a duty. *See* *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). Indeed, it is unclear that Joshua’s constitutional claim would have prevailed on a due process claim even had a county official personally administered the beating. The Court has held that government employees’ intentional, random and unauthorized deprivations of property, when a state tort remedy is available, do not violate due process. *See* *Hudson v. Palmer*, 468 U.S. 517, 536 (1984); *see also* *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (Due Process Clause not violated by lack of due care of official, even if it causes injury to one’s liberty).

This approach forces nice questions about when a deprivation results from an established state procedure rather than from the employee’s random and unauthorized act. *See, e.g.,* *Zinermon v. Burch*, 494 U.S. 113, 137 (1990) (failure to apply involuntary admission procedures to visibly disoriented “voluntarily” admitted patient to mental health facility held not “unauthorized,” but instead pursuant to delegated authority).

<sup>37</sup> 110 S. Ct. 2926 (1990).

<sup>38</sup> *See id.* at 2961-64. Those findings included the following: although the statute sought primarily to protect minors’ well-being by encouraging them to discuss their pregnancy



bypass applications were granted: "The judges who adjudicated 90% of the petitions testified; none of them found any positive effects of the law."<sup>39</sup> On the whole, the district court found the evidence overwhelmingly established that the law failed to advance the state's interest in promoting the pregnant minor's welfare or enhancing family integrity, but instead caused considerable harm to the minor and her family. Nevertheless, those four Justices, reciting platitudes about the state's interest in protecting and fostering the parent-child relationship—and ignoring the contemporary realities of divorce, separation, dysfunctional relationships, and abusive parents in many families—were willing to defer to legislative judgment on the wisdom of the measure.<sup>40</sup>

In comparison to the foregoing examples, government's impact on Clarence Thomas seems tame. In his case, government merely raised questions and provided a forum for allegations. To be sure, some of those questions and allegations were decidedly embarrassing and even painful; and his reputation may have suffered some permanent damage as he moves from one life-tenured position to another. But, it is no denial of Thomas's sense of outrage to recognize that the irreversible and enormous impact of government decisions on the lives of helpless and disadvantaged persons, who

with their parents, it also was intended to deter minors from choosing to terminate their pregnancies; only half of the minors in Minnesota live with both parents and a third live with one parent; the two-parent notification requirement had especially harmful effects on both the custodial parent and the pregnant minor when the parents were divorced or separated because of the forced involvement with the family of the absent parent; and the two-parent requirement also had detrimental effects in two-parent families, especially when domestic violence was a serious problem (notwithstanding the abuse exception, which few minors found a practical alternative because of the obligation to involve the authorities). *Id.*

A majority of the Court held that requiring both parents to be notified, whether or not involved in the minor's upbringing, "does not reasonably further any legitimate state interest." *Id.* at 2945. A different majority, however, upheld the statute; but those Justices could not agree on the result. Justices Kennedy, Scalia, White, and the Chief Justice would have upheld the notification requirement even without a judicial bypass. Justice O'Connor concluded that the judicial bypass provision remedied her constitutional objection to the two-parent notification requirement. As a result, the Minnesota requirement of two-parent notification and a forty-eight hour waiting period, coupled with the right to a court order authorizing an abortion without parental notification, was upheld. *Id.*

<sup>39</sup> *Id.* at 2940.

<sup>40</sup> Another example is *Ohio v. Akron Ctr. for Reprod. Health*, 110 S. Ct. 2972, 2981 (1990), in which Justice Kennedy, writing for the Court, uncritically sustained patently burdensome procedural hurdles for access to judicial bypass of a single-parent notification requirement.

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must rely on the state for protection and health care, raise at least equally strong claims to privacy, liberty, and fairness. Allegations of sexual harassment, if baseless, are wrongfully damaging and offensive. The alleged harasser's life, like any other wrongfully accused person, is adversely affected in a substantial way. But bribing, misleading, and hounding indigent or young women in an effort to lead them to bear unwanted children, and isolating Joshua DeShaney in his patent victimization, inflicts damage no less real, and ought to occasion no less cause for concern.

### C. *Fairness*

Recent criminal procedure cases provide further instances of the Court's disregard for the fairness claims of individuals who are subjected to state authority. In each case, the Court's willingness to privilege the abstract interests of the state over the claims of individuals reflects an absence of even minimal empathy with the claimant. In the Court's habeas cases, the Justices' psychic distance from the claimant manifests itself in an increasingly pervasive resistance to the merits of claims of patent violation of constitutional rights. Once again, the Court's conclusions and reasoning do not compare favorably with Justice Thomas's position. As discussed below, following the description of several recent cases, it is difficult to see how—in terms of the interests to be included on *both* sides of the balance—Justice Thomas stood on firmer ground than did the unsuccessful claimants before the Court.

Reaching the merits in recent Fourth Amendment cases, the Court has shown itself remarkably unwilling or unable to identify with the position of the less powerful. For example, Justice O'Connor concluded for the Court in *Florida v. Bostick*<sup>41</sup> that a person confronted by armed police in the confines of a bus, pursuant to a police practice of routinely approaching bus passengers to search their luggage, could “feel free ‘to disregard the police and go about his business,’” and therefore did not necessarily feel compelled to submit to the search.<sup>42</sup> She reasoned that the individual's “movements were ‘confined’ in a sense, but this was the

<sup>41</sup> 111 S. Ct. 2382 (1991).

<sup>42</sup> *Id.* at 2386 (quoting *California v. Hodari D.*, 111 S. Ct. 1547, 1551 (1991)).

natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive."<sup>43</sup> The suggestion seems to be that any coercion derived from the individual's ill-advised choice to take a bus (instead of, one assumes, a private jet or personal automobile), and not from the decision of the armed officer to tower over him in a narrow, cramped corner of a bus. One also suspects that of everyone involved in the case, including the officers themselves, perhaps only the *Bostick* majority—whose members probably rarely, if ever, ride buses and whose encounters with armed officers most likely are limited to bodyguard services provided by federal marshalls—believes that the encounter was not inherently (and perhaps not intentionally) coercive.

The Court's recent penchant for expediting executions and for restricting federal habeas corpus review provides an especially vivid illustration of the Court's resistance to judicial empathy. One example is *Coleman v. Thompson*.<sup>44</sup> In that 1990 Term case, the Court upheld denial of federal habeas review of Coleman's death sentence on the ground that he had procedurally defaulted on his federal claims because his lawyer filed his notice of appeal from his state habeas proceeding three days late. Justice O'Connor's opinion reflects an exclusive concern with the state's interest in federal noninterference. This concern is evident from her first words for the Court—"This is a case about federalism"<sup>45</sup>—to her analysis of the adequate-and-independent-state-ground doctrine for federal habeas review in cases involving a defendant's procedural default in state court and her application of the cause-and-prejudice standard to Coleman's case. She never once takes account that a man's life is at stake.<sup>46</sup>

Justice O'Connor's relentless solicitude for the state's interests, by contrast, dominates her opinion. She commences her opinion

<sup>43</sup> *Id.* at 2387.

<sup>44</sup> 111 S. Ct. 2546 (1991).

<sup>45</sup> *Id.* at 2552.

<sup>46</sup> Indeed, the only mention that the case involves Coleman's execution is in a two-sentence recitation of the original proceedings below. The only mention of justice is in a passing reference to the third prong of the exception to the procedural default rule: that the defendant can avoid the consequences of his or her default by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 2568.

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with a paean to the virtues of procedural default rules. Next, in rejecting Coleman's argument that the federal-ground presumption of *Michigan v. Long*<sup>47</sup> and *Harris v. Reed*<sup>48</sup> ought to apply when a defendant presents federal claims to the state court, she worries exclusively about the burden imposed on a state court when it is merely required, "in the course of disposing of cases on its overcrowded docket," to provide a clear statement of its reliance on an adequate and independent state ground.<sup>49</sup> Justice O'Connor concludes that allowing as sufficient "cause" attorney error that produced the procedural default, even if such error would have amounted to constitutionally ineffective assistance of counsel in the original proceeding or direct appeal under *Strickland v. Washington*,<sup>50</sup> would intolerably require the state to "bear the cost of any resulting default and the harm to state interests that federal habeas review entails."<sup>51</sup> Therefore, "[a]s between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules"—even if that burden is imposition of the death penalty in violation of defendant's constitutional rights.<sup>52</sup>

As Justice Blackmun observed in dissent, the majority's approach is an "unjustifiable elevation of abstract federalism over fundamental precepts of liberty and fairness." He further stated:

Federalism; comity; state sovereignty; preservation of state resources; certainty; the majority methodically inventories these multifarious state interests before concluding that the plain-statement rule . . . does not apply to a summary order. One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death . . . . Rather, displaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth

<sup>47</sup> 463 U.S. 1032 (1983).

<sup>48</sup> 489 U.S. 255 (1989).

<sup>49</sup> *Coleman*, 111 S. Ct. at 2559.

<sup>50</sup> 466 U.S. 668 (1984).

<sup>51</sup> *Coleman*, 111 S. Ct. at 2567.

<sup>52</sup> *Id.*

Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims.<sup>53</sup>

The Court's overwhelming dedication to the interests of finality—as opposed to constitutionality—in state criminal judgments reached its zenith in *McCleskey v. Zant*.<sup>54</sup> Warren McCleskey was convicted of the murder of an off-duty policeman during a robbery. The state's key witness was Offie Evans, who occupied the jail cell next to McCleskey and testified that McCleskey admitted shooting the officer. McCleskey argued in his second federal habeas proceeding that Evans's twenty-one page signed statement, which the state had withheld until one month before that hearing, established that the state had used Evans to elicit inculpatory admissions from McCleskey in violation of his Sixth Amendment right to counsel under *Massiah v. United States*.<sup>55</sup> For the Court, the issue was whether McCleskey had “abused the writ”—not whether Georgia should be allowed to abuse a human being and the Constitution by executing someone whose rights plainly had been violated, simply because he was insufficiently prescient in uncovering evidence that the state itself had withheld. Speaking through Justice Kennedy, the Court ruled that the same “cause and prejudice” standards applicable to procedural default cases are to be applied to abuse of the writ. The Court also held that abuse of the writ can be established through excusable neglect and not just deliberate abandonment of a constitutional claim. The Court further concluded that the “cause” element requires petitioner to show that some “external” force interdicted his ability to discover the violation, and apparently believed that deception by the state is not such a force. Justice Kennedy's reasoning in reaching these conclusions, presaging Justice O'Connor's *Coleman* opinion, is all finality, federalism, and conservation of scarce judicial resources; it breathes not a word about the importance of preserving constitutional rights. The Court's balance thus places

<sup>53</sup> *Id.* at 2569 (Blackmun, J., dissenting).

<sup>54</sup> 111 S. Ct. 1454 (1991).

<sup>55</sup> 377 U.S. 201 (1964).

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not a thumb but both feet on the state's side of the scale; and the Court fails to pay even lip service on the scale's other side to the writ's *raison d'être*.

The Court's application of its vigorous new rules evidences its commitment to the result they ultimately obtained in *McCleskey*. Because McCleskey himself was a party to the conversations contained in Evans's statement, the Court reasoned, he "had at least constructive knowledge all along of the facts he now claims to have learned only from the twenty-one page document."<sup>66</sup> Finding no "cause," the Court never reached the "prejudice" element; but it did conclude that no "miscarriage of justice"<sup>67</sup> occurred. That exception is limited to conviction of an innocent person. Because the trial court found Evans's testimony credible, the Court was convinced that no harm was being done in any event.

As the dissent pointed out, however:

[t]he majority's analysis of this case is dangerous precisely because it treats as irrelevant the effect the State's disinformation strategy had on counsel's assessment of the reasonableness of pursuing the *Massiah* claim. . . . [I]n this case, by withholding the 21-page statement and by affirmatively misleading counsel as to the State's involvement with Evans, state officials created a climate in which McCleskey's first habeas counsel was perfectly justified in focusing his attentions elsewhere. The sum and substance of the majority's analysis is that McCleskey had no "cause" for failing to assert the *Massiah* claim because he did not try hard enough to pierce the State's veil of deception.<sup>68</sup>

The dissent further observed that, in view of the centrality of Evans's testimony to the state's case, its exclusion under *Massiah* very likely would have led to a different outcome at trial.

The troubling denouement to this drama graphically illustrates the consequences of the tilt in the majority's account of the inter-

<sup>66</sup> *McCleskey*, 111 S. Ct. at 1473. McCleskey relied on the testimony of a jailer, whose relevance to the case McCleskey's attorneys did not discover until they obtained Evans's statement, to show that the state had indeed planted Evans and used him to induce inculpatory testimony. *Id.*

<sup>67</sup> *Id.* at 1474.

<sup>68</sup> *Id.* at 1488 (Marshall, J., dissenting).

ests at stake. The interest in expeditious executions was satisfied with a vengeance. The Court handed down its *McCleskey* opinion on April 16, 1991. On Monday, September 23, 1991, two jurors from McCleskey's trial testified to the Georgia Board of Pardons and Paroles, McCleskey's last hope, that they would *not* have voted for the death penalty had they known that Evans was a police informant whose testimony may have been influenced by the prospect of a lighter sentence.<sup>59</sup> Shortly after 3:00 A.M. on Wednesday, September 25, 1991, after a flurry of futile last-minute appeals (one of which nightmarishly saw McCleskey put into, taken out of, and replaced in the electric chair), Georgia succeeded in electrocuting Warren McCleskey.<sup>60</sup> Finality, in the strongest possible sense, thus was brought to McCleskey's case; the writ is safe from further abuse by him. Whether justice was done is another matter. It appears that the United States Supreme Court has sanctioned the execution of an individual whose constitutional rights were plainly violated as a consequence of the state's affirmatively misleading defense counsel about facts that jurors themselves testified would have changed the outcome.

The interests of finality, repose, timeliness, and orderly procedures are important; and, as Justice Kennedy observed in *McCleskey*, those interests serve all litigants in the system, including those facing capital trials. It is, of course, essential that criminal offenders be brought to justice. But, the Constitution constrains the weight of those interests by embodying normative commitments of a higher order: how we treat individuals in the criminal justice

<sup>59</sup> See Peter Applebome, *Man Whose Appeals Shook the Courts Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A18. That testimony is relevant to both the *Massiah* claim and to McCleskey's claim under *Giglio v. United States*, 405 U.S. 150 (1972), that the state failed to disclose an agreement to drop certain charges against Evans in exchange for his inculpatory testimony. McCleskey raised his *Giglio* claim in his first federal habeas petition and received a favorable ruling from the District Court. *McCleskey v. Zant*, 580 F. Supp. 338, 381-82, 384 (N.D. Ga. 1984). That grant of the writ, however, was reversed by the Eleventh Circuit, which held that the state had not made such a promise to Evans and that the error was harmless in any event. *McCleskey v. Kemp*, 753 F.2d 877, 884-85 (11th Cir. 1985). The Supreme Court affirmed the Eleventh Circuit, and also ruled that Georgia's capital sentencing procedures were constitutional, notwithstanding McCleskey's showing that imposition of the death penalty might be statistically related to the victim's race. *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987).

<sup>60</sup> Peter Applebome, *Georgia Inmate Is Executed After "Chaotic" Legal Move*, N.Y. TIMES, Sept. 16, 1991, at A10.

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system matters in a most fundamental way.

Ensuring that nominees to the nation's highest court are professionally qualified and ethically fit to serve is an interest of prime importance as well. Society also plainly has an undeniable interest in protecting and vindicating the rights of victims of sexual harassment. But Justice Thomas reminded us during his hearings, as Oliver North and Edwin Meese also reminded us when they faced unpleasant accusations, that we must not compromise our commitment to basic fairness simply because the stakes are high and the case is sensational. One might therefore sympathize with Justice Thomas's objection at the unfairness of being confronted years after the alleged fact with an especially elusive kind of allegation.

It is difficult to see, however, how Thomas's asserted interest in fairness should receive greater weight than, say, Warren McCleskey's. It does not diminish the subjective significance of Thomas's own sense of indignation<sup>81</sup> or the importance to him and society of fairness, relevance, and accuracy in the confirmation process to observe that McCleskey had the stronger claim. All McCleskey asked of the Supreme Court was an opportunity to show how the state had plainly violated his constitutional rights and then withheld evidence of that violation, where such evidence very well might have made the difference between life and death. Both the condemned and society have a powerful interest in procedural punctiliousness in capital cases, especially when, as McCleskey himself unavailingly argued in his first trip to the Supreme Court, there is reason to suspect that racial bias taints the sentencing process.<sup>82</sup>

Comparison of the two claims, of course, must maintain perspective. Thomas was not charged with a crime, nor was he even formally accused of sexual harassment. No charges against him—civil or criminal—were ever filed. And sexual harassment, ugly as it is, of course lies moral light-years away from armed rob-

<sup>81</sup> One wonders whether his experience will lead Thomas to reconsider his position that the feelings of one whose rights have been violated, for example, by racial discrimination, are constitutionally irrelevant. See Clarence Thomas, *Toward a "Plain Reading" of the Constitution: the Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 989-91 (1987).

<sup>82</sup> *McCleskey*, 481 U.S. at 279-80.



bery and homicide. But just as the allegations against Thomas were manifestly less grave than those against McCleskey, so too were the consequences of the process government imposed on him. As Thomas himself repeatedly observed during his hearings, he was free at any time to walk away from the nomination and return to his impregnable position as "the youngest member of the U.S. Court of Appeals for the D.C. Circuit." Unlike McCleskey, Thomas could say that "I'll go back to my life of talking to my neighbors, and cutting my grass, and getting a Big Mac at McDonald's, and driving my car, seeing my kids play football. I'll live. I'll have my life back."<sup>63</sup> To be sure, he probably would have suffered severe disappointment and embarrassment; but he would still have his life, liberty, and job.

Any unfairness inflicted on Thomas is also of a different order than the violation of McCleskey's rights. The "staleness" of the allegations against Thomas did not result from any wrongdoing by the powerful apparatus of the state; indeed, the Senate studiously resisted even addressing the allegations openly until forced to "take them seriously" by the pressure of public opinion. McCleskey, by contrast, sought an opportunity to show that the state had withheld constitutionally relevant evidence in a capital case. Thomas's objection is further counterbalanced at least in part by his own former agency's official recognition that, because of the degrading nature of the violation, victims of sexual harassment may not come forward with a complaint for a long time and may maintain an apparently positive relationship with the accused.<sup>64</sup>

<sup>63</sup> *Hearings, supra* note 6.

<sup>64</sup> See *EEOC Policy Guidance*, N-915.050, *Empl. Prac. Rep.* (CCH) ¶ 5258, at 6924-27 (Mar. 19, 1990) (footnotes omitted). As the EEOC has stated:

While a complaint or protest is helpful to charging party's case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct . . . . In appropriate cases, the Commission may make a finding of harassment based solely on the credibility of the victim's allegation. As with any other charge of discrimination, a victim's account must be sufficiently detailed and internally consistent so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.

*Id.* Indeed, the Commission has stated expressly that "[i]f the investigation exhausts all possibilities for obtaining corroborative evidence, but finds none, the Commission may

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Finally, comparison of the racial discrimination claims raised by both men further illustrates the contrast. Thomas characterized Ms. Hill's allegations that he had boasted of his sexual endowment and prowess as "charges that play into racist, bigoted, stereotypes," and he objected that "these are the kind of charges that are impossible to wash off . . . ."<sup>65</sup> While one might quarrel with Justice Thomas's objection that it is inherently stigmatizing to be accused of being sexually well-endowed, he is doubtless correct that "we still have underlying racial attitudes about black men and their views of sex." In any event, Thomas's claim of racism seems puny next to McCleskey's unsuccessful assertion that statistical disparities in the imposition of the death sentence reflect the ultimate in racial injustice.

In sum, Thomas's confirmation hearings gave at least one Justice an opportunity to experience firsthand what it feels like to have his privacy invaded, his character questioned, and his life disrupted by government officials in the performance of their official duties. His protests are understandable, but they pale in comparison to far more compelling claims recently rejected by the Court. One of the most persuasive witnesses in Thomas's favor, Dean Guido Calabresi, expressed optimism at Thomas's capacity to grow and learn from experience as a Justice. Justice Thomas's confirmation ordeal was a substantial first lesson, which, if learned well, could go far to alleviate his critics' concerns. If Justice Thomas meant what he said both about individual rights and empathy with such claimants, and if he is willing to universalize the norms deriving from those perceptions, then consistency and integrity would seem to require him to take a more liberal position than the Court currently demonstrates.

### III. THE SHAPE OF THINGS TO COME?

Unfortunately, early indications are not encouraging. One of

make a cause finding based solely on a reasoned decision to credit the charging party's testimony." *Id.* at 6927 (footnote omitted). The Commission went on to state that a "'bare assertion' of sexual harassment 'cannot stand without some factual support.' To the extent this decision suggests that a charging party can never prevail based solely on the credibility of her own testimony, that decision is overruled." *Id.* at 6927 n.18.

<sup>65</sup> *Hearings*, *supra* note 6.

Justice Thomas's first votes on the Supreme Court, albeit without opinion, belies his professed new-found faith in procedural fairness. His dissenting opinion in a recent Eighth Amendment case calls into question his alleged sensitivity to the plight of the victims of abuse by government officials.

#### A. *Fairness*

In *Collins v. May*,<sup>66</sup> Justice Thomas joined Chief Justice Rehnquist and Justice Scalia in voting against the denial of the state's motion to vacate the Fifth Circuit's stay of execution of Justin Lee May.<sup>67</sup> Although no fingerprints or other physical evidence linked May to the robbery of a Western Auto Store in Freeport, Texas in 1978, during which Jeanetta Murdaugh was fatally shot, he was convicted of Ms. Murdaugh's murder and sentenced to death. The state's case rested largely on the testimony of Richard Miles and Oren Howard. Bullets recovered from the bodies of the victims were traced to a gun belonging to Miles. Facing an indictment on two counts of capital murder, Miles testified that May was his accomplice in the robbery and that May had shot Ms. Murdaugh with Miles's gun.<sup>68</sup> Howard testified at May's trial that conversations with May and Miles while the three were in prison together identified May as the killer.<sup>69</sup>

Both Miles and Howard recanted after May's conviction and now alleged that their false testimony resulted from governmental wrongdoing. Miles swore that he testified against May because "I was afraid that if I didn't point the finger at May, they would pin me on capital murder and I would be executed . . . . This is what Captain Wagner [of the Freeport Police] told me, and I believed him."<sup>70</sup> Miles stated that, during his cross-examination at May's

<sup>66</sup> 112 S. Ct. 576 (1991).

<sup>67</sup> *Id.* at 576.

<sup>68</sup> Appellant's Brief at 6-7, *May v. Collins*, 1992 WL 33723 (5th Cir. 1992) (No. 91-6273).

<sup>69</sup> The State also introduced corroborating evidence in the form of testimony by Robert Dohle, who, based only on a fleeting glimpse of a man he had never seen before, identified May six years after the event as having been in front of the Western Auto store sometime earlier that day. Appellant's Brief at 7-8.

<sup>70</sup> *Id.* at 9. Miles further swears that the police confronted him with a written statement by May (which statement the state now denies exists) accusing Miles of the homicide. *Id.*

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capital murder trial, prosecutors renewed their threats to ensure his adherence to his perjured testimony. Miles explicitly exonerated May: “My testimony concerning Justin Lee May’s involvement was not true. While I was present, and was an eyewitness to the offense, Justin Lee May was not present nor did he participate in the offense in any manner.”<sup>71</sup> Howard also stated that his testimony was largely “a lie,” which resulted from offers of reward money by the prosecutors and fear that they would attempt to blame him for the homicide.<sup>72</sup> At the state habeas proceeding, which involved no live testimony, the Texas court refused to credit the affidavits of Miles and Howard repudiating their trial testimony, and instead relied on affidavits by prosecutors and police denying that they engaged in the misconduct alleged by Miles and Howard.

All May asked was an evidentiary hearing to resolve this new disputed issue of material fact—which turns exclusively on the credibility of the affiants. At the least, he requested an opportunity to test by cross-examination the prosecutors’ and police officers’ self-serving denials. As May’s counsel has argued:

If Miles’ and Howard’s affidavits are true, Justin May is innocent and was deprived of a fundamentally fair trial. . . . If, as Miles and Howard now state, the prosecutors coerced their testimony, supplied false details to make it more believable, and interfered with cross-examination by the defense, the state prosecuted a man who should not have been charged in the first place, deprived him of a fundamentally fair trial, and thereby prevented the jury from seeing that he should be acquitted.<sup>73</sup>

Just a few hours before May’s scheduled midnight execution, the Fifth Circuit decided that the issue warranted full briefing and therefore granted a stay. May remained at the executioner’s doorstep until ten minutes before midnight, however, when the Supreme Court finally denied the State’s motion to vacate the stay. The legal issue for the federal courts in *May* was whether the cir-

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.* at 17.

cumstances of May's case were sufficient to rebut the statutory presumption of correctness of state court findings.<sup>74</sup> Given the centrality of the credibility issue, and the absence of live testimony or cross-examination in the state court habeas proceeding, May's claim to an evidentiary hearing was a legitimate one.<sup>75</sup> The only question for the Supreme Court, which Justice Thomas answered in the negative, was simply whether the Fifth Circuit should be allowed to decide whether May would receive a hearing.

### *B. Abuse by Government Officials*

Another disturbing example is Justice Thomas's dissent in *Hudson v. McMillian*.<sup>76</sup> Two Louisiana prison officials, Jack McMillian and Marvin Woods, manacled and shackled inmate Keith Hudson and walked him toward an administrative lockdown area. On the way there, "McMillian punched Hudson in the mouth, eyes, chest, and stomach while Woods held the inmate in place and kicked and punched him from behind."<sup>77</sup> Arthur Mezo, the supervisor on duty, watched and encouraged McMillian and Woods by telling them "'not to have too much fun.'"<sup>78</sup> Hudson suffered bruises; swelling of his face, mouth, and lip; loosened teeth; and a cracked dental plate. The Magistrate characterized Hudson's injuries as "minor" and awarded damages of \$800.

The Court, in an opinion by Justice O'Connor, held that the excessive use of force against an inmate that constituted unnecessary and wanton infliction of pain, when administered maliciously and sadistically, violated the Eighth Amendment's prohibition on cruel and unusual punishment. Although the Court found the extent of injury relevant to the Eighth Amendment inquiry, it as-

<sup>74</sup> See 28 U.S.C. § 2254(d) (1988) (reliable written determination by state court presumed correct).

<sup>75</sup> As this article was going to print, the Fifth Circuit ruled that the issue was "debatable among jurists of reason" and granted a certificate of probable cause to appeal. *May v. Collins*, 1992 WL 33723, at \*7-8. The court vacated the stay, however, concluding that even assuming May had established a "colorable showing of factual innocence," the state court's factual findings—even though based only on a paper record—were entitled to a presumption of correctness. *Id.* at 9-15. This presumption was a key factor in the court's conclusion over both May's trial and the State habeas proceeding. *Id.* at \*14.

<sup>76</sup> 1992 WL 30619 (U.S. Feb. 25, 1992) (No. 90-6531).

<sup>77</sup> *Id.* at \*2.

<sup>78</sup> *Id.* (citation omitted).

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serted that this objective component “is therefore contextual and responsive to ‘contemporary standards of decency.’”<sup>79</sup> Those standards are always violated, the Court concluded, when prison officials use excessive force maliciously and sadistically to cause harm—regardless of whether the prisoner suffers “significant harm”—provided that the harm is more than *de minimis*.<sup>80</sup> The Court therefore upheld Hudson’s claim.

Clarence Thomas, joined by Justice Scalia, dissented. In Justice Thomas’s view, it apparently is bad enough that the Court has applied the cruel and unusual punishments clause to prisoner treatment not inflicted as part of the sentence.<sup>81</sup> But to extend the Eighth Amendment to harms not objectively “serious” or “significant,” no matter how egregious the prison official’s subjective culpability, Justice Thomas complained, is “yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society.”<sup>82</sup> For Justice Thomas, there is nothing cruel or unusual about the unnecessary, malicious, and sadistic beating of a handcuffed and shackled man, so long as the individual is hardy enough to come away without objectively serious injury.

According to Justice O’Connor, Justice Thomas thus rejected the principle that “punishments ‘incompatible with the evolving standards of decency that mark the progress of a maturing society’ or ‘involv[ing] the unnecessary and wanton infliction of pain’ are ‘repugnant to the Eighth Amendment.’”<sup>83</sup> Justice Thomas rejected any distinction between claims based on conditions of confinement and those based on excessive force. Again according to Justice O’Connor: “To deny, as the dissent does, the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the ‘concepts of dignity, civilized standards, humanity, and decency’ that animate the Eighth Amendment.”<sup>84</sup>

<sup>79</sup> *Id.* at \*5.

<sup>80</sup> *Id.* at \*5-6.

<sup>81</sup> *Id.* at \*10-11 (Thomas, J., dissenting).

<sup>82</sup> *Id.* at \*15 (Thomas, J., dissenting).

<sup>83</sup> *Id.* at \*6 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976)).

<sup>84</sup> *Id.* (quoting *Estelle*, 429 U.S. at 102).

*C. Portents*

Clarence Thomas's vote to vacate the *Collins v. May* stay and his *Hudson* dissent are troublesome enough on their own merits, but they are especially disturbing in what they portend. As his own vigorous objections during his confirmation hearings imply, Justice Thomas of all people should appreciate the palpable injustice of denying someone a fair opportunity to demonstrate that evidence against him was fabricated, that he was framed by overzealous accusers, and that the key witnesses have recanted. Clarence Thomas observed during his confirmation hearings that if such a thing can happen to him, it can happen to anybody on any issue. It seems fair to assume, then, that Justice Thomas would agree that if an affluent, respectable, politically connected man nominated to the United States Supreme Court can be falsely accused of sexual harassment, then a poor man with a lengthy prison record (including a guilty plea to another homicide) can be falsely accused of homicide. The obvious lesson for an attentive pupil would be the need for judicial vigilance to guard against such injustices, especially in capital cases.

Further, Justice Thomas seemed to have no trouble recognizing violations of evolving standards of decency and the relevance of outrageousness when government inflicted pain by probing sensitive areas of his life. His *Hudson* dissent failed to explain, however, how such standards become unworkable and how outrageousness becomes irrelevant when the pain is physically inflicted with malice on someone bound hand and foot. He also failed to explain how it is more objectionable for "hate mongers" and others to use the United States Senate for their own ends than it is for malicious and sadistic prison guards to use the Louisiana Penitentiary for their evil purposes. To be sure, Justice Thomas's dissent in *Hudson* concedes that "[a]busive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt."<sup>85</sup> The problem is that, his assurances to the Senate

<sup>85</sup> *Id.* at \*15. And he did object, as did Justice Stevens in his concurring opinion, to the Court's elevation of the subjective standard to require malice and sadism even in cases in which institutional security is not at stake. *Id.* at \*7-8 (Stevens, J., concurring in part and concurring in the judgment); *id.* at \*13-14 (Thomas, J., dissenting).

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Judiciary Committee to the contrary notwithstanding, Justice Thomas's dissent blinks the connection between such outrage and contempt, "our relationship with our government," and the need for constitutional checks on governmental abuse. After all, it is through such checks that society expresses its intolerance of especially deplorable conduct by public officials.

Following so closely on the heels of Justice Thomas's assertion of strikingly similar claims, his vote in *Collins v. May* and his dissent in *Hudson v. McMillian* therefore make it difficult to resist the conclusion that Dean Calabresi's prediction was badly mistaken. One is left to wonder just what Justice Thomas might have meant, and indeed whether he meant anything at all, when he complained bitterly of "people who are interested in digging up dirt to destroy other people, and who will stop at no tactics when they can use our great institutions for their own political ends,"<sup>86</sup> and when he said that his experience "heightened my awareness of the importance of those protections . . . privacy, due process, equal protection, fairness."<sup>87</sup> Perhaps Clarence Thomas learned nothing from the confirmation process after all about what privacy, liberty, and fairness might mean to other people. In retrospect, however, other people are learning something about what those values mean to him. And perhaps the lesson for us all is that what matters most is not *how* we choose our Justices, but *whom* we select. At present, at least with respect to sensitivity to the values of fairness, privacy, and liberty so passionately invoked by Justice Thomas in his confirmation hearings, there appears substantial room for improvement.

<sup>86</sup> *Hearings*, *supra* note 6.

<sup>87</sup> *Id.*



