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The Problem of Qualified Immunity in K-12 Schools

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THE PROBLEM OF QUALIFIED IMMUNITY IN K-12 SCHOOLS

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I. INTRODUCTION

When thirteen-year-old Savana Redding arrived at school one autumn day in 2003, she was not expecting to be pulled out of her math class and strip searched.[1] But, that is exactly what happened after the assistant principal suspected her of possessing and distributing "prescription-strength ibuprofen" and "over-the-counter . . . naproxen" after receiving information from another student.[2] After Savana consented to a search of her backpack and other belongings—a search which turned up no evidence of drug possession—the assistant principal asked the school nurse and administrative assistant to search Savana's clothes.[3] To do this, the school officials asked Savana "to remove her jacket, socks, and shoes," followed by her pants and shirt.[4] As if this was not enough, they then told Savana "to pull her bra out to the side and shake it, and to pull out the elastic of her underpants, thus exposing her breasts and pelvic area . . . ."[5] Ultimately, the school

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1. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368 (2009).
2. *Id.* That student, Marissa, was also subjected to a strip search before the school officials' search of Savana, during which the school did not find any pills. *Id.* at 373.
3. *Id.* at 368-69.
4. *Id.* at 369.
5. *Redding*, 557 U.S. at 369.

officials did not find any pills after the "embarrassing, frightening, and humiliating" strip search.[6]

In response to the strip search, Savana's mother filed suit against the school, the assistant principal, the administrative assistant, and the school nurse for violating Savana's Fourth Amendment rights.[7] The case made it to the Supreme Court, which found that although the strip search violated Savana's Fourth Amendment rights, qualified immunity protected the school officials from liability because the law surrounding school strip searches was not "sufficiently clear."[8] This is the most recent Supreme Court case that addresses qualified immunity's application to public school officials.

However, numerous lower courts have also held that qualified immunity protected school officials in cases with other forms of egregious conduct against students.[9] Lower courts' applications of qualified immunity as a shield for school personnel have created a problem for students and their parents who attempt to sue school officials for wrongful conduct but are barred because of the doctrine's broad application.[10] This Comment argues that the Supreme Court should abolish qualified immunity in Section 1983 cases, which enables private individuals to sue government actors for civil rights violations,[11] against public school officials.

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6. *Id.* at 369, 374-75.

7. *Id.* at 369.

8. *Id.* at 378-79.

9. *See, e.g.*, Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951-52 (11th Cir. 2003) (teacher entitled to qualified immunity after performing strip searches of fifth grade students after twenty-six dollars disappeared from the teacher's desk); Harris v. Robinson, 273 F.3d 927, 929, 931 (10th Cir. 2001) (teacher entitled to qualified immunity after making student clean out a toilet with his bare hands); Heidemann v. Rother, 84 F.3d 1021, 1025-26, 1033 (8th Cir. 1996) (school district and physical therapist entitled to qualified immunity after using a blanket wrapping technique to restrain a mentally and physically disabled student for over one hour, allowing flies to enter the student's nose and mouth); Hagan v. Hous. Indep. Sch. Dist., 51 F.3d 48, 50, 53-54 (5th Cir. 1995) (school principal entitled to qualified immunity after failing to sufficiently respond to complaints of sexual molestation by a coach even though he failed to follow the steps for handling sexual abuse complaints in the school handbook).

10. *See* Amanda Harmon Cooley, *An Efficacy Examination and Constitutional Critique of School Shaming*, 79 OHIO ST. L.J. 319, 345 (2018).

11. *See* 42 U.S.C. § 1983.

The modern-day application of the doctrine, particularly how courts view and apply the "clearly established" prong, allows school officials to escape liability for egregious acts against students. Indeed, courts applying the "clearly established" prong require the facts in a particular case to be strikingly similar, substantially similar, or nearly identical to a previous case that "a reasonable official would understand that what he is doing violates" the constitutional right at issue.[12] If the Supreme Court rejected qualified immunity for public school officials, students would have a greater chance of winning their Section 1983 claims.

In the absence of qualified immunity as an affirmative defense for school officials, courts should evaluate claims against these officials based on the nature of the claimed injury, applying existing standards. *First*, courts should continue to evaluate claims for Fourth Amendment violations through the *New Jersey v. T.L.O.* standard for school searches[13] and the *Ingraham v. Wright* standard for corporal punishment.[14] *Second*, regarding Fourteenth Amendment violations, courts should continue to use the already burdensome "shocks-the-conscience" test for substantive Due Process violations.[15] *Third*, concerning First Amendment violations, courts should continue to apply heightened scrutiny, based on the quartet of Supreme Court cases that govern issues implicating student speech rights.[16]

To be clear, practically, these standards already govern a student's Section 1983 claim after it survives the defendant's dispositive motion grounded in qualified immunity. However, this Comment argues that the Supreme Court should reject qualified immunity in these cases because it has been an additional barrier for vindications of students' constitutional rights. Relying on these standards alone, without the interference

12. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

13. 469 U.S. 325, 341-42 (1985).

14. 430 U.S. 651, 674 (1977).

15. *See* Lewis M. Wasserman, *Students' Freedom From Excessive Force by Public School Officials: A Fourth or Fourteenth Amendment Right?*, 21 KAN. J.L. & PUB. POL'Y 35, 51-61 (2011).

16. *See* Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

of the qualified immunity defense, will more effectively balance vindication of student rights with school officials' discretion to control the learning environment.[17] The existing standards also provide adequate notice to school officials about what behaviors are and are not permissible when performing their job duties because they are sufficiently clear to define the contours of the implicated constitutional rights.[18]

This Comment includes four parts. Part II explains the doctrine of qualified immunity and its policy justifications and summarizes other protections for school officials to defend against Section 1983 claims. It then argues that the modern application of qualified immunity is inappropriate in the K-12 public school context because it fails to support the Supreme Court's policy justifications for the doctrine. Part III analyzes the existing legal standards and structures that should continue to inform courts' evaluations of students' claims for constitutional violations against school officials. This Part lays out the *T.L.O.* standard for Fourth Amendment claims for unreasonable searches, describes the burdensome "shocks-the-conscience" test for Fourteenth Amendment excessive punishment claims, and explains how First Amendment claims for violations of student speech are analyzed under heightened scrutiny. Part IV considers the implications of abolishing qualified immunity for public school officials and relying on the existing legal standards alone to evaluate students' Section 1983 claims.

In conclusion, this Comment suggests that abolishing qualified immunity as a defense for K-12 public school officials will respect the policy justifications of qualified immunity while providing an avenue for more successful student claims asserted against school officials under Section 1983. Allowing traditional legal standards alone to guide students' Section 1983 claims will effectively balance public and private interests by securing greater protections for students' constitutional rights, shielding school officials from financial liability where appropriate, providing adequate notice of the types of conduct that violate

17. *See infra* Part III.
18. *See infra* Parts III-IV.

constitutional protections, and respecting school officials' discretion to perform their duties as educators.[19]

II. QUALIFIED IMMUNITY AND OTHER PROTECTIONS

To fully understand why the modern application of the doctrine of qualified immunity has failed in the K-12 public school context, it is instructive to look at how the doctrine began and how it has evolved in the Supreme Court. This Part traces the Supreme Court's introduction of the doctrine in the public school context, its subsequent transformation to its modern iteration, and scholars' support of the doctrine. It then discusses other protections that are available to public school officials and districts when students bring Section 1983 claims for violations of their constitutional rights. This Part concludes with a discussion of why courts' modern applications of qualified immunity are inappropriate in the K-12 context.

A. Qualified Immunity

The main statutory mechanism for students to vindicate their constitutional rights in claims against teachers is 42 U.S.C. § 1983, which provides that anyone who, "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia," deprives another "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."[20] Although written broadly, Section 1983 has its limits, including several immunities for government officials.[21] Courts have traditionally

19. Courts' applications of qualified immunity are problematic in all areas, not just K-12 public schools. However, it is important to focus on qualified immunity in the school context because schools are charged with the important task of "educating the young for citizenship[, which] is reason for scrupulous protection of Constitutional freedoms of the individual." *Tinker*, 393 U.S. at 507 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)). Thus, this Comment is limited to qualified immunity in the K-12 public school context.

20. 42 U.S.C. § 1983.

21. David C. Blickenstaff, *Strip Searches of Public School Students: Can* New Jersey v. T.L.O. *Solve the Problem?*, 99 DICK. L. REV. 1, 19-20 (1994).

allowed school officials to raise qualified immunity as an affirmative defense against claims of civil rights violations.[22] Qualified immunity is a "judicial construct"[23] created because the Supreme Court determined "that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs."[24]

The Supreme Court first addressed qualified immunity's application to school officials in *Wood v. Strickland*.[25] In that case, Arkansas high school students brought a Section 1983 action against two school administrators, claiming that the administrators violated their Due Process rights when they expelled the students for possessing and consuming alcohol at an extracurricular meeting in violation of a school regulation.[26] The Court held:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[27]

The *Wood* Court based this holding on the principle that "the school disciplinary process . . . necessarily involves the exercise of discretion . . ." and reasoned that denying immunity to school officials "would contribute not to principled and fearless decision-making but to intimidation."[28]

The Court modified its *Wood* holding in *Harlow v. Fitzgerald*, which introduced the modern qualified immunity

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22. *Id.* at 20; *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

23. Blickenstaff, *supra* note 21, at 21. *But see* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1858 (2018) (arguing that qualified immunity is "an unquestioned principle of American statutory law").

24. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989).

25. 420 U.S. 308, 318-22 (1975).

26. *Id.* at 309-11.

27. *Id.* at 322.

28. *Id.* at 319 (citing Pierson v. Ray, 386 U.S. 547, 554 (1967)).

doctrine.[29] Although *Harlow* involved presidential aides rather than school officials, it introduced the current qualified immunity defense school officials raise in response to claims of constitutional violations.[30] Justice Powell noted that the *Wood* holding involved both an objective component and a subjective component but found the subjective component created "substantial costs" in the litigation of whether the government officials acted in good faith in carrying out their duties.[31] In response, the Court articulated a new test for the application of the qualified immunity doctrine: "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 would have known."[32] The new test wholly eliminated the subjective component articulated in *Wood* and reworked the objective component to include the "clearly established" language on which courts rely so heavily today.[33]

Anderson v. Creighton further expanded the protection granted to government officials under the qualified immunity doctrine.[34] In that case, an F.B.I. agent conducted a warrantless search of a family while pursuing the suspect of a bank robbery.[35] Justice Scalia explained that "if the test of 'clearly established law' were to be applied" too generally, "it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*."[36] Thus, he clarified that "[t]he contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[37] Under this rule, it is substantially easier for government officials, including public school officials, to avoid liability.[38]

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29. 457 U.S. 800, 818 (1982).
30. *Id.* at 802.
31. *Id.* at 815-16.
32. *Id.* at 818.
33. Blickenstaff, *supra* note 21, at 22; *Harlow*, 457 U.S. at 818.
34. 483 U.S. 635, 639-40 (1987).
35. *Id.* at 637.
36. *Id.* at 639.
37. *Id.* at 640.
38. Blickenstaff, *supra* note 21, at 23.

Pearson v. Callahan is another important qualified immunity decision.[39] In that case, "state law enforcement officers . . . conducted a warrantless search of [the respondent's] house incident to his arrest for the sale of methamphetamine to an undercover informant . . . ."[40] The Court overturned its previous ruling in *Saucier v. Katz* which required courts first to determine "whether 'the facts alleged show the officer's conduct violated a constitutional right'" and then to decide "whether the right was clearly established."[41] The Court in *Pearson* held that "[t]he judges of the district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which [one] of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[42] Following this decision, many courts have failed to reach the first prong (i.e., "whether the conduct violated a constitutional right") and have focused solely on the "clearly established" prong of qualified immunity.[43]

As discussed in Part I, the most recent Supreme Court case applying qualified immunity to school officials is *Safford Unified School District No. 1 v. Redding*.[44] The Court held that a school principal was entitled to qualified immunity after he strip searched a thirteen-year-old girl because he suspected her of bringing prescription-strength ibuprofen and over-the-counter naproxen to school.[45] While the Court did not spend much of its opinion discussing qualified immunity, it found that even though the principal's search of the student's bra and underwear was unreasonable, the law surrounding school strip searches was unclear.[46] Therefore, the principal was not expected to know that his conduct would violate the student's Fourth Amendment right to be free from unreasonable searches.[47] This decision renewed

39. 555 U.S. 223, 227 (2009).

40. *Id.*

41. *Id.* at 232 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

42. *Id.* at 236.

43. Susan Bendlin, *Qualified Immunity: Protecting "All but the Plainly Incompetent" (and Maybe Some of Them, Too)*, 45 J. MARSHALL L. REV. 1023, 1041 (2012).

44. 557 U.S. 364, 368 (2009).

45. *Id.*

46. *Id.*

47. *Id.* at 378-79.

the debate over the legality of strip searches in schools and whether qualified immunity should protect public school administrators and teachers in these situations.[48]

The Supreme Court has articulated several policy justifications for its creation of and reliance on the qualified immunity doctrine.[49] In *Pearson*, the Court stated that qualified immunity was necessary to balance "the need to hold public officials accountable when they exercise power irresponsibly and need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[50] The Supreme Court in *Harlow* also pointed to the doctrine's protection against (1) "the expenses of litigation," (2) "the diversion of official energy from pressing public issues," (3) "the deterrence of able citizens from acceptance of public office," and (4) "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" as important policy justifications for the doctrine.[51] In *United States v. Lanier*, the Court explained that "qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,'" meaning that public officials need to have "fair warning" that their conduct would violate an individual's constitutional rights to be held liable for their actions.[52] A more recent justification for the doctrine is to reduce the "burdens

48. *See* Ryan E. Thomas, Comment, Safford Unified School District No. 1 v. Redding*: Qualified Immunity Shields School Officials Who Ordered Strip-Search of Thirteen-Year-Old Girl*, 45 NEW ENG. L. REV. 267, 275 (2010); Eric W. Clarke, Note, Safford Unified School District #1 v. Redding*: Why Qualified Immunity is a Poor Fit in Fourth Amendment School Search Cases*, 24 B.Y.U. J. PUB. L. 313, 324-26 (2010); Thomas R. Hooks, Comment, *A Rock, a Hard Place, and a Reasonable Suspicion: How the United States Supreme Court Stripped School Officials of the Authority to Keep Students Safe*, 71 LA. L. REV. 269, 269-70 (2010).

49. *See generally* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 13-16, 58-76 (2017) [hereinafter Schwartz, *How Qualified Immunity Fails*]; Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236-37 (2006).

50. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

51. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

52. 520 U.S. 259, 270 (1997) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)); *see also* Hope v. Pelzer, 536 U.S. 730, 739, 741 (2002) (explaining that "qualified immunity operates 'to ensure that before they are subject to suit, officers are on notice that their conduct is unlawful'") (quoting Saucier v. Katz, 553 U.S. 194, 206 (2001)).

associated with discovery and trial" for public officials.[53] In the public school setting, the Supreme Court has placed heavy emphasis on qualified immunity's protection of school officials' discretion in disciplining and protecting students.[54]

B. Other Protections

Aside from qualified immunity, public school teachers and districts are afforded other protections against claims for civil rights violations. One of these is the lack of a school's legal duty to protect its students under the Fourteenth Amendment's substantive Due Process right.[55] According to the Supreme Court in *DeShaney v. Winnebago County Department of Social Services*, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[56] Therefore, school officials cannot be liable for private actors' actions against students while attending school under the traditional rule.[57]

However, "courts have recognized two exceptions to this rule: (1) the special relationship theory and (2) the state-created danger doctrine."[58] The special relationship theory states that "a special relationship exists, imposing an affirmative duty to protect, only when a state entity confines a person in its custody against her will, rendering that person unable to care for herself."[59] Notably, the Supreme Court has not recognized that a special relationship exists between students and their schools or teachers, and even though states have "compulsory education laws," several circuit courts have determined that these laws do not create a special relationship between schools and their students that would establish a duty to protect the students.[60] The

53. Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 9.

54. *See* Wood v. Strickland, 420 U.S. 308, 319 (1975).

55. Danielle Weatherby, *Opening the "Snake Pit": Arming Teachers in the War Against School Violence and the Government-Created Risk Doctrine*, 48 CONN. L. REV. 119, 130 (2015).

56. 489 U.S. 189, 197 (1989).

57. Weatherby, *supra* note 55, at 130.

58. *Id.*

59. *Id.* at 132.

60. *Id.*

lack of a special relationship between schools and their students means that student plaintiffs may not assert a heightened duty of care when bringing claims against teachers.[61]

Further, the state-created danger doctrine provides a very narrow exception to the no-duty rule if the "harms . . . are brought onto campus by the school itself or its employees."[62] This doctrine only applies in limited circumstances, however, so it alone is insufficient to enable student claims against school officials, especially since qualified immunity poses an additional barrier.[63] Therefore, school officials can avoid liability for certain civil rights violations because of a lack of special relationship between schools and their students or if the school itself did not create the danger.

The Supreme Court has also afforded school boards and districts protection under the extremely stringent standard articulated in *Monell v. Department of Social Services*.[64] Under this standard, "when execution of a government's policy or custom . . . inflicts the injury, . . . the government as an entity is responsible under § 1983."[65] A *Monell* claim involves two elements.[66] First, a state actor (i.e., public school official) must have "violated the plaintiff's constitutional rights."[67] Second, the school must be responsible for the violation because its policy, practice, or custom was the "'moving force' of the deprivation of the plaintiff's federal rights."[68] Further, the plaintiff must show the school, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the plaintiff] constitutional harm."[69] Because the deliberate indifference standard sets such a high bar for plaintiffs, it offers substantial protection to school districts, even when an

61. *See id.* at 133.

62. Weatherby, *supra* note 55, at 135.

63. *Id.* at 135-36 (listing the elements required for a plaintiff to rely on the state-created danger doctrine).

64. 436 U.S. 658, 691, 694 (1978).

65. *Id.* at 694.

66. Weatherby, *supra* note 55, at 160.

67. *Id.*

68. *Id.* at 161 (quoting Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 400 (1997)).

69. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1988).

individual teacher or administrator is liable for a constitutional violation.

C. Why Qualified Immunity is Inappropriate in K-12 Public Schools

In response to the Supreme Court's policy justifications for qualified immunity, several scholars have advanced significant criticisms of the qualified immunity doctrine.[70] Although many of these criticisms arise in the context of the doctrine's application to law enforcement officers, they are still relevant to the doctrine's application to school officials.

Professor Joanna Schwartz has advanced several arguments against the doctrine.[71] She first argues that "qualified immunity has no basis in the common law."[72] In *Pierson v. Ray*, the Supreme Court claimed that the qualified immunity defense should be available to government officials because there was a "good faith and probable cause" defense available for "common-law action[s] for false arrest and imprisonment."[73] Professor Schwartz argues that because there was no "good faith defense to liability" to the Civil Rights Act of 1871 which initially enacted Section 1983, the Supreme Court's claim in *Pierson* is not accurate.[74] Even if the Supreme Court was correct about qualified immunity's basis in the common law, its modern application of the doctrine undermines this claim because the Court "eliminated consideration of officers' subjective intent and instead focused on whether officers' conduct was objectively unreasonable."[75] Consequently, even if "a plaintiff can demonstrate that a defendant was acting in bad faith, that evidence is considered irrelevant to the qualified immunity analysis."[76]

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70. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*]; Bendlin, *supra* note 43, at 1040; Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126 (1985).

71. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1801-32.

72. *Id.* at 1801-02.

73. 386 U.S. 547, 556-57 (1967).

74. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1801.

75. *Id.* at 1802.

76. *Id.*

Professor Schwartz further claims that the doctrine does not actually advance the policy goals articulated in *Harlow*, in part because qualified immunity "does not shield officers from financial burdens."[77] In her six-year study of law enforcement officers, she found that "[i]n the vast majority of jurisdictions, 'officers are more likely to be struck by lightning' than to contribute to a settlement or judgment over the course of their career" because of state laws either requiring or allowing municipalities to indemnify officers in Section 1983 cases.[78] This argument also applies in the K-12 context because school boards or districts often "have a statutory duty to hold . . . teacher[s] harmless from financial loss and expense, including legal fees" for Section 1983 claims or reimburse school officials "for legal expenses incurred with respect to his or her duties."[79] Although one of the main policy justifications for qualified immunity is to protect government officials from "the expenses of litigation," these statutes that authorize teacher indemnification already provide that protection, rendering qualified immunity unnecessary to shield school officials from financial burdens.[80]

Further, Professor Schwartz argues that the doctrine "does not protect against overdeterrence."[81] One of the main policy objectives of qualified immunity articulated in *Harlow* was to prevent "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[82] However, Professor Schwartz notes that "law enforcement officers infrequently think about the threat of being sued when performing their jobs."[83] She also argues that any difficulty in recruiting police officers is due to "high-profile shootings,

77. *Id.* at 1804-08, 1813-14.

78. *Id.* at 1806 (quoting Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 914 (2014)).

79. 78 C.J.S. *Schools and School Districts* § 460 (2021); *see also* Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 269-74 (2020).

80. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

81. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1811.

82. *Harlow*, 457 U.S. at 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

83. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1811.

negative publicity about the police, strained relationships with communities of color, tight budgets, low unemployment rates, and the reduction of retirement benefits."[84] There has also been an increased shortage of teachers in the past several years, largely due to inadequate salaries, "the repeated refrain that US schools are failing and terrible," "loss of professional autonomy," and the sentiment that teaching is so easy that anyone can do it.[85] It is unlikely that the elimination of qualified immunity would deter individuals from working in public schools any more than other factors already do.

Qualified immunity also does not further the policy objective of providing government officials notice that specific kinds of conduct may violate individuals' constitutional rights.[86] This is largely because of "[t]he challenge of identifying clearly established law."[87] Professor Schwartz notes that "the Supreme Court's qualified immunity decisions require that the prior precedent clearly establishing the law have facts exceedingly similar to those in the instant case."[88] The Court has stated that "'clearly established law' should not be defined at a high level of generality."[89] However, by requiring such close factual similarity between cases, "Supreme Court precedent [may be] the only surefire way to clearly establish the law."[90] When the Supreme Court's *Pearson* decision allowed lower courts to evade the constitutional violation issue if they found that no clearly-established right existed in a particular case, it created a "vicious cycle" in which courts grant qualified immunity without ruling on the underlying constitutional claim, thus not "clearly establish[ing]" the law.[91] This resulting "constitutional stagnation" only creates more "confusion about the scope of constitutional rights" and makes it extremely difficult for

84. *Id.* at 1813.

85. Peter Greene, *We Need to Stop Talking About the Teacher Shortage*, FORBES (Sept. 5, 2019, 8:35 PM), [https://perma.cc/A6PB-XTTM].

86. *See* Jacob Heller, *Abominable Acts*, 34 VT. L. REV. 311, 316-17 (2009).

87. Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1814-15.

88. *Id.* at 1815.

89. *Id.* (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011)) (internal quotations omitted).

90. *Id.*

91. *Id.* at 1815-16.

plaintiffs to bring successful claims for constitutional violations under Section 1983.[92]

The above criticisms of qualified immunity are concerning in the public school context.[93] Further, there are other protections that courts have afforded to school officials that still allow teachers and administrators to exercise discretion in their job duties.[94] The modern application of qualified immunity in the K-12 context is inappropriate because it protects school officials' egregious conduct. The Supreme Court should abolish the doctrine's use in cases against public school officials and instead should simply rely on existing legal standards for students' claims of constitutional violations. Courts should continue to use the *T.L.O.* standard for school searches[95] and the *Ingraham* standard for corporal punishment to evaluate Section 1983 claims based on the Fourth Amendment.[96] Concerning Fourteenth Amendment claims, courts should continue to rely on the burdensome "shocks-the-conscience" test for substantive Due Process violations.[97] Lastly, courts should continue to evaluate claims for First Amendment violations under heightened scrutiny, based on previous Supreme Court decisions analyzing students' claims for First Amendment violations.[98] These modes of analysis are sufficiently clear as to provide notice to school personnel about what actions may or may not impermissibly violate students' constitutional rights. Relying on these standards without allowing school officials to raise a qualified immunity defense will also further clarify the law, which will allow school officials

92. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 11-12 (2015); Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 318 (2020) [hereinafter Schwartz, *After Qualified Immunity*]; *see also* Bendlin, *supra* note 43, at 1040, 1047-48 (arguing that the modern application of qualified immunity allows courts to skip the constitutional question, thus "leav[ing] an allegedly unclear area of law entirely unsettled, and the state officials remain uncertain whether their actions will violate someone else's constitutional rights").

93. *See supra* text accompanying notes 70-92.

94. *See supra* Section II.B.

95. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985).

96. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

97. *See* Wasserman, *supra* note 15, at 51-61.

98. *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 408 (2007); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969).

to have even more adequate notice of what kinds of conduct may or may not be unlawful.

Abolishing qualified immunity will provide more protections for students' constitutional rights while still preserving the policy justifications that qualified immunity was designed to serve. Recognizing that existing legal standards clarify what conduct is permissible and what is impermissible for school officials in performing their job duties will effectively balance the need "to hold [school] officials accountable when they exercise power irresponsibly" with the protection of school personnel from "harassment, distraction, and liability."[99] Further, the existing legal standards that put school officials on notice of what they can and cannot do when performing their duties as educators continue to provide school personnel with discretion in controlling the learning environment.[100] Overall, abolishing qualified immunity in the K-12 public school context will enable more successful student Section 1983 claims while continuing to permit school officials to perform their job duties without fear of financial liability.

III. STUDENTS' CLAIMS

A rejection of the doctrine of qualified immunity would not mean that students' Section 1983 claims against school officials "would imperil individual defendants' pocketbooks and the government fisc . . . [or] discourage people from accepting" positions in K-12 public schools.[101] Current modes of analysis that courts use to evaluate students' constitutional claims are designed to protect teachers' discretion in schools so that school officials can perform their job duties without fear of frivolous lawsuits or financial liability. This Part will explain the standards that courts should continue to use to evaluate students' Section 1983 claims, beginning with claims for bodily injury or violations of bodily integrity under both the Fourth and Fourteenth

99. Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 8 (quoting Pearson v. Callahan, 555 U.S. 233, 231 (2009) (internal quotations omitted)).

100. *See infra* Part III.

101. Schwartz, *After Qualified Immunity*, *supra* note 92, at 315.

Amendments. It will then discuss students' claims for violations of their free speech rights under the First Amendment.

A. Bodily Injury and Violations of Bodily Integrity

Students' claims for bodily injury or violations of bodily integrity commonly arise as claims for violations of the Fourth or Fourteenth Amendments.[102] Fourth Amendment claims usually arise in response to strip searches of students,[103] and Fourteenth Amendment claims commonly result from excessive punishment.[104] This Section will analyze claims under each amendment separately. It will also argue that these standards—which courts already use—provide adequate notice to school officials regarding the lawfulness of their conduct because they are sufficiently clear in defining the scope of permissible conduct for school officials performing their job duties.

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102. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 368-69 (2009) (student's mother claimed assistant principal and school nurse violated student's Fourth Amendment right to be free from unreasonable searches after nurse strip-searched the student to look for pills); Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 168 (3d Cir. 2017) (student claimed high school football coach violated student's substantive Due Process rights when student received a traumatic brain injury after coach required the student to participate in practice after student received a violent hit and coach observed concussion symptoms); Thomas *ex rel.* Thomas v. Roberts, 323 F.3d 950, 951-52 (11th Cir. 2003) (fifth-grade students claimed teacher violated their Fourth Amendment right to be free from unreasonable searches after teacher performed strip searches to find missing money); Heidemann v. Rother, 84 F.3d 1021, 1028-29 (8th Cir. 1996) (disabled student's parents claimed school-employed physical therapist violated the student's substantive Due Process rights under the Fourteenth Amendment after restraining student using a blanket-wrapping technique for over an hour).

103. *See generally* Holly Hudelson, *Spare the Rod, but a Strip Search is Okay? The Effect of Qualified Immunity and Allowing a Strip Search in School*, 39 J.L. & EDUC. 595 (2010) (discussing how the *Redding* Court analyzed the student's Fourth Amendment claim against assistant principal for strip search); Hooks, *supra* note 48, at 270, 278-79; Thomas, *supra* note 48, at 275-77 n.101; Blickenstaff, *supra* note 21, at 2 n.7.

104. *See* Carolyn Peri Weiss, Note, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. U. L.Q. 1251, 1272-73 (1996). However, it is also common for claims of school officials using excessive force against students to arise under the Fourth Amendment. *See, e.g.*, J.W. *ex rel.* Williams v. Birmingham Bd. of Educ., 904 F.3d 1248, 1253 (11th Cir. 2018); Preschooler II v. Clark Cty. Sch. Bd., 479 F.3d 1175, 1179 (9th Cir. 2007); *see also* Wasserman, *supra* note 15, at 35-38. For the purposes of this Comment, claims for excessive punishment, including corporal punishment, will be dealt with under the Fourteenth Amendment analysis because the majority of courts apply substantive Due Process analyses to these claims. *Id.* at 35.

1. Fourth Amendment Claims: Unreasonable Searches

Scholars have noted qualified immunity's failure to protect students in cases involving Section 1983 claims for violations of the Fourth Amendment, particularly in cases involving strip searches of students by school personnel.[105] One reason for the doctrine's failure is courts' misinterpretations or misapplications of the Supreme Court's articulation of the law regarding strip searches of students in *T.L.O.*[106] In that case, a high school principal searched a student's purse for cigarettes and drugs.[107] Although *T.L.O.* did not involve strip searches, the Supreme Court held that school searches are subject to a two-part inquiry from *Terry v. Ohio* based on the "reasonableness, under all the circumstances, of the search."[108] This two-part inquiry requires courts first to consider "whether the . . . action was justified at its inception" and then determine whether the search as conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[109] The Court then continued and stated how the *Terry* standard should apply in school search cases:

> Under ordinary circumstances, a search of a student by a teacher or other school official[] will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[110]

In *Redding*, the Court determined that the law from *T.L.O.* was unclear because the Circuits interpreted the law differently and that these differences were significant enough for the

105. *See* Hudelson, *supra* note 103, at 597, 602; Hooks, *supra* note 48, at 285; Thomas, *supra* note 48, at 281; Blickenstaff, *supra* note 21, at 55.

106. New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985); *see also* Thomas, *supra* note 48, at 275; Blickenstaff, *supra* note 21, at 42-47.

107. *T.L.O.*, 469 U.S. at 328.

108. *Id.* at 341.

109. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

110. *Id.* at 341-42.

assistant principal to receive qualified immunity.[111] The Court found that these different interpretations of *T.L.O.* did not provide the assistant principal with adequate notice that ordering the strip search of Savana violated the Fourth Amendment.[112] However, the Court's failure to clarify the law from *T.L.O.* has not allowed the law regarding student searches to become sufficiently clear. This kind of "circular reasoning" is a common critique of qualified immunity, even outside cases involving school officials and students.[113]

However, two of the dissenters in *Redding* argued that the *T.L.O.* standard outlining reasonable searches of students under the Fourth Amendment was sufficiently clear to act as a guide for school officials in determining whether a search of a student was reasonable.[114] First, Justice Stevens argued in his dissent that the *T.L.O.* standard was unambiguous, especially regarding strip searches of students.[115] He even stated, "I have long believed that '[i]t does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude.'"[116] Using the *T.L.O.* standard, he would have determined the strip search of Savana "was both more intrusive and less justified than the search of the student's purse in *T. L. O.*"[117] He also noted that "the clarity of a well-established right should not depend on whether jurists have misread [the Supreme Court's] precedent."[118] Justice Ginsburg also argued in her dissent that *T.L.O.* "'clearly established' the law governing" the facts in *Redding* because "it was not reasonable for [the assistant principal] to believe that the law permitted" his "abusive" treatment of Savana.[119] This demonstrates that, at least in the eyes of two Supreme Court Justices, the *T.L.O.* standard is

111. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 378 (2009).

112. *Id.*

113. *See* Bendlin, *supra* note 43, at 1040.

114. *Redding*, 557 U.S. at 379-82 (Stevens, J., concurring in part and dissenting in part).

115. *Id.* at 380.

116. *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 382 n.5 (1985)).

117. *Id.*

118. *Id.*

119. *Redding*, 557 U.S. at 381-82 (Ginsburg, J., concurring in part and dissenting in part).

sufficiently clear to put school officials on notice of what conduct is and is not permissible when conducting searches of students.

Further, the *T.L.O.* standard for assessing the reasonableness of school searches of students preserves discretion for school officials in performing their daily duties.[120] Alysa Koloms notes that the Supreme Court's *T.L.O.* standard "heavily favors the disciplinary authority of the school administration."[121] In fact, much of the Court's reasoning for the reasonableness standard was to preserve the school's "freedom to maintain order in the school . . . ."[122] The majority in *T.L.O.* even stated that the goal of the reasonableness standard was to "strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place[.]"[123] Because the *T.L.O.* standard was formulated in part to protect school officials' discretion in disciplining students, qualified immunity for public school personnel is unnecessary to protect their discretion, contrary to the Court's suggestion in *Wood*.[124]

2. Fourteenth Amendment Claims: Excessive Punishment

The majority of claims for excessive punishment arise as claims for violations of a student's substantive Due Process rights under the Fourteenth Amendment.[125] In the seminal corporal punishment case, *Ingraham*, the Supreme Court held "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . . Fourteenth Amendment liberty interests are implicated."[126] However, the Court failed to extend this to the substantive component of the

120. Alysa B. Koloms, Note, *Stripping Down the Reasonableness Standard: The Problems with Using* In Loco Parentis *to Define Students' Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 189 (2010).

121. *Id.* at 191.

122. New Jersey v. T.L.O., 469 U.S. 325, 339-342 (1985).

123. *Id.* at 340.

124. *Id.*; Wood v. Strickland, 420 U.S. 308, 319-20 (1975) (holding that "the school disciplinary process . . . necessarily involves the exercise of discretion . . . .").

125. Wasserman, *supra* note 15, at 35.

126. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

Due Process Clause and expressly rejected the notion that these claims implicated the Eighth Amendment, leaving lower courts unsure as to how to deal with excessive or corporal punishment cases brought under the Fourteenth Amendment.[127]

Circuit courts that deal with claims for excessive punishment as an alleged violation of the student's substantive Due Process rights usually rely on *Johnson v. Glick*, a case from the Second Circuit that first applied the "shocks-the-conscience" test to these claims.[128] Although that case involved incarcerated persons and correctional officers rather than students and school officials, other circuits have extended the Second Circuit's four-factor test to students' claims of excessive force.[129] The *Glick* "shocks-the-conscience" test requires courts to:

> [L]ook to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[130]

In these cases, the stringent analysis courts use to evaluate the "clearly established" prong of qualified immunity imposes an additional barrier to students' claims. For example, in *Heidemann v. Rother*, a student's parents brought a claim alleging a Fourteenth Amendment violation after a school-employed physical therapist used a blanket wrapping technique to physically restrain their mentally and physically disabled nine-year-old daughter for over an hour at a time.[131] The blanket wrapping technique bound the student's body "with a blanket such that she could not use her arms, legs, or hands."[132] When the student's mother found her at the school the first time, the student had "flies crawling in and around her mouth and nose."[133] The second time her mother found her, the physical therapist had

127. *Id.* at 659 n.12; Wasserman, *supra* note 15, at 54.
128. 481 F.2d 1028, 1033 (2d Cir. 1973).
129. *Id.* at 1033-34; Wasserman, *supra* note 15, at 56-58.
130. *Glick*, 481 F.2d at 1033.
131. 84 F.3d 1021, 1025-26 (8th Cir. 1996).
132. *Id.* at 1025.
133. *Id.* at 1026.

wrapped the student so tightly that her mother could not remove the blanket without help.[134] Shockingly, the Eighth Circuit held that the physical therapist was entitled to qualified immunity against the student's Section 1983 claim because the "treatment was . . . within the scope of professionally accepted choices" and was not a "substantial departure from accepted professional judgment, practice, or standards . . . ."[135]

Had qualified immunity not been available in *Heidemann*, the court's use of the "shocks-the-conscience" test from *Glick* would have resulted in the physical therapist's liability under Section 1983.[136] "[T]he need for the application of force" was low, if not nonexistent.[137] In fact, the facts of *Heidemann* provide no evidence that the physical therapist needed to administer the blanket wrapping technique except for the presence of the student's disabilities and the professional judgment of the physical therapist.[138] Therefore, "the relationship between the need and the amount of force that was used" was disproportionate because no force was necessary and the restraint of the student—so tight that her mother could not remove the blanket without assistance—was excessive.[139] Further, "the extent of injury" was substantial, especially considering the presence of flies in and around the student's nose and mouth.[140] Moreover, although there was no evidence that the punishment was inflicted "maliciously and sadistically for the very purpose of causing harm," it was also not "applied in a good faith effort to maintain or restore discipline."[141] Therefore, had qualified immunity not applied, the nine-year-old student and her family would have been able to bring a successful claim for a violation of the student's substantive Due Process rights under Section 1983.

Courts' use of the "shocks-the-conscience" test in evaluating students' right to be free from excessive punishment without the interference of a qualified immunity defense would allow

134. *Id.*
135. *Id.* at 1030-31.
136. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).
137. *Id.*
138. *Heidemann*, 84 F.3d at 1025-26.
139. *Glick*, 481 F.2d at 1033; *Heidemann*, 84 F.3d at 1026.
140. *Glick*, 481 F.2d at 1033; *Heidemann*, 84 F.3d at 1026.
141. *Glick*, 481 F.2d at 1033.

students to bring more successful claims for egregious violations of their substantive Due Process rights while still allowing some level of discretion for school personnel. The "shocks-the-conscience" test is a high bar to clear, leaving much room for school officials to implement appropriate disciplinary measures to protect the students and the learning environment. Further, the use of the "shocks-the-conscience" test will continue to protect school officials from the fear of frivolous lawsuits interfering with their ability to perform their jobs. However, for conduct that is completely outrageous, the "shocks-the-conscience" standard will still serve to protect students.

This standard will also allow school officials to have "fair warning" regarding what kinds of conduct are and are not permissible.[142] The "shocks-the-conscience" test is a stringent standard, one that is based on "our common moral intuitions."[143] One does not have to be a constitutional scholar to recognize that some conduct is so egregious that it violates an individual's constitutional rights.[144] The "shocks-the-conscience" standard reflects that sentiment and informs public officials that some conduct is so horrible that it cannot possibly pass constitutional muster, even without the protection of qualified immunity.

B. First Amendment Violations

The qualified immunity defense is also frequently raised in students' claims against school officials for violations of their First Amendment rights.[145] However, it often creates an

142. Heller, *supra* note 86, at 320.

143. *Id.* at 356.

144. *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 662 (1998) (arguing that some conduct "contains indicia of its own blameworthiness").

145. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334, 338-39 (2d Cir. 2011) (school administrators entitled to qualified immunity when student brought claim for violation of her First Amendment free speech rights after preventing her from running for student government because of her off-campus speech and prohibiting her from wearing a homemade printed t-shirt at a school assembly); Morgan v. Swanson, 659 F.3d 359, 364-65 (5th Cir. 2011) (principal entitled to qualified immunity when student brought a claim for violation of her First Amendment rights after he restricted her from distributing religious materials outside of school hours to a group of students); C.F. *ex rel.* Farnan v. Capistrano Unified Sch. Dist., 654 F.3d 975, 978 (9th Cir. 2011) (teacher entitled to qualified immunity after student claimed teacher violated the Establishment Clause of the First Amendment

additional obstacle for students who bring claims against school officials under Section 1983 for First Amendment violations.[146] In fact, the Second Circuit noted that "[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case."[147] One First Amendment scholar notes that the *Pearson* Court's decision to allow courts to skip the analysis of whether there was a constitutional violation and directly determine whether the right was clearly established posed serious problems for student speech.[148] In particular, he argued that "[t]he *Pearson* decision gives judges the discretion to avoid tough constitutional questions and decide cases based on the 'clearly established' prong . . . ."[149] Because of this problem, another argument is that "First Amendment values and constitutional values in general would be better served by an approach that obliges courts to decide constitutional questions."[150] Abolishing qualified immunity would allow courts to rule on these constitutional issues without dealing with the stringent "clearly established" standard that requires extreme factual similarity to find that the right was "clearly established" at the time of the school officials' conduct.

The traditional standard for analyzing student speech under the First Amendment comes from *Tinker v. Des Moines Independent Community School District*.[151] In that case, the

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when teacher made statements hostile to religion while discussing creationism in history class); Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1259, 1265, 1269 (11th Cir. 2004) (teacher and principal not entitled to qualified immunity when student brought claim for violation of his First Amendment free speech rights after school officials paddled student for raising his fist during a daily flag salute instead of reciting the Pledge of Allegiance).

146. *See* Mickey Lee Jett, Note, *The Reach of the Schoolhouse Gate: The Fate of* Tinker *in the Age of Digital Social Media*, 61 CATH. U. L. REV. 895, 916-17 (2012); David L. Hudson, Jr., Pearson v. Callahan *and Qualified Immunity: Impact on First Amendment Law*, 10 FIRST AMEND. L. REV. 125, 136 (2011) [hereinafter Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*].

147. *Doninger*, 642 F.3d at 353.

148. Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136.

149. *Id.*

150. David L. Hudson, Jr., *4th Amendment Ruling Could Influence First Amendment Law*, FREEDOM F. INST. (Jan. 27, 2009), [https://perma.cc/MXW6-TPXE].

151. 393 U.S. 503, 512-14 (1969).

Supreme Court ruled that a public school district could not prohibit students from wearing black armbands at school in protest of the Vietnam War.[152] The Court also announced that student speech should only be prohibited if it threatens a "substantial disruption of or material interference with school activities . . . ."[153]

After the *Tinker* decision, the Court carved out three exceptions to the *Tinker* doctrine.[154] The first exception applies to "offensively lewd and indecent speech."[155] The Court held that public schools may prohibit this type of speech because it "would undermine the school's basic educational mission."[156] The second exception includes student newspapers and other school-sponsored speech.[157] The Court determined that "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner" when "students, parents, and members of the public might reasonably perceive [it] to bear the imprimatur of the school."[158]

The last exception is in the Court's second most recent student speech decision, *Morse v. Frederick*, in which the Court took a significant step away from the traditional *Tinker* standard but did not abandon it altogether.[159] In that case, a school principal suspended a student for displaying a banner with the phrase "BONG HiTS 4 JESUS."[160] Chief Justice Robert's majority held that the principal did not violate the student's First Amendment rights because the principal interpreted the banner to advocate for illegal drug use.[161] The Court recognized that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest" and that "[t]he First Amendment does not require schools to tolerate at school events student

152. *Id.* at 510-11.
153. *Id.* at 512-14.
154. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685-86 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988).
155. *Fraser*, 478 U.S. at 685.
156. *Id.*
157. *Hazelwood*, 484 U.S. at 272-73.
158. *Id.* at 270-71.
159. 551 U.S. 393, 408-10 (2007).
160. *Id.* at 397-98.
161. *Id.* at 402.

expression that contributes to" the dangers of student drug use, thus creating the third exception to the *Tinker* standard.[162]

Justice Breyer's concurrence in part and dissent in part in *Morse* would not have undertaken this analysis under the First Amendment.[163] Instead, Justice Breyer would have held that qualified immunity protected the principal in this case because "she did not clearly violate the law during her confrontation with the student."[164] The majority suggested it did not decide the case based on qualified immunity because the principal asked for declaratory and injunctive relief as well as money damages (and qualified immunity is only available as a defense in cases requesting money damages).[165] However, Justice Breyer's approach of avoiding the constitutional question in favor of finding that the principal was entitled to qualified immunity because there was no "clearly established" right is precisely the problem that the qualified immunity doctrine poses.[166] Without negotiating the highly discretionary qualified immunity analysis, courts could rely solely on *Tinker*, *Fraser*, *Hazelwood*, and *Morse* to evaluate students' Section 1983 claims for violations of their First Amendment rights, and the law in these areas would become clearer.

Although the outcome in *Morse* would likely have been the same with or without a qualified immunity analysis, lower court opinions have demonstrated that qualified immunity is unnecessary in cases involving Section 1983 claims for First Amendment violations.[167] Lower courts tend to rely on *Tinker*'s

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162. *Id.* at 407, 408, 410 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

163. *Id.* at 425 (Breyer, J., concurring in part and dissenting in part).

164. *Morse*, 551 U.S. at 429 (Breyer, J., concurring in part and dissenting in part).

165. *Id.* at 400 n.1 (majority opinion).

166. *Id.* at 429 (Breyer, J., concurring in part and dissenting in part); Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136.

167. *See, e.g.*, Doninger v. Niehoff, 642 F.3d 334, 338-39 (2d Cir. 2011) (school administrators entitled to qualified immunity when student brought claim for violation of her First Amendment free speech rights after preventing her from running for student government because of her off-campus speech and prohibiting her from wearing a homemade printed t-shirt at a school assembly); Morgan v. Swanson, 659 F.3d 359, 364-65 (5th Cir. 2011) (principal entitled to qualified immunity when student brought a claim for violation of her First Amendment rights after he restricted her from distributing religious materials outside of school hours to a group of students); C.F. *ex rel.* Farnan v. Capistrano

"substantial disruption" standard when analyzing students' claims for violations of their First Amendment free speech rights "unless the speech is lewd, advocates drug use, or bears the school's imprimatur."[168]

For example, in *Doninger v. Niehoff*, the Second Circuit granted qualified immunity to a principal and a superintendent of a school after they prohibited a student from running for class secretary and from wearing a homemade printed shirt stating "Team Avery" to a school assembly based on the student's off-campus speech calling the school administrators "douchebags" and urging other students to take action "to piss [them] off more."[169] Under the *Tinker* analysis, the court held "it was objectively reasonable for school officials to conclude that [the student]'s behavior was potentially disruptive of student government functions . . ." and thus, the student did not have a clearly established right "not to be prohibited from participating in a voluntary, extracurricular activity because of offensive off-campus speech . . . ."[170] Despite the student's reliance on a Supreme Court case in which "public school students were punished for publishing and distributing to their peers a lewd, satirical newspaper" off campus, the court found that this did not create a "clearly established" right despite the substantial factual similarities in the cases.[171] If the school administrators had been unable to raise qualified immunity as an affirmative defense, the student would have had a greater chance to prevail because the Second Circuit would have had more freedom to compare prior

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Unified Sch. Dist., 654 F.3d 975, 978 (9th Cir. 2011) (teacher entitled to qualified immunity after student claimed teacher violated the Establishment Clause of the First Amendment when teacher made statements hostile to religion while discussing creationism in history class). *But see* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) (teacher and principal not entitled to qualified immunity when student brought claim for violation of his First Amendment free speech rights after school officials paddled student for raising his fist during a daily flag salute instead of reciting the Pledge of Allegiance).

168. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969); Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 404 (2011).

169. 642 F.3d at 340-41, 351, 356.

170. *Id.* at 346, 351 (quoting Doninger v. Niehoff, 594 F. Supp. 2d 211, 222 (D. Conn. 2009)).

171. *Id.* at 346.

cases with similar facts to the case at issue when applying the *Tinker* standard.

The previous example also demonstrates the discretion the *Tinker* standard affords to school personnel in determining whether to limit particular student speech.[172] The standard "requires courts to defer to educators' reasonable determinations of what speech may cause a substantial disruption . . . ."[173] This is exactly the type of deference that the Supreme Court was trying to protect in *Wood* when they extended qualified immunity to protect school officials.[174] The *Tinker* standard and the three other exceptions to protect student speech are also sufficiently clear to provide officials with "fair warning" about what conduct is unlawful when dealing with student speech issues.[175] Therefore, qualified immunity is unnecessary and may actually present additional challenges to students bringing Section 1983 claims for First Amendment violations.[176]

IV. IMPLICATIONS OF ABOLISHING QUALIFIED IMMUNITY

The biggest challenge to abolishing qualified immunity in K-12 schools and simply relying on existing legal standards to evaluate students' Section 1983 claims is that scholars argue that these standards are unclear and thus do not provide school officials with "fair warning"[177] that their conduct is unlawful.[178] Regarding Fourth Amendment claims for unreasonable searches, David Blickenstaff argues that the *T.L.O.* standard is "too lenient

172. *See* Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1282 (2008).

173. *Id.*

174. Wood v. Strickland, 420 U.S. 308, 319 (1975).

175. *See* Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 182-88 (2012); Goldman, *supra* note 168, at 405; Hope v. Pelzer, 536 U.S. 730, 739-41 (2002).

176. *See* Hudson, Jr., *Pearson v. Callahan and Qualified Immunity: Impact on First Amendment Law*, *supra* note 146, at 136-39.

177. *Hope*, 536 U.S. at 739-41.

178. *See* Blickenstaff, *supra* note 21, at 41 (arguing that the *T.L.O.* standard to evaluate strip searches of students is unclear); Jett, *supra* note 146, at 897-98, 918-19 (arguing that the *Tinker* standard is unclear as applied to student speech cases).

and too ill-defined" to apply to strip searches of students at school.[179] However, Justices Stevens's and Ginsburg's dissents in *Redding* demonstrate why this view is incorrect.[180] They opined that there is disagreement about the *T.L.O.* standard not because the *T.L.O* test is ambiguous but rather because lower courts misapply the standard.[181] Therefore, if lower courts were to apply the *T.L.O.* test correctly, school officials would have "fair warning" about what is and is not permissible behavior when conducting student searches because the standard is sufficiently clear to provide that notice.[182]

Regarding First Amendment claims, a common critique of the *Tinker* standard is that it is unclear how it applies in student speech cases, particularly regarding online or off-campus student speech.[183] Allison Belnap notes that the *Tinker* standard is ambiguous because it is uncertain whether a school needs to show "*specific and concrete evidence*" that previous similar speech has "resulted in a material and substantial interference with school operations," "*a well-founded belief* that the disruption will occur," or "merely *a foreseeable risk* that the speech would result in a material and substantial disruption . . . ."[184] Another scholar notes that lower courts have applied *Tinker* differently and reached different results in online school speech cases because of "the difficulty in applying traditional school-speech jurisprudence to cyberspeech."[185]

However, these arguments highlight the fact that lower courts are misapplying the Supreme Court's precedent in *Tinker* rather than the standard's ambiguity.[186] Professor Dryden notes that lower courts run into trouble when they only apply one of *Tinker*'s prongs rather than both.[187] If courts applied both prongs

179. Blickenstaff, *supra* note 21, at 47.

180. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 380-82 (2009).

181. *See supra* text accompanying notes 114-19.

182. *Hope*, 536 U.S. at 741.

183. *See generally* Jett, *supra* note 146; Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 509 (2011).

184. Belnap, *supra* note 183, at 523-24.

185. Jett, *supra* note 146, at 897.

186. *See* Dryden, *supra* note 175, at 182-88; Goldman, *supra* note 168, at 405.

187. Dryden, *supra* note 175, at 215-16.

of the *Tinker* standard in analyzing students' claims for First Amendment violations:

> [S]chool officials would not be permitted to proscribe any speech . . . unless they could articulate objective facts which would demonstrate that the expression created, or was likely to create, a substantial disruption of school operations or the expression interfered with the rights of others on more than just a temporary and superficial level.[188]

This hearkens back to Justice Stevens's comment in *Redding* that "the clarity of a well-established right should not depend on whether jurists have misread [the Supreme Court's] precedents."[189] In other words, if applied correctly, the *Tinker* standard is sufficiently clear to put school officials on notice of what kinds of conduct are and are not permissible when dealing with student speech issues.

Relying on *T.L.O.*, the highly deferential "shocks-the-conscience" test, and *Tinker* and its progeny for analyzing students' Section 1983 claims will still provide school officials notice of conduct that is unconstitutional in discharging their duties without the need for qualified immunity. The Supreme Court has stated that "officials can still be on notice that their conduct violates established law even in novel factual circumstances."[190] The standards under which courts analyze students' First, Fourth, and Fourteenth Amendment claims are sufficiently clear to provide school officials with "fair warning" of what conduct is and is not permissible.[191] Further, the argument that qualified immunity is designed to allow public officials, particularly law enforcement officers, to make split-second decisions is not as pressing in the K-12 context.[192] It is much more likely that teachers and school administrators have time to consult attorneys, supervisors, and co-workers about a

188. *Id.* at 215.

189. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 380 (2009) (Stephens, J., concurring in part and dissenting in part).

190. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

191. *Id.*

192. *See* Reichle v. Howards, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring) ("Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy.").

particular method they intend to use to discipline students or prevent distractions in the learning environment.

Even if these standards are not sufficiently clear to provide school officials with notice about the lawfulness of their conduct, it has been noted that public officials "do not pause in the course of conduct to ponder whether their behavior violates the Constitution and can therefore subject them to federal liability . . . ."[193] Therefore, there is an argument that "providing [public officials] with legal or constitutional notice is of little practical use" because state actors do not consider "federal forum[s] or attorney's fees" when deciding how to handle a particular situation.[194] Instead, public officials, "like most people, make decisions based on their conceptions of right and wrong, buttressed perhaps by a rough sense of the law."[195] When viewed in this light, qualified immunity may not be necessary to provide notice to school officials about lawful and unlawful conduct because these officials do not rely on specific articulations of the law when making decisions in the classroom.

Students will also receive more expansive constitutional protections if the Supreme Court abolishes qualified immunity in the K-12 context. According to the *Wood* Court:

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students.[196]

Thus, qualified immunity in the school setting serves to protect teachers and other school officials from costly litigation by allowing them to exercise discretion in their day-to-day duties.[197] However, the legal standards previously discussed provide that same level of protection of school officials' discretion.[198]

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193. Heller, *supra* note 86, at 317.
194. *Id.* at 354.
195. *Id.*
196. Wood v. Strickland, 420 U.S. 308, 319-20 (1975).
197. *See id.*
198. *See supra* Part III.

Rejecting qualified immunity for school officials would not affect any other protections the law has already afforded to school personnel, such as the law's refusal to recognize any duty to protect or supervise students.[199] Some cases have applied qualified immunity in cases alleging a failure to protect or supervise students, and these cases usually result in awarding qualified immunity to the school officials.[200] For example, in *Mann v. Palmerton Area School District*, a student brought suit against his football coach under a failure to protect theory of the Fourteenth Amendment after the student suffered a traumatic brain injury when the coach knew the student sustained multiple hard hits in practice and failed to implement the policies required when a student suffered a head injury.[201] The court held that the football coach was entitled to qualified immunity because "it was not so plainly obvious that requiring a student-athlete, fully clothed in protective gear, to continue to participate in practice after sustaining a violent hit and exhibiting concussion symptoms implicated the student athlete's constitutional rights."[202] The Third Circuit repeatedly emphasized the fact that although there were other cases involving student-athletes and coaches brought under Fourteenth Amendment failure to protect claims, none of the facts of those cases was similar enough to create a "clearly established" right.[203] However, without having to undertake a qualified immunity analysis, the court would have been allowed to rely more heavily on the other cases, and thus may have allowed the student to prevail on his claim for a constitutional violation.

Further, abolishing qualified immunity for school officials would not affect the protections that the stringent *Monell* standard

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199. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196-97 (1989).

200. *See, e.g.*, Mann v. Palmerton Area Sch. Dist., 872 F.3d 165, 169-70 (3d Cir. 2017) (student claimed high-school football coach violated student's substantive Due Process rights when student received a traumatic brain injury after coach required the student to participate in practice after student received a violent hit and coach observed concussion symptoms); Walton v. Alexander, 44 F.3d 1297, 1300-01 (5th Cir. 1995) (superintendent entitled to qualified immunity after a classmate sexually assaulted the student because the court found no special relationship existed that would create a duty to protect).

201. 872 F.3d at 169-70.

202. *Id.* at 174.

203. *Id.* at 173-74.

provides to school districts and school officials.[204] School districts often indemnify teachers and other school administrators when students bring claims under Section 1983.[205] If a school district or school board indemnifies a school official, another avenue for students to bring Section 1983 claims is against a school district or school board under *Monell*, which requires that (1) a state actor "violated the plaintiff's constitutional rights" and (2) the municipal entity be responsible for the violation because of the entity's policies, practices, or customs.[206] Therefore, even with the availability of qualified immunity, teachers are rarely responsible for the financial burden that comes from Section 1983 liability. Even without qualified immunity, this framework would preserve the doctrine's goal of protecting public officials from financial liability.[207] The strict "deliberate indifference" requirement under *Monell* also serves to protect school districts from financial liability, meaning that eliminating qualified immunity in the K-12 context would not lead to more successful suits against school districts if suits brought against individual school officials fail.[208]

V. CONCLUSION

The Supreme Court should abolish qualified immunity in favor of relying on existing legal standards when analyzing Section 1983 claims against school officials for violating students' constitutional rights. The modern application of the doctrine fails to protect students from constitutional violations because it requires too strict a reliance on cases with substantially similar facts. The *T.L.O.* standard for Fourth Amendment claims,

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204. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 724-25, 729-30 (3d Cir. 1989).

205. 78 C.J.S. *Schools and School Districts* § 460 (2021).

206. Weatherby, *supra* note 55, at 160-61.

207. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that "the expenses of litigation" is one of qualified immunity's protections afforded to public officials).

208. *See Stoneking*, 882 F.2d at 725. This is important because one way that school districts receive the money they could use to pay damages, court costs, and attorneys' fees is from taxes levied against the communities in which they operate. *See Public School Revenue Sources*, NAT'L CTR. FOR EDUC. STATS., [https://perma.cc/J57T-FRKZ] (May 2021). Thus, *Monell*'s strict standard protects school districts, the school officials these districts may indemnify, and the families of students who attend those school districts.

the "shocks-the-conscience" standard for Fourteenth Amendment claims, and the *Tinker* standard for First Amendment claims more effectively balance students' interests and the need for adequate notice about what constitutes unlawful conduct. These tests will also preserve discretion for school officials to perform their job duties effectively. Further, eliminating qualified immunity in cases against school officials would not leave them entirely unprotected from students' Section 1983 claims.

Qualified immunity is not only a problem in K-12 schools.[209] For years, scholars have noted the serious problems the doctrine poses, especially in excessive force claims asserted against law enforcement.[210] After the tragic death of George Floyd in May 2020 while in police custody,[211] many critics renewed the call for a repeal of qualified immunity, especially in the law enforcement context.[212] The U.S. House of Representatives even passed a bill entitled the George Floyd Justice in Policing Act of 2021, which would amend Section 1983 to state that qualified immunity can no longer be a defense for law enforcement officers.[213] However, not everyone is on board with the idea of abolishing qualified immunity.[214] Considering the Supreme Court's reluctance to

209. Courts' applications of qualified immunity are problematic in all areas, not just K-12 public schools. However, it is important to focus on qualified immunity in the school context because schools are charged with the important task of "educating the young for citizenship[, which] is reason for scrupulous protection of Constitutional freedoms of the individual." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

210. *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 70, at 1798-1800; Schwartz, *How Qualified Immunity Fails*, *supra* note 49, at 6-7, 22; John P. Gross, *Qualified Immunity and the Use of Force: Making the Reckless into the Reasonable*, 8 ALA. C.R. & C.L. L. REV. 67, 67 (2017).

211. *See* Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Oct. 29, 2021, 9:48 AM), [https://perma.cc/8BR5-36XX].

212. *See* John Kramer, *George Floyd and Beyond: How "Qualified Immunity" Enables Bad Policing*, INST. FOR JUST. (June 3, 2020), [https://perma.cc/AY7K-MYM3]; Tyler Olsen, *George Floyd Case Revives 'Qualified Immunity' Debate, as Supreme Court Could Soon Take Up Issue*, FOX NEWS (May 29, 2020), [https://perma.cc/N7TX-EJL5].

213. George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. § 102 (2021). As of April 19, 2021, only the U.S. House of Representative has passed this bill.

214. *See* Schwartz, *After Qualified Immunity*, *supra* note 92, at 315 & nn.18-19 (describing the Supreme Court and other scholars' "strongest defenses of qualified immunity").

address the issue for police officers, it may be a while before there is any further progress in the movement to abolish the doctrine.[215]

The next time the Court addresses the issue, however, it may be more feasible to start in the K-12 public school context than in the law enforcement context. School officials are not often faced with situations in which they must make life or death decisions as law enforcement officers are.[216] Abolishing qualified immunity for K-12 school officials could be a starting point for the Court to see how public officials may react to not having the affirmative defense of qualified immunity in their back pockets when making decisions within the scope of their employment.

Ultimately, regardless of how abolishing qualified immunity in the K-12 context may affect other public actors, the Supreme Court must take a hard look at how the doctrine protects egregious conduct by school officials and prevents students from bringing successful Section 1983 claims. Students do not and should not "shed their constitutional rights . . . at the schoolhouse gate."[217] Courts' modern applications of qualified immunity in K-12 school cases dilute this sentiment and leave students and their families without a legal remedy in the face of more and more violations of their constitutional rights.

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215. *See* Andrew Chung, *U.S. Supreme Court Rejects Case Over 'Qualified Immunity' For Police*, REUTERS (Mar. 8, 2021, 8:48 AM), [https://perma.cc/57U9-CAFM].

216. *See supra* text accompanying notes 190-93; *see also* Justin Driver, *Schooling Qualified Immunity*, EDUC. NEXT, [https://perma.cc/6M3Q-PY4J] (Mar. 23, 2021) ("The teacher's paddle is . . . a far cry from the officer's gun.").

217. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).