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I. INTRODUCTION

In 2009 the U.S. Supreme Court decided *Safford Unified School District #1 v. Redding* ("*Safford*"),[1] a case regarding the civil rights standards to which lower-education school officials are held when they conduct a search of a student's property. In its only other Fourth Amendment school search decision, the 1985 decision of *New Jersey v. T.L.O.*,[2] the Court applied a two-prong test, which was based on a mere reasonableness standard or whether common sense was used by the school official.[3] The Court adopted this standard so that educators would not be required to remain well-versed on Fourth Amendment search and seizure law, which is constantly in flux due to judicial decisions. Regrettably, in *Safford* the Court failed to reiterate the mere reasonableness standard and instead applied the more complex reasonable suspicion standard.[4] While the Court did not explicitly do this, a careful comparison of the two cases shows this is the most reasonable understanding of *Safford.* This is unfortunate because, while some may argue the standards are the same, reasonable suspicion is a more complicated and case-law based standard than what the Court described in *T.L.O.* Applying such a standard contradicts the policy of *T.L.O.* that school officials should not be required to remain abreast of changes in Fourth Amendment law.[5]

Secondly, this was the Court's first opportunity to apply both the *T.L.O.* test and the qualified immunity standard in a school search case. The mere reasonableness standard from *T.L.O.* makes qualified immunity very difficult to apply because it looks to common sense and not to current case law while, in contrast, qualified immunity considers whether current case law has put the governmental actor on notice that the action was unconstitutional. This is possibly the reason the Court

1. 129 S. Ct. 2633 (2009).

2. 469 U.S. 325 (1985).

3. Arguably, the Court used reasonable suspicion rather than mere reasonableness in *T.L.O.* For a discussion of why I conclude the Court established a mere reasonableness standard see *infra* Part II.A.

4. 129 S. Ct. 2633.

5. 469 U.S. at 343.

failed to utilize the mere reasonableness standard and relied on the reasonable suspicion standard.

A likely result of *Safford* is that school officials now have more protections than qualified immunity normally grants. I refer to this as "qualified immunity plus." After all, if the search that occurred in *Safford* was not enough to overcome the qualified immunity defense, it is difficult to imagine a situation where the school official would be held liable. Qualified immunity plus is an appropriate standard for school officials—especially classroom teachers. They should have a broader shield than other government actors because their principal role is not law enforcement but rather educating the youth. However, courts should explicitly state that school officials are granted a higher protection from civil suit than other government officials. Otherwise, school officials will be granted qualified immunity plus but courts will refer to the standard as qualified immunity. This could cause a slippery slope where other government officials asserting qualified immunity could be granted the additional protections of qualified immunity plus. Inversely, the civil rights protections offered by § 1983 actions could be weakened because school officials are offered qualified immunity plus, but it is termed merely "qualified immunity."

The two points from the preceding paragraphs—that in *Safford* the Court distanced itself from the mere reasonableness standard and that school officials now are given qualified immunity plus—are illustrative of my principal thesis that qualified immunity is a poor fit with school search law. The Court may resolve this problem in two ways. First, it could explicitly abandon the rationale of *T.L.O.*, rely on reasonable suspicion for school searches, and require teachers to remain informed of Fourth Amendment law. This is a poor solution because it places an unrealistic expectation on teachers. Second, the Court (or Congress) could declare that qualified immunity does not fit with school search standards and provide qualified immunity plus. Rather than possibly weakening civil rights protections by granting greater protections than qualified immunity should, the courts should decide that school officials—particularly teachers—are due absolute immunity in § 1983 actions regarding school searches. This proposal is logical due to alternative remedies in school settings, such as the intense political pressure parents place on school boards to adopt policies and procedures to protect students and the relative ease of firing administrators and teachers for civil rights violations.[6]

6. Documentation of these remedies is beyond the scope of this paper. Consequently, I assume that they exist and help to justify removing teachers from § 1983 school search cases.

Part II discusses the *Safford* decision and the law established by *T.L.O.* Part III lays out the history and current state of § 1983 actions and the defense of qualified immunity. Part IV demonstrates that applying qualified immunity to school search standards is problematic. Part V specifically shows how qualified immunity actually provides qualified immunity plus in school search cases, and Part VI outlines other issues that arise from the problems identified in Part IV. Finally, Part VII concludes that granting teachers absolute immunity provides a better solution than adopting the reasonable suspicion standard.

II. *SAFFORD* AND *T.L.O.*

Safford was a significant case because it was the first time the Court applied the test it set out in *T.L.O.* This section first describes *T.L.O.* It then lays out the facts of *Safford*. Lastly, it discusses the Court's *Safford* opinion and the concurring in part and dissenting in part opinions.

A. Significant Legal Background

The principal precedent-setting case for *Safford* was *New Jersey v. T.L.O.*[7] However, prior to *T.L.O.*, the Supreme Court laid the groundwork for § 1983 actions to be filed against teachers and school administrators in *Tinker v. Des Moines Independent Community School District* by stating that neither "students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[8] *Tinker*'s guaranteeing of First Amendment rights to students established precedent for the protections of other fundamental rights in schools, such as Fourth Amendment rights regarding searches.

In *T.L.O.*, the Court initially granted certiorari to determine whether the exclusionary rule[9] applies in criminal proceedings when an unlawful search was conducted by a school official.[10] However, the Court ordered re-arguments focusing on the standard for determining the lawfulness of searches performed by school officials.[11] T.L.O. was a high school student that had been caught smoking in the girls' bathroom by a teacher.[12] When T.L.O. denied she had been smoking, the assistant

7. 469 U.S. 325.

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

9. The exclusionary rule "excludes or suppresses evidence [in a criminal proceeding] obtained in violation of an accused person's constitutional rights." BLACK'S LAW DICTIONARY 606 (8TH ed. 2004).

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

11. *Id*. at 327–28.

12. *Id*. at 328.

principal opened her purse and pulled out a package of cigarettes.[13] When he removed the cigarettes, the administrator saw a package of rolling papers, which caused him to suspect that T.L.O. had marijuana in her purse. He then conducted a second, more extensive search of the purse and found "a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing."[14] In a subsequent juvenile delinquency proceeding, T.L.O. sought to suppress the results of the search under the exclusionary rule, claiming her Fourth Amendment rights had been violated by the school administrator's search.[15]

The juvenile court denied the motion to suppress evidence, and "found T.L.O. to be a delinquent."[16] The appellate court reversed on Fifth Amendment grounds, and the New Jersey Supreme Court reversed both lower-court decisions and ordered suppression of the items based on the Fourth Amendment.[17] After rehearing arguments, the U.S. Supreme Court established a reasonableness standard for searches of students by school officials.[18] It held that the search of T.L.O.'s purse was reasonable and, thus, did not violate the Fourth Amendment.[19]

The first issue the Court addressed was whether Fourth Amendment protections applied to unreasonable searches and seizures conducted by school officials.[20] The Court cited several cases that applied Fourth Amendment protections to searches conducted by other state actors such as building inspectors,[21] health inspectors,[22] and firemen.[23] It then held that the Fourth Amendment did apply to searches by school officials[24] based on the policy that the Fourth Amendment protects people from any state actor, regardless of whether the actor's goal is criminal investigation or other regulatory purposes.[25]

After determining that the Fourth Amendment applies to school searches,[26] the Court addressed the issue of what standard should be

13. *Id.*
14. *Id.*
15. *Id.* at 329.
16. *Id.* at 330.
17. *Id.*
18. *Id*. at 341–342.
19. *Id*. at 347.
20. *Id.* at 333.
21. Camara v. Mun. Court, 387 U.S. 523 (1967).
22. Marshall v. Barlow's, 436 U.S. 307 (1978).
23. Michigan v. Tyler, 436 U.S. 499 (1978).
24. *T.L.O.*, 469 U.S. at 333.
25. *Id.* at 335.
26. Throughout this Note, I use the term "school searches" to signify searches conducted by

applied to determine whether a school search violates the Fourth Amendment. The Court acknowledged the competing interests that students have some expectation of privacy at school (privacy interest), while the school, on the other hand, has a pressing interest in discipline—which interest has increased over the years.[27]

In its key reasoning, the Court pointed out the importance of informality and flexibility when establishing rules that teachers and administrators will have to follow.[28] The Court held that the Fourth Amendment does not require school officials to "obtain a [search] warrant before searching a student who is under their authority," and that the level of suspicion does not have to reach the level of probable cause.[29] Rather, school officials' actions should be judged on a mere reasonableness standard in a two-part test: (1) was there a reasonable expectation the search would discover evidence of wrongdoing; and (2) were "the measures adopted . . . 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"?[30] In adopting a reasonableness standard rather than probable cause, the Court acknowledged that teachers should not be required to follow the complex and ever changing rules governing probable cause: "By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the *dictates of reason and common sense*."[31]

In applying this new standard to the facts in *T.L.O.*, the Court held that two searches occurred: one for cigarettes based on the suspicion of the teacher catching T.L.O. smoking, and a second for drug paraphernalia based on what the administrator saw when he removed the cigarettes.[32] The Court held that both searches were reasonable in their inception and in the manner in which they were carried out.[33]

There were two concurrences and Justice Brennan dissented in part, ardently arguing that the Court had established an unclear standard in a realm of the law—school law—where clear standards are desirable. Brennan argued against a balancing test and for probable cause to be the

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school officials.

27. *T.L.O.*, 469 U.S. at 339.

28. *Id.* at 339–40.

29. *Id.* at 340–41.

30. *Id.* at 342. The Court failed to elaborate on exactly how the age and sex of the student affects the analysis. As *Safford* also failed to address this subject, it is not within the scope of this Note and will not receive further consideration.

31. *Id.* at 343 (emphasis added).

32. *Id.* at 343–44.

33. *Id.* at 346–47.

standard of whether school searches are constitutional[34] because teachers will not be able to easily understand what the reasonableness standard entails.[35]

Justice Stevens concurred in part and dissented in part.[36] Primarily, Stevens argued that the Court should have decided the case on its original petition for certiorari and not ordered a rehearing on a different issue.[37] One footnote towards the end of his decision, however, directly addressed the issue that would eventually come before the Court in *Safford*. After arguing for a more stringent standard for school official searches, Justice Stevens noted:

One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. "It 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."[38]

Given Justice Stevens's strong language regarding school strip searches, it is surprising that over two decades passed before the Court heard a case on this topic.

B. Facts and Procedural History

The facts surrounding *Safford* occurred in the fall of 2003 in Safford, Arizona. By way of background, Safford is a small community roughly 170 miles southeast of Phoenix. In 2003, the population was around 10,000.[39] Savana Redding was an eighth grade student at Safford Middle School, which educates around 600 students from sixth, seventh, and eighth grades.[40] While the school had experienced issues with drugs over the years, the record before the appellate courts was both incomplete and contested by Redding, thus the courts did not allow prior incidents regarding drug possession by other students to carry any weight in their decisions.[41]

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34. *Id.* at 357–58 (Brennan, J., concurring in part and dissenting in part).

35. *Id.* at 365–66.

36. *Id.* at 370–386.

37. *Id*. at 371.

38. *Id.* at 382 n.25 (Stevens, J., concurring in part and dissenting in part) (quoting Doe v. Renfrow, 631 F.2d 91, 92–93 (7th Cir. 1980)) (internal citations omitted).

39. Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

40. *See id.*

41. Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 829 n.1 (9th Cir. 2007), *aff'd in part, rev'd in part*, 531 F.3d 1071 (9th Cir. 2008), *en banc*, *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009). The school rule banning any medications, both prescription and over-the-counter, was put in place a couple of years before this incident because a student had ingested pills at school and become violently ill to the point that he was hospitalized. Brief of Appellant at 3, *Safford*, 504 F.3d

In August at the back-to-school dance, several teachers and staff members noticed the smell of alcohol emanating from a rowdy group of students, which included Savana Redding, Marissa Glines, and Jordan Romero.[42] During the dance alcohol and cigarettes were found in the girls' restroom of the school.[43]

On October 1, roughly six weeks after the dance, Jordan Romero and his mother met with the school's assistant principal Kerry Wilson. Jordan's mother was concerned because Jordan had been extremely sick the night before, and he claimed the cause was pills that he had received from a classmate,[44] who was presumably neither Marissa nor Savana.[45] In this meeting Jordan told Wilson that he had attended a party at Savana Redding's house before the back-to-school dance, that alcohol was served at the party, and that Savana's parents knew of the alcohol and failed to take any steps to prevent it from being served.[46] Next, he reported that "certain students were bringing drugs and weapons on campus."[47]

One week later, on October 8, Jordan approached Wilson before school started and gave Wilson a white pill.[48] He stated that Marissa had given it to him and that "students were planning to take the pills at lunch."[49] Wilson took the pill to the school nurse, Peggy Schwallier, who identified it as prescription strength, 400-milligram ibuprofen.[50] When school began, Wilson pulled Marissa from her class, and the teacher of the class gave him a planner that had been in the desk adjacent to Marissa and apparently belonged to Marissa.[51] When the planner was opened it contained "several knives, lighters, a permanent marker, and a cigarette."[52] Marissa denied ownership of the planner and its contents.[53]

Once in his office, Wilson had a female administrative assistant, Helen Romero, come into his office, and Wilson asked Marissa to turn out her pockets.[54] Marissa did so and produced several white pills

828 (No. 05-15759).

42. *Redding*, 531 F.3d at 1075.

43. *Redding*, 129 S. Ct. at 2641.

44. *See id.* at 2640.

45. Had Romero received the pill from one of these girls, one of the appellate courts likely would have mentioned it. Furthermore, a third student was questioned as a suspected pill distributor but not strip-searched on the day Marissa and Savana were searched. *Redding*, 531 F.3d at 1077 n.5.

46. *See id.* at 1076.

47. *Redding*, 129 S. Ct. at 2640 (citation omitted).

48. *Redding*, 531 F.3d at 1076.

49. *Redding*, 129 S. Ct. at 2640.

50. *Id.*

51. *Redding*, 531 F.3d at 1076.

52. *Redding*, 129 S. Ct. at 2638.

53. *Id.* at 2640.

54. *Redding*, 531 F.3d at 1076.

identical to the one Jordan had previously given Wilson, a blue pill later identified as an over-the-counter 200 milligram anti-inflammatory called naproxen,[55] and a razor blade.[56] Wilson asked where the blue pill came from, and Marissa replied, "'I guess it slipped in when she gave me the IBU 400s.'"[57] After a follow-up question Marissa clarified that the "she" who had given her the pills was Savana Redding.[58]

Next, Wilson had Ms. Romero accompany Marissa to the nurse's office so a strip search could be conducted.[59] The strip search entailed Marissa pulling up her shirt and pulling out her bra and shaking it.[60] She also removed her pants and pulled out the waistband of her underpants and shook them.[61] No additional contraband was found.[62]

After this search, Mr. Wilson summoned Savana to his office. Savana was a thirteen-year-old honor student[63] who "had never [previously] been disciplined for any infraction of school rules."[64] The information that gave rise to Mr. Wilson's suspicion of Savana was (1) Jordan's statement that the alcohol had been served at a party at Savana's home and (2) Marissa's statement that Savana had provided her the pills.[65] However, Marissa had not stated when Savana allegedly gave her the pills nor if she knew of any additional pills in Savana's possession.[66]

When Wilson first showed Savana the day planner, Savana admitted that she owned the day planner, but not any of its contents.[67] She stated that she had lent the planner to Marissa a few days earlier because Marissa wanted a place to hide "cigarettes, a lighter and some jewelry."[68] Savana denied any knowledge or possession of the pills.[69] She then consented to a search of her backpack which was conducted by Ms.

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55. The blue pill was a generic version of the over the counter anti-inflammatory Aleve.

56. *Redding*, 129 S. Ct. at 2640.

57. Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 830 (9th Cir. 2007), *aff'd in part, rev'd in part, en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).

58. *Id.*

59. The Court addressed use of the term "strip search," and stated that several terms could be used for the search that occurred in this case, but strip search was accurate and sufficiently served the Court's purposes. *Redding*, 129 S. Ct. at 2641.

60. *Redding*, 531 F.3d at 1077.

61. *Id*.

62. *Id.*

63. *Id.* at 1074.

64. *Id.* at 1077.

65. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2641 (2009).

66. *Redding*, 531 F.3d at 1083. Indeed Wilson's failure to ask Marissa follow-up questions regarding these points was pointed out by the Ninth Circuit's en banc decision. *Id.*

67. *Id.* at 1075 n.2.

68. *Id.*

69. *Redding*, 129 S. Ct., 2638.

Romero; no contraband was found.[70] Wilson then ordered a strip search of Savana.[71] In the nurse's office, Savana was initially asked to remove her coat, shoes, and socks; nothing was found in these items.[72] She was next asked to remove her T-shirt and stretch pants—neither of which had any pockets.[73] Again, nothing was found. Finally, she was asked to pull out her bra and then her underpants waistband and shake them.[74] No additional pills were discovered.[75] Savana put her clothes back on and returned to Mr. Wilson's office.[76]

When Savana's mother learned of the search, she requested a meeting with Mr. Wilson. Afterwards she filed a § 1983 civil rights action against the school district, Wilson, the administrative assistant, Romero, and the school nurse, Schwallier.[77] Ms. Redding filed the § 1983 action in the Federal District Court of Arizona.[78] The court granted summary judgment for the defendants on qualified immunity grounds.[79] On appeal, the Ninth Circuit affirmed in a split decision.[80] Subsequently, the Ninth Circuit reheard the case en banc and reversed the initial three-judge panel. The en banc court held that the search constituted a constitutional violation and Mr. Wilson was not entitled to qualified immunity.[81]

C. The Court's Safford *Decision*

1. The strip search

The Court held that the strip search of Savana Redding was unreasonable and violated her Fourth Amendment rights, but that the defendants were entitled to qualified immunity.[82] Consequently, Redding did not recover any damages, fees, or expenses. Justice Souter wrote the

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Redding*, 531 F.3d at 1075.
77. *Id*. at 1077.
78. *Id.*
79. It is unclear what happened regarding the school district as a defendant. The Supreme Court remanded regarding the school district because the Ninth Circuit case did not address it at all. *Redding*, 129 S. Ct. at 2644.
80. Redding v. Safford Unified Sch. Dist. #1, 504 F.3d 828, 836 (9th Cir. 2007), *aff'd in part, rev'd in part, en banc*, 531 F.3d 1071 (9th Cir. 2008), *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).
81. Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1074 (9th Cir. 2008) (en banc) *aff'd in part, rev'd in part*, 129 S. Ct. 2633 (2009).
82. *Redding*, 129 S. Ct. at 2637–38.

majority opinion in *Safford*. Chief Justice Roberts, and Justices Scalia, Kennedy, Breyer, and Alito joined in the majority.[83] Justices Stevens and Ginsburg each joined the majority opinion insofar as it found the search a Fourth Amendment violation, but dissented over whether qualified immunity should apply.[84] Justice Thomas, conversely, concurred in granting qualified immunity and dissented over whether the search constituted a Fourth Amendment violation.[85]

In reaching a decision as to whether the strip search of Savana Redding violated her Fourth Amendment rights, the Court first addressed the standard that would judge the search. The Court provided a brief discussion on probable cause—stating it is the customary standard applied to searches and that the Court has struggled in clearly defining it.[86] The Court defined probable cause, for purposes of searches, as whether there is a "'fair probability' or a 'substantial chance' of discovering evidence of criminal activity."[87] The Court relied on *T.L.O.* for the proposition that the standard governing school searches is somewhat lower than probable cause, and defined the standard, which justified searches by school officials if there existed "a moderate chance of finding evidence of wrongdoing."[88]

The Court's application of the *T.L.O.* standard is confusing because it alternates between the language of *T.L.O.* and the traditional probable cause/reasonable suspicion used in other Fourth Amendment cases. The Court held that the information known to Wilson was sufficient "to justify a search of Savana's backpack and outer clothing."[89] However, on the issue of the strip search the Court reasoned that "both subjective and reasonable societal expectations . . . requir[e] distinct elements of justification."[90] Thus, it appears that the standard established is: a moderate suspicion of wrongdoing justifies any search by a school official, except a strip search. In instances where the student is required to remove any article of clothing that will expose undergarments, some additional justification would be required. Without citing any authority, the Court reverted back to probable cause/reasonable suspicion analysis

83. *Id*. at 2637.

84. *Id*. at 2644–45.

85. *Id*. at 2646–58.

86. *Id.* at 2639.

87. *Id.* (quoting Illinois v. Gates, 462 U.S. 213, 238, 244 n.14 (1983)) (internal citations omitted).

88. *Id.* It should be noted that while the Court often uses the language from the rules regarding school searches and police searches interchangeably, in a school search all that is required is suspicion of a violation of school rules. However, for a police search there must be suspicion of criminal activity.

89. *Id.* at 2641.

90. *Id.*

to support the rule that more than a mere suspicion is required for a strip search; the Court reasoned that Savana possessed both a subjective belief (demonstrated by her statement of being embarrassed, frightened, and humiliated) and an objective belief (based on adolescent vulnerability) that her privacy would not be invaded to the extent of a strip search.[91]

Rather than simply state that strip searches require probable cause—which would have provided a bright line rule but contradicted *T.L.O.* by requiring school officials to become versed in probable cause case law—the Court reverted mid-paragraph back to the *T.L.O.* rule by quoting that the search, as executed, must be "'reasonably related in scope to the circumstances which justified the interference in the first place.' . . . The scope will be permissible, that is, when it is 'not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[92] In applying this second prong of the *T.L.O.* test, the Court considered the type of drugs Wilson was searching for and the evidence that pills were hidden in Savana's underwear.[93] The Court held that the strip search was unreasonable because the school officials were merely looking for over-the-counter and prescription-strength anti-inflammatory pills, and because there was no evidence of hiding pills on one's person in regards to Savana specifically or of a general practice within the school.[94] At the end of the analysis, the Court apparently attempted to clarify its confusing language by stating a clear standard—reasonable suspicion—for school strip searches. However, the paragraph that articulates this standard describes it as in conformance with *T.L.O.* but fails to acknowledge the difference between the common sense reasonableness from *T.L.O.* and reasonable suspicion as used in other Fourth Amendment search and seizure cases.

The Court's decision regarding the strip search is disappointing in two regards. First, it failed to clearly follow the *T.L.O.* test. Doing so would have provided lower courts some parameters on the vague second prong of the test regarding the reasonableness of the scope of the search given the age and sex of the student and the nature of the infraction. Second, and more problematic, the Court failed to state whether the reasonable suspicion required for a school strip search is derived from *T.L.O.*—which considers age, sex, and the nature of the infraction—or is the equivalent to the reasonable suspicion required by law enforcement for temporary stops and searches under the *Terry v. Ohio* line of cases.[95]

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91. *Id.* at 2641–42.

92. *Id.* at 2642 (quoting New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985)) (internal citations omitted).

93. *Id.*

94. *Id.*

95. *Terry v. Ohio* established reasonable suspicion as the standard for limited searches and

Because "reasonable suspicion" is such a common term in Fourth Amendment case law, school administrators must assume that the reasonable suspicion in *Safford* is equivalent to the standard imposed on law enforcement officers. Thus, the entire policy supporting *T.L.O.* of not applying the complex probable cause standard to school officials is circumvented because the reasonable suspicion standard is arguably just as complex in the case law as that of probable cause.[96]

2. Qualified immunity

The Court's entire section on qualified immunity comprised less than one page of the decision, even though this was the principal disagreement between the majority and the Justices that dissented in part. There is only one qualified immunity test for all government officials. Consequently, the Court applied the same qualified immunity test to the school officials in *Safford* that it applied earlier in the term in a case that did not regard school law.[97] The Court defined qualified immunity as immunity for government officials accused of performing unconstitutional searches "'where clearly established law does not show that the search violated the Fourth Amendment.'"[98] It explained that qualified immunity is not applicable if clear case law exists that holds the type of search at issue to be unconstitutional.[99] Qualified immunity is also not applicable in circumstances of "outrageous conduct."[100] Furthermore, the Court stated that if the law sufficiently put government officials on notice, then qualified immunity may not be appropriate even if the government official's conduct presents a "'novel factual circumstance.'"[101] Thus in order to successfully claim qualified

seizures performed by police officers as opposed to the higher standard of probable cause. 392 U.S. 1, 20–21 (1968). Since *Terry*, there have been a considerable number of cases that addressed the reasonable suspicion standard. *See, e.g.*, Adams v. Williams, 407 U.S. 143, 147–48 (1972) (allowing an officer to reach into a car and seize a weapon hidden on the body of a suspect, when knowledge of the weapon was based on an informant); Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (creating the bright-line rule, based on *Terry*, that an officer can order a driver out of a vehicle when the stop was merely for a traffic violation).

96. Admittedly, *T.L.O.* does use the term "reasonable suspicion," but a careful reading of the case, or a simple search of the term reasonable, shows that the *T.L.O.* Court established a tort-like reasonableness standard and not the reasonable suspicion standard commonly linked with *Terry v. Ohio*. *See T.L.O.*, 469 U.S. at 337–43.

97. *Redding*, 129 S. Ct. at 2643 (quoting the rule from Pearson v. Callahan, 129 S. Ct. 808, 822 (2009)). *Pearson* dealt with a drug task force's warrantless arrest outside of a home and subsequent search of the residence. *Pearson*, 129 S. Ct. at 813–14.

98. *Redding*, 129 S. Ct. at 2643 (quoting *Pearson*, 129 S. Ct. at 822).

99. *Id.* (quoting Wilson v. Layne, 526 US. 603, 615 (1999)).

100. *Id.*

101. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)). For example, if the duties and rights are clearly defined by the Court, a "novel factual circumstance" will not guarantee that qualified immunity is applicable.

immunity, the school officials in *Safford* had to show that (1) there was not clearly established case law holding similar facts analogous to this case to be unconstitutional, (2) the strip search as conducted may later have been found to be unconstitutional by dispassionate judges, but not outrageously so, and (3) the general guiding principles of the law were not established sufficiently to give notice that the "novel" facts regarding the search in the case constituted a clear constitutional violation.

Regarding the first requirement, the Court held that there was sufficient divergence in the case law to conclude no established law existed.[102] The Court first cited the divergence of opinions from the Ninth Circuit in this case.[103] This analysis is unhelpful to future courts because a school administrator, in determining whether a search would be appropriate, will not know in advance how a majority of judges on the circuit where the school is located would rule on the specific facts currently before the administrator. Next, the Court turned to the case law on the topic.[104] It noted courts' difficulty in applying the *T.L.O.* standard and cited circuit court cases that dealt with strip searches. In *Williams v. Ellington* "the Sixth Circuit upheld a strip search of a high school student for a drug, without any suspicion that drugs were hidden next to her body."[105] In *Thomas v. Roberts* the Eleventh Circuit "grant[ed] qualified immunity to a teacher and police officer who conducted a group strip search of a fifth grade class when looking for a missing $26."[106]

The Court then held that qualified immunity should be granted because the Sixth and Eleventh Circuits, as well as a sizable minority of the Ninth Circuit judges that heard *Safford*, all allowed strip searches based on little to no suspicion; thus, the case law was not established that a strip search violated the Fourth Amendment when the search was for drugs and there was no reasonable suspicion that the student currently had drugs hidden on her body.[107] The Court included the following caveat to this type of reasoning that granted qualified immunity due to a disagreement among judges:

We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or

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102. *Id.*

103. *Id.*

104. *Id.* (quoting Jenkins v. Talladega City Bd. of Educ. 115 F.3d 821, 828 (11th Cir. 1997) (en banc)) ("[O]ther courts considering qualified immunity for strip searches have read *T.L.O.* as 'a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other . . . .'").

105. *Id.* (citing Williams v. Ellington, 936 F.2d 881, 882–83 (6th Cir. 1991)).

106. *Id.* at 2643–44 (citing Thomas v. Roberts, 323 F.3d 950 (11th Cir. 2003)). For a brief discussion of how informants now play a role in determining reasonable suspicion for strip searches in schools, s*ee* Ralph D. Mawdsley & Jacqueline Joy Cumming, *Reliability of Student Informants and Strip Searches*, 231 WEST'S EDUC. L. REP. 1, 1–4 (2008).

107. *Redding*, 129 S. Ct. at 2644.

state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.[108]

This statement—given in an attempt to stave off what will surely become the government's argument in any qualified immunity case, namely that the law is not established because some judges disagree—will likely only further confuse school officials and judges because (1) it is unclear if the final part of the sentence, stating that clarity by the Supreme Court trumps any lower-court views, applies to the entire sentence; and (2) it raises the question of whether the initial statement about disuniform views not "guaranteeing" qualified immunity creates a strong presumption in favor of qualified immunity; and (3) it leaves unclear how many judges are needed to establish a significant enough minority view to unsettle the law.

In sum, while the Court appeared to simply hold that qualified immunity protects the defendants in this case and that this was a mere run-of-the-mill qualified immunity case, the Court's statement on how to establish whether the law is unclear for qualified immunity purposes will likely confound courts in their application of this standard.

D. The Dissent

Three Justices concurred in part and dissented in part to the Court's opinion: Justice Stevens, Justice Ginsburg, and Justice Thomas. Each justice wrote an individual opinion as to their reasons for dissenting from the majority opinion.

Justice Stevens did not address the Court's questionable analysis of the qualified immunity rule. He avoided the issue by stating the search was obviously outrageous.[109] His opinion, which was joined by Justice Ginsburg, noted that the Court was merely applying *T.L.O.* and not altering it in any way.[110] Next, in a restatement of his *T.L.O.* footnote,[111] he argued that a strip search of a thirteen-year-old student by school officials is clearly outrageous conduct.[112] Most interesting is Stevens's critique of the majority's qualified immunity reasoning and rule application. He absolutely rejected the proposition that courts should consider a split of authority in determining whether there existed settled law for qualified immunity purposes when the split arises from a Supreme Court decision: "[T]he clarity of a well-established right should

108. *Id*.

109. *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part).

110. *Id*.

111. *Supra* text accompanying note 38.

112. *Redding*, 129 S. Ct. at 2644 (Stevens, J., concurring in part and dissenting in part).

not depend on whether jurists have misread our precedents."[113] He points out that any time an authority split had been considered by the Court regarding qualified immunity, it was to prevent officials from having to "'predict the *future course* of constitutional law.'"[114] However, since this case was the straightforward application of *T.L.O.*, a rule already in existence, no new course was undertaken; consequently, a split of authority should have no impact on the Court's decision.[115]

Justice Ginsburg ardently argued that "Wilson's treatment of Redding was abusive and it was not reasonable for him to believe that the law permitted it."[116] She obviously agreed with the majority's finding that the search violated Savana's Fourth Amendment rights, but felt that the violation was extreme enough that qualified immunity should not be available to the school officials.[117] Rather than focus on the type of search, as Stevens had, Ginsburg based her dissent on the absolute lack of evidence that Savana was hiding pills on her body. She claimed the search should have ended with an inspection of Savana's backpack and jacket pockets, and that anything beyond that clearly violated *T.L.O.* by being "'excessively intrusive in light of the age and sex of the student and the nature of the infraction.'"[118]

Lastly, Justice Thomas wrote a lengthy opinion in which he argued that the *T.L.O.* standard, as applied by the majority, "impose[d] a vague and amorphous standard on school administrators. . . [and] grant[ed] judges sweeping authority to second-guess" administrators.[119]

III. QUALIFIED IMMUNITY HISTORY

A. § 1983 Actions

Today, § 1983 actions comprise the vast majority of civil rights actions filed in federal courts and form the "backbone of federal civil rights enforcement."[120] Tens of thousands of § 1983 actions are filed annually.[121] 42 U.S.C. § 1983 is a short statute that provides:

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113. *Id.* at 2645.

114. *Id.* at 2645 (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

115. *Id.*

116. *Id.* at 2646 (Ginsburg, J., concurring in part and dissenting in part).

117. *Id.*

118. *Id.* (quoting New Jersey v. T.L.O. 469 U.S. 325, 342 (1985)).

119. *Id.* at 2646 (Thomas, J., concurring in part and dissenting in part). Justice Thomas's opinion is not discussed in depth because this Note focuses on qualified immunity and he focused on the Fourth Amendment standard imposed by the Court. This is not meant to detract from the valid argument he posed.

120. RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS 14:7 (3d ed. 2009).

121. *Id.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[122]

Congress originally passed § 1983 in 1871. It was intended, as part of the Ku Klux Klan Act,[123] to provide a federal remedy for civil rights abuses when states failed to act.[124] However, the section was utilized very infrequently by litigants until the 1960s when the Court began to open the § 1983 door by broadly interpreting "actions taken 'under color of law'" in *Monroe v. Pape*.[125]

The *Monroe* Court reversed a dismissal of a § 1983 action.[126] Monroe alleged that thirteen Chicago police had broken into his home in the early morning without a search or arrest warrant.[127] They then made him and others stand naked in the living room while a thorough search of the home was conducted—which included "emptying drawers and ripping mattress covers."[128] After the search, Monroe was taken to the police station and questioned for ten hours; he was denied the opportunity to call a lawyer or family member.[129] After the questioning he was released, and no charges were ever filed against him.[130] In *Monroe*, the Court opened the door for future § 1983 actions by broadly defining actions "under color of law" as "actions taken by state government officials in carrying out their official responsibilities, even if contrary to state law."[131] It further encouraged future litigation by holding that plaintiffs can file a § 1983 action in federal court without first seeking redress through state remedies in state courts.[132]

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122. 42 U.S.C. § 1983 (2006).

123. Civil Rights Act of 1871 (Ku Klux Klan Act), ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)).

124. SMOLLA, *supra* note 120, at 14:2.

125. 365 U.S. 167, 186 (1961) (quoting H.R. REP. NO. 2187, 84th Cong., 2d Sess., p. 16.); MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1–2 (2d. ed. 2008). While only a handful of § 1983 cases were filed between 1871 and the 1960, the statute still had a huge impact on civil rights because *Brown v. Board of Education* was a § 1983 action. SMOLLA, *supra* note 120, at 14:2.

126. *Monroe*, 365 U.S. 167.

127. *Id*. at 170.

128. *Id*. at 169.

129. *Id.*

130. *Id.*

131. SCHWARTZ & URBONYA, *supra* note 125, at 2 (citing *Monroe*, 365 U.S. at 173–74).

132. *Id.*

Subsequent Supreme Court decisions have opened the § 1983 door further. In the late 1970s and early 1980s, the Court held that plaintiffs were not limited in bringing § 1983 actions against government officials, but could also bring the actions against the municipalities that employed the officials if the officials were carrying out an official policy[133] and if the officials acted in good faith.[134] During this time the Court also held that § 1983 actions could be filed for civil rights violations that occurred under color of federal law, thus allowing § 1983 actions based on actions by federal government actors.[135] The Court did eventually stop opening the § 1983 door by holding that there is no respondeat superior regarding municipalities; rather, a municipality can be liable under § 1983 only if its "'policy' or 'custom'" causes the injury.[136]

The Court was not the only government entity that strengthened § 1983. Congress also encouraged § 1983 actions by passing the Civil Rights Attorney Fees Award Act of 1976, which generally awards attorneys fees in successful § 1983 actions.[137]

It is interesting that the Rehnquist Court, which generally sought to restrict broad holdings from the Warren Court, did not place any significant restriction on § 1983 actions even though huge numbers of these actions were filed annually. A possible explanation for this anomaly was the Rehnquist Court's preference for civil remedies over the exclusionary rule as a remedy for Fourth Amendment violations.[138]

B. The Qualified Immunity Defense

Just as the Court opened the door to § 1983 civil rights actions, it also created an affirmative defense to these actions, namely qualified immunity.[139] The Court originally established the qualified immunity defense in the 1967 case *Pierson v. Ray*.[140] In *Pierson*, which was decided six years after the Court opened the § 1983 door in *Monroe*,

133. SCHWARTZ & URBONYA, *supra* note 125, at 2–3 (citing Monell v. N.Y. City Dep't of Soc. Serv.s, 436 U.S. 658 (1978)).

134. Smolla, *supra* note 125, at 14:2 (citing Owen v. City of Independence, 445 U.S. 622 (1980)).

135. *Id.* at 14:5 (citing Maine v. Thiboutot, 448 U.S. 1 (1980)).

136. Bd. of County Comm'rs v. Brown 520 U.S. 397, 403 (1997) (quoting *Monell*, 436 U.S. at 694) (providing a list of citations to plurality and concurring opinions to support the statement, "We have consistently refused to hold municipalities liable under a theory of *respondeat superior.")*.

137. 42 U.S.C. § 1988(b) (2006); Smolla, *supra* note 120, at 14:6.

138. This topic is not discussed at length in this paper, but I have written briefly on it elsewhere. Eric Clarke, Note, Lopez-Rodriguez v. Mukasey: *The Ninth Circuit's Expansion of the Exclusionary Rule in Immigration Hearings Contradicts the Supreme Court's* Lopez-Mendoza *Decision*, 2010 BYU L. REV. 51, 64–65.

139. Nancy Leong, *The* Saucier *Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 671 (2009).

140. 386 U.S. 547, 555 (1967); *see also* Leong, *supra* note 139, at 671.

fifteen clergymen were arrested in Mississippi after ignoring segregation signs in a bus terminal.[141] They were charged with congregating "in a public place under circumstances . . . that [may cause] a breach of the peace" and refusing to move "when ordered to do so by a police officer."[142] The clergymen were convicted in a bench trial, but on appeal a new trial was ordered.[143] In the subsequent trial all charges were dropped.[144] The clergymen brought a § 1983 action against the judge who convicted them and the arresting police officers.[145] A jury returned a verdict in favor of the judge and police officers.[146] The Fifth Circuit affirmed as to the judge, granting him absolute immunity, but reversed as to the officers.[147] The circuit court noted that subsequent to the arrest, but prior to this action, the Mississippi law allowing the arrest had been declared unconstitutional.[148] Thus, even though the law was in effect at the time of the arrest and the officers had been acting in good faith and the officers had probable cause, they were liable for a § 1983 violation.[149] The Supreme Court affirmed the judicial immunity but reversed the circuit court's ruling regarding the officers.[150]

The Court held that the affirmative defense of good faith and probable cause, which was available to police officers under the common law, was available in § 1983 actions.[151] The Court remanded for a new trial in which a jury was to determine if "the officers reasonably believed in good faith that the arrest was constitutional."[152] In *Pearson* the Court established a qualified immunity defense, though not explicitly calling it this, for police officers based on subjective good faith and probable cause—or in other words, on whether the officers had a reasonable, good faith belief that their action was constitutional.[153] In subsequent cases the Court provided two policy justifications for this early form of qualified immunity: first, it was to protect government officials from civil monetary actions when they acted in good faith, and second, it sought to

141. 386 U.S. 547, 549.

142. *Id.* at 549 (footnote omitted).

143. *Id.* at 549–50.

144. *Id.* at 550.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 550–51. The circuit court avoided such an unjust outcome in this case by ordering a new trial due to bias-creating questioning of the clergy witnesses, which had been allowed, and by holding that if a jury found the clergymen had gone to Mississippi planning on being arrested, then they would have waived any claim of unlawful arrest. *Id.* at 551.

150. *Id.* at 557–558.

151. *Id.* at 557.

152. *Id.*

153. Pearson v. Callahan, 129 S. Ct. 808, 822–23 (2009).

ensure that officials were not prevented from executing their "office[s] with the requisite decisiveness and judgment"—or to prevent a "chilling effect" on decision-making due to fear of losing one's personal property.[154]

However, the Court eventually rejected the subjective good-faith prong of qualified immunity analysis and began justifying qualified immunity on the policy of resolving "'insubstantial claims' against government officials . . . prior to discovery."[155] In its 1982 decision *Harlow v. Fitzgerald*,[156] the Court fundamentally changed qualified immunity by establishing a purely objective test.[157] By the time *Harlow* was decided, qualified immunity was an established doctrine that applied broadly to government officials and not solely to police officers.[158] When *Harlow* was argued the qualified immunity test had an objective and subjective prong. The objective prong was whether the government official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."[159] The subjective prong was whether the official "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."[160]

In *Harlow* the Court addressed whether qualified immunity was proper for aides to President Richard Nixon in an action for unlawful termination brought by an Air Force Officer.[161] The aides argued that in order for qualified immunity to successfully allow "'insubstantial lawsuits to be quickly terminated,'"[162] specifically prior to trial, the subjective good-faith prong of the qualified immunity test must be eliminated.[163] The Court agreed. It eliminated good faith as a policy justification of qualified immunity, stating that qualified immunity sought to balance the need of allowing a "realistic avenue for vindication

154. Nicole B. Lieberman, Note, *Post*-Johnson v. Jones *Confusion: the Granting of Back-Door Qualified Immunity*, 6 B.U. PUB. INT. L.J. 567, 568–69 (1997) (citing Scheuer v. Rhodes, 416 U.S. 232, 241 (1974)).

155. Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

156. 457 U.S. 800 (1982).

157. Leong, *supra* note 139, at 672 (citing *Harlow*, 457 U.S. at 815–16, 818).

158. *Harlow*, 457 U.S. at 807 ("For executive officials in general, however, our cases make plain that qualified immunity represents the norm.").

159. Wood v. Strickland, 420 U.S. 308, 322 (1975) (applying qualified immunity to school board members), *quoted in Harlow*, 457 U.S. at 815.

160. *Id.*, *quoted in Harlow*, 457 U.S. at 815.

161. *Harlow*, 457 U.S. at 802. The Court also addressed whether absolute immunity was proper. *Id.*

162. *Id.* at 814 (quoting Butz v. Economou, 438 U.S. 478, 507 (1978)) (internal brackets omitted).

163. *Id.* at 814–15.

of constitutional guarantees"[164] against the various social costs accrued when suit is brought against government officials, namely "expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office[, and] . . . 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.'"[165] The Court rejected the good-faith prong because, as a question of fact, it prevented qualified immunity from being applied early on in summary judgments and because broad and distracting discovery was often required to prove good or bad faith.[166] Thus, the Court held that to establish qualified immunity, a government official only had to establish that her conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[167]

The *Harlow* decision required that the Court redefine the justifications for the qualified immunity defense. Before *Harlow*, qualified immunity was often referred to as "good faith" immunity,[168] and *Harlow* was significant because it abandoned the subjective element of qualified immunity. What is often overlooked is that the Court had to completely redefine the policy justifications for qualified immunity in abandoning its subjective element. The *Harlow* Court essentially stated that qualified immunity was principally meant to prevent government distraction from baseless lawsuits by facilitating early dismissal of such actions.[169] This policy has been cited by the Court in subsequent cases and remains the principal justification for qualified immunity.[170] Thus, rather than merely protect government actors from having to pay civil damages, qualified immunity is meant also to protect them from having to mount time-consuming defenses to civil actions. It is "an entitlement not to stand trial or face the other burdens of litigation" and thus provides "an immunity from suit rather than a mere defense to liability."[171]

C. Saucier v. Katz*: Sequencing and Reasonableness*

164. *Id.* at 814 (citing *Butz*, 438 U.S. at 506).

165. *Id.* at 814 (internal brackets omitted) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

166. *Id.* at 816–17.

167. *Id.* at 818.

168. *Id.* at 815.

169. *See id.* at 814–15.

170. *See, e.g.*, Saucier v. Katz, 533 U.S. 194, 202 (2001) ("[T]he goal of qualified immunity [is] to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" (quoting *Harlow*, 457 U.S. at 818)).

171. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (italics omitted), *quoted in Saucier*, 533 U.S. at 200–01.

The test for qualified immunity has not changed since *Harlow*,[172] but the Court has taken efforts to protect the policy established in *Harlow* and ensure that judges can apply qualified immunity early on in litigation.[173] For two decades following *Harlow*, the Court struggled with the question of whether the two prongs that currently comprise the qualified immunity test must be analyzed in any particular order.[174] The Court reached the conclusion to this question in *Saucier v. Katz* by stating that qualified immunity had a two-prong test that must be applied in order. The first prong is whether "the facts alleged show the [government official's] conduct violated a constitutional right."[175] Then, only if that prong is met, the court should ask whether the constitutional right was clearly established, or in other words "whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation."[176] This second prong boils down to whether the official was put on notice by existing law that her act was unlawful.

While the Court based this sequencing requirement on the need to clarify the law regarding the violation of constitutional rights in order to put officials on notice, the decision did not explicitly state this rational. Interestingly, even though prior cases had hinted at sequencing and a circuit split existed over whether there was a mandatory sequence,[177] the Court only dedicated one paragraph to establishing and justifying the sequencing rule.[178] It merely stated that sequencing was necessary and "one reason" supporting sequencing was "the law's elaboration from case to case."[179] No other justifications were given. This single reason has been widely accepted as the policy justification.[180] In order to put

172. In the 2009 decision of *Pearson v. Callahan*, the Court quoted the holding from *Harlow* as the qualified immunity rule. 129 S. Ct. 808, 815 (2009) ("The doctrine of qualified immunity protects government officials '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.'" (quoting *Harlow*, 457 U.S. at 818)).

173. *See* discussion *infra* Part III.C.

174. *See* Leong, *supra* note 139, at 672–73.

175. *Saucier*, 533 U.S. at 201.

176. *Id.* at 202.

177. *See* Leong, *supra* note 139, at 672–73.

178. *Saucier*, 533 U.S. at 201.

179. *Id.*

180. *See, e.g.*, Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 58 (2008) ("[T]he Court has trumpeted, often explicitly, the importance of norm-announcement over the competing principle of constitutional avoidance, focusing on the value of creating clear rules to guide lower courts and public officials . . . ."); *see also* Pearson v. Callahan, 129 S. Ct. 808, 816 (2009) ("This two step procedure, the *Saucier* Court reasoned, is necessary to support the Constitution's 'elaboration from case to case' and to prevent constitutional stagnation. 'The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.'"

government officials on notice, courts need to establish the law by making determinations of what conduct is unconstitutional.[181]

While *Saucier* is generally only cited for its sequencing rule, the bulk of the decision addresses whether qualified immunity is applicable as a separate standard when the overarching issue of a case is the reasonableness of a government official's actions.[182] In *Saucier*, Katz was arrested and alleged undue force was used when he was shoved into a police van.[183] The district court denied the government's argument that qualified immunity required summary judgment on the excessive force claim. The Ninth Circuit affirmed.[184] It held that because an officer's use of excessive force was governed by a reasonableness standard (whether the force was reasonable in the situation) and qualified immunity also relies on a reasonableness standard in its second prong ("if a reasonable officer could have believed, in light of the clearly established law, that his conduct was lawful"), then the reasonableness at issue in both rules was identical. Because it was the basis for the cause of action, a jury should decide the reasonableness question.[185] This holding by the Ninth Circuit consequently implied that qualified immunity would not be grounds for summary judgment any time an excessive-force claim was brought before a court.

The Supreme Court reversed the Ninth Circuit.[186] Six justices agreed that qualified immunity was still applicable in instances when the cause of action at issue turned on the reasonableness of the defendant's actions.[187] Justice Kennedy, writing for the Court, explained that reasonableness regarding excessive force was governed by a test that balanced several factors,[188] but reasonableness regarding qualified immunity asked the separate question of whether the officer had a reasonable misunderstanding of the law.[189] Thus, under the second prong of qualified immunity, a judge is to determine whether the government official who violated a constitutional right did so because, due to a reasonable misunderstanding of the law, she thought her action was lawful.[190]

(quoting *Saucier*, 533 U.S. at 201) (internal citations omitted)).

181. *See supra* note 180.

182. *Saucier*, 533 U.S. at 197–216 .

183. *Id.* at 198.

184. *Id.* at 199.

185. *Id.* at 199–200.

186. *Id.* at 196

187. *Id.*

188. *Id.* at 205.

189. *Id.* at 202–04.

190. This could be termed the "objective legal reasonableness" test. *See* Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal

Justices Ginsburg, Stevens, and Breyer dissented. Justice Ginsburg argued that qualified immunity and excessive force "both hinge on the same question," and the Court's decision "holds large potential to confuse" lower courts.[191] She disagreed with the Court's splitting of objective reasonableness into two parts, where the legality of the act applies to qualified immunity and is separate from the actual action taken. She would have rather held that the two-part qualified immunity test outlined in prior cases was inapplicable to excessive-force cases.[192]

The Court recently overturned the *Saucier* sequencing in *Pearson v. Callahan*.[193] In this unanimous decision the Court rejected mandatory sequencing of the qualified immunity prongs.[194] Otherwise, *Pearson* does not discuss qualified immunity in detail. The Court relied on the second prong of the qualified immunity test to hold that police officers did not violate clearly established law when they entered a residence without a warrant based on the consent-once-removed doctrine, which had already been adopted in other jurisdictions but not yet by the Supreme Court.[195] The Court has not addressed the reasonableness issue from *Saucier* in subsequent decisions.

D. Qualified Immunity Today

A summary of qualified immunity as the rule currently exists will be helpful before moving on to discuss why it does not fit with the school search rule established in *T.L.O.* and *Safford*. Today, qualified immunity protects government officials from suit and civil liability if they have not been given constructive notice that any particular action is unlawful.[196] Because it offers protection from suit, government officials can immediately file an interlocutory appeal when summary judgment is denied on qualified immunity grounds.[197]

Qualified immunity provides protection from the "'hazy border'" between permitted and unlawful conduct.[198] The general rule is that qualified immunity protects government officials if "'their conduct does not violate clearly established statutory or constitutional rights of which a

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reasonableness' of the action . . . ." (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982))).

191. *Saucier*, 533 U.S. at 210 (Ginsburg, J., concurring).

192. *Id.* at 214.

193. 129 S. Ct. 808 (2009).

194. *Id.* at 818.

195. *Id.* 822–23.

196. *Saucier*, 533 U.S. at 206; *See Pearson*, 129 S. Ct. at 815. The term "constructive" is not used in the Supreme Court cases, but I use it here because it accurately portrays the rule.

197. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1945 (2009).

198. Priester v. Riviera Beach, 208 F.3d 919, 926–27 (11th Cir. 2000) (quoting Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997), *quoted in Saucier*, 533 U.S. at 206.

reasonable person would have known.'"[199] The rule has been broken down into two prongs. The first prong is whether "'the facts alleged show the officer's conduct violated a constitutional right.'"[200] The second prong is "'whether the right was clearly established . . . in light of the specific context of the case.'"[201] The actual test used to determine the second prong is "the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'"[202] Judges can determine which prong to address first.[203] Generally, this will only matter when one of the prongs dictates that qualified immunity should be granted, in which instances a judge may grant summary judgment after only analyzing that specific prong.

IV. THE DOUBLE REASONABLENESS STANDARD IS INAPPLICABLE IN SCHOOL SEARCHES

A. The T.L.O. *Reasonableness Standard*

1. The Court has correctly determined that probable cause is not the appropriate standard for school searches

In *T.L.O.*, the Court correctly established a reasonableness standard to govern school searches rather than probable cause. While school searches are generally conducted by administrators, there are times when it may be preferable for a teacher to conduct the search. It would be absolutely unrealistic to expect teachers to remain abreast of probable cause law because the law is complex and changes regularly. Indeed, law students spend the bulk of the criminal procedure course studying probable cause and reasonable suspicion under the Fourth Amendment. Peace officers undergo a similar, extensive training regarding probable cause and Fourth Amendment standards; they also must receive continuing education because this area of the law regularly changes.[204] The judiciary expects police officers to remain familiar with probable cause law because they apply the probable cause standard to their decisions on a regular basis.[205] School teachers and, to a lesser extent,

199. *Pearson*, 129 S. Ct. at 815 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

200. Scott v. Harris, 550 U.S. 372, 377 (2007) (quoting *Saucier*, 533 U.S. at 201).

201. *Id.* (quoting *Saucier*, 533 U.S. at 201).

202. *Pearson*, 129 S. Ct. at 822. (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).

203. *Id.* at 818.

204. Chief Ken Wallentine, Lecture at BYU Law School (on or about October 6, 2009).

205. *See, e.g.*, Lopez-Rodriguez v. Mukasey 536 F.3d 1012 1016–19 (9th 2008) en banc (holding that officers had egregiously violated the Fourth Amendment by entering the residence of a suspected undocumented immigrant because of case law establishing the unconstitutionality of searches and seizures inside a home). *But see* Illinois v. Gates 462 U.S. 213, 235 (1983) ("Likewise,

administrators, on the other hand, cannot be expected to remain aware of Fourth Amendment search standards. They do not undergo an extensive training on the subject, and may not receive any training on the Fourth Amendment in their preparatory studies to earn a teaching certificate.[206] Teacher training should focus on other areas that will improve students' educational experiences. Teachers should not have to spend time learning Fourth Amendment law—especially in continuing education situations where time in seminars replaces time in the classroom with students. However, if the law did require that teachers remain abreast of Fourth Amendment law, some continuing education would have to be devoted annually to this subject. Dedicating such valuable continuing education time to Fourth Amendment law would negatively impact students by eliminating more necessary and useful training opportunities for teachers.

Because the majority of school searches are conducted by school administrators, proponents of a higher school search standard may argue that the ever evolving reasonable suspicion, or even probable cause, are appropriate standards for school searches. After all, administrators are expected to follow changes in the law much more closely than teachers, and they are required generally to take a class that covers students' First and Fourth Amendment rights before earning an administrator certificate.[207] Furthermore, in conferences administrators have the opportunity to discuss current legal matters with one another.[208]

This argument fails because school search law would still apply to teachers in addition to administrators. As long as teachers are able to conduct searches—which is necessary due to the many possible scenarios that can arise in modern classroom—reasonableness and not probable cause should be the standard. Courts could adopt a lower standard for teacher searches than school administrator searches;[209] however, such a standard would be very difficult to apply due to the difficulty of classifying some staff members as either administrators or teachers. Furthermore, this proposed rule may encourage teachers, who

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search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'"). The fact that the *Gates* Court held police officers to a lower standard speaks to the slippery slope that threatens § 1983 actions if some government employees are given increased protections under qualified immunity than those traditionally given to law enforcement.

206. For example, as a former elementary school teacher, I never received any training on the subject.

207. *See, e.g.*, ARIZONA DEP'T OF EDUC. – CERTIFICATION UNIT, REQUIREMENTS FOR PRINCIPAL CERTIFICATE, PREKINDERGARTEN – 12, pt. 6, *available at* http://www.ade.state.az.us/certification/requirements/admin/RequirementsforPrincipalCertificate.pdf (requiring at least three credit hours of school law).

208. Professor Scott Ellis Ferrin, Lecture at BYU Law School (on or about October 21, 2009).

209. This alternative was originally made by Professor Scott Ellis Ferrin of BYU.

would have higher protections, to conduct searches rather than having better trained administrators conduct them.

2. The T.L.O. *Court correctly concluded that common sense reasonableness is the appropriate standard for school searches*

The *T.L.O.* Court also correctly defined reasonableness for school search purposes as "the dictates of reason and common sense."[210] The Court could have defined reasonableness in school searches as reasonable suspicion. While the Court did provide a specific two-prong test ("whether the . . . action was justified at its inception . . . [and] whether the search as actually conducted was reasonably related in scope to the circumstances which justified" the search[211]), it did not state that "reasonable suspicion" was required.[212] Reasonable suspicion is a term of art in Fourth Amendment law and has its own set of standards that, like probable cause, are often altered or adjusted by the courts.[213] By requiring reasonableness defined by "common sense" rather than reasonable suspicion as defined by the courts, the *T.L.O.* Court affirmed the policy that school officials should not be expected to follow the intricacies of Fourth Amendment law.[214]

B. The Second Prong— Reasonableness Prong—of the Qualified Immunity Test Directly Contradicts the Reasonableness Required in T.L.O.

Qualified immunity does not fit with *T.L.O.* because qualified immunity looks at whether the law effectively put the government actor on notice that her actions would violate a constitutional right, while *T.L.O.* rejects the notion that teachers should be required to remain abreast of the law.[215] Consequently, teachers could never be put on notice by the law and will always be protected by qualified immunity.

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210. New Jersey v. T.L.O., 469 U.S. 325, 343 (1985).

211. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)) (internal quotation marks and citation omitted).

212. *Id.* at 342.

213. *See, e.g.*, Arizona v. Gant, 129 S. Ct. 1710, 1721 (2009) (holding that reasonable suspicion of dangerousness is the appropriate standard for vehicle searches and rejecting the previous bright-line rule of always allowing searches of a vehicle incident to an arrest).

214. *T.L.O.*, 469 U.S. at 343.

215. The Court has used common sense in other school law areas rather than more formalistic legal approaches. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 583 (1975) (referring to its holding that some, minimal due process is due to students suspended from school for less than ten days as "requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions").

This changes qualified immunity into absolute immunity in school search cases.

The second-prong of the qualified immunity test does not explicitly rely on reasonableness; it addresses whether the constitutional right at issue was clearly established to the extent that the official was put on notice that her actions would be unlawful.[216] However, the test used to apply this prong is whether a reasonable official would have been aware of the unlawfulness of the action.[217] Thus, we can refer to this as a reasonable awareness of the current state of the law.

On the surface qualified immunity reasonableness (which looks at the actor's awareness of the law) and school search awareness under *T.L.O.* (which looks at common sense) are based on different standards and do not conflict. The situation is the same as it was in *Saucier*, where the Court held that two reasonableness tests could be applied because they were based on different considerations.[218] In light of the clear differences between the reasonableness standards, it is no wonder that none of the opinions in *Safford* addressed whether there was any conflict between the qualified immunity and *T.L.O.* standards.

However, the qualified immunity reasonableness standard directly conflicts with the *T.L.O.* reasonableness standard because it requires school officials, to some extent, to be aware of the status of the law. But *T.L.O.* was based on the policy of not requiring school officials to remain abreast of the law. *T.L.O.* absolutely relies on the need to have a standard which teachers can be held accountable, without having to require Fourth Amendment trainings. Yet, qualified immunity is based on reasonable awareness of the current status of Fourth Amendment law.

C. Reasonable Plus Reasonable Equals an Excuse for Unreasonable Actions

When the two reasonable tests from *T.L.O.* and qualified immunity are considered together they lead to a near-absolute immunity for school officials who conduct searches. In applying the second prong of qualified immunity to school actors, who are not expected to be aware of changes in the law, courts can only conclude that a reasonable awareness of the law is virtually no awareness at all. Thus, qualified immunity will almost always be granted. The only instances where school officials would not be granted immunity would be when facts were analogous to cases that are so well publicized that it would be reasonable to hold a school

216. *Supra* notes 197–201 and accompanying text.

217. *Supra* note 166 and accompanying text.

218. *Supra* note 165 and accompanying text.

official accountable. *Safford* may be an example of this as it has been well publicized due to the extreme facts. Thus, it could be expected for a principal to know it is now unconstitutional to (1) order a strip search (2) of a junior high student (3) searching for ibuprofen (4) when there is no evidence the student *currently* has any pills hidden on her body. In contrast, it is totally unrealistic to expect *teachers* to be aware of this new rule in school law because the vast majority of them do not follow Supreme Court decisions that affect school law.

V. THE UNFORESEEN CONSEQUENCES OF A DOUBLE REASONABLENESS STANDARD: CHILLING FUTURE LAW SUITS

A possible dire consequence of the double reasonableness standard is a chilling of the impetus to file § 1983 suits against school officials. If lower courts accept Justice Stevens's statement in his concurrence that the Court is merely applying *T.L.O.* and not changing it in any way,[219] then the double reasonableness standard still applies, rather than reasonable suspicion, and it will be virtually impossible for a plaintiff to overcome qualified immunity.

The Court held in *Safford* that qualified immunity protected the school officials; thus, the school officials were not expected to apply the *T.L.O.* test and reach the same conclusion as *eight* members of the Court—that the strip search was unreasonable. Consequently, it appears that qualified immunity will generally provide immunity to any school official unless (1) the facts of a case are extremely close to a prior case where the action was held to be unconstitutional and (2) the prior case is so widely known that it would be unreasonable for a school official to not be aware of it. *Safford* is the only Supreme Court school search case where a search was held unreasonable. Perhaps there are a handful of circuit court cases that would be widely enough publicized in their jurisdictions that teachers could be held accountable under the double reasonableness standard. However, the vast majority of possible school search scenarios are not covered by such case law. Thus, a § 1983 action seeking damages for any novel school search will end with the district court granting qualified immunity, and the plaintiff being left with no viable argument to make on appeal.

Such decisions in cases with novel fact scenarios will have a chilling effect on future § 1983 actions. First, and most importantly, the high probability that school officials will be granted qualified immunity gives plaintiffs a small likelihood of success. Consequently there is extremely little incentive to pursue a lawsuit. Perhaps some plaintiffs seek some

219. *Supra* note 84 and accompanying text.

emotional vindication rather than monetary damages. It is possible that such plaintiffs would be willing to pay the costs and fees of a lawsuit in hopes of getting a judge to rule that the action was unlawful under the first prong of qualified immunity even if the second prong will prevent the recovery of any damages. However, even this is unlikely because after *Pearson*, courts are no longer required to consider the constitutionality of the action at issue if it is clear the defendant's misunderstanding of the law was reasonable—which will almost always be the case with the double reasonableness standard. Thus, judges will likely simply find that qualified immunity applies based on the second prong of the test and not reach any decision regarding the first prong.

Furthermore, the filing of future lawsuits will be chilled because any appeal of a decision to grant qualified immunity must overcome the daunting double reasonableness standard. If qualified immunity should clearly be granted because it provides near-absolute immunity to school officials who are not expected to know the current status of the law, then appellate courts will simply affirm the lower judge's decision and not address the constitutionality of the action at issue.

Not only will this prevent the plaintiff from obtaining damages, but more importantly, affirming based on the second prong of qualified immunity will prevent future case law from being formed. For example, if the Court had merely addressed the second prong of qualified immunity in *Safford*, then we would not have case law declaring the type of search that occurred in *Safford* unlawful. And, if the trial courts only address the second prong, then the appellate courts will not be able to review the constitutionality of the act, the first prong, because there would be nothing to review.

VI. *SAFFORD* MAY FURTHER COMPLICATE THE ISSUE RATHER THAN SOLVE IT

The preceding section assumed that Justice Stevens was correct in his *Safford* concurrence—*Safford* in no way "altered the basic framework" of *T.L.O.*[220] This section addresses a different conclusion—that *Safford* significantly changed *T.L.O.* by establishing *Terry*-type reasonable suspicion rather than common sense reasonableness as the standard school officials are held to in school search cases. Presumably Justice Stevens feared such an interpretation and thus dedicated the first two paragraphs of his concurrence to emphatically stating that *Safford* does not change *T.L.O.* If we accept, though, that *Safford* does create a new standard (and thus find Stevens's concurrence divergent from the

220. *Supra* note 84 and accompanying text.

majority decision), then the Court has resolved the issue of near-absolute immunity for school officials. But under *this* reading, the Court distances itself from *T.L.O.*'s policy of not requiring teachers to remain abreast of the status of Fourth Amendment law. If this is true, then the holding effectually rejects this policy by (1) adopting a complex legal standard of reasonable suspicion rather than common sense and (2) using other circuit's strip search cases to determine whether Wilson should be granted qualified immunity in a way that would require Wilson to have been aware of these cases in order to be aware what law was going to be applied to him.

A. Safford *Failed to Follow the "Common Sense" Reasonable Standard from* T.L.O.

Justice Souter, in writing for the *Safford* majority, failed to quote the "common sense" reasonableness standard from *T.L.O.* Rather, he interpreted *T.L.O.* as having applied some form of the "reasonable suspicion" standard.[221] In an open acknowledgement that this is a complicated standard, Justice Souter devoted the two paragraphs immediately following the statement of this rule to stating that the Court has "attempted to flesh out the" standard in "[a] number of our cases," but has failed to do so and thus reverted "to saying that the standards [of reasonable suspicion] are 'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed."[222] He next attempted to define reasonable suspicion for school searches—even though he had just finished describing it as indefinable—"as a moderate chance of finding evidence of wrongdoing."[223]

Consequently, it is now unclear to what standard teachers are to be held. Is it (1) common sense of a reasonable teacher, (2) reasonable suspicion under *Terry*, or (3) "a moderate chance of finding evidence of wrongdoing"?[224] Rather than clarify and provide an example of how the *T.L.O.* common sense reasonableness standard was to be applied, the Court in *Safford* muddied the water by providing two potential standards for courts to use, common sense reasonableness and reasonable suspicion. If courts use the reasonable suspicion standard and the *Terry* line of cases, then the double reasonableness problem may be solved. However, school officials would then be required, under the second prong of qualified immunity, to have some awareness of reasonable suspicion law.

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221. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633, 2639 (2009).

222. *Id.* (quoting Ornealas v. United States, 517 U.S. 690, 696 (1996)).

223. *Id.*

224. *Id.* at 2638.

B. Basing Qualified Immunity on Case Law from Other Circuits

The fact that the Court cited other circuit cases to justify granting qualified immunity may lead lower courts to believe that the Court has abandoned common sense reasonableness and rather is going to hold school officials to the higher standard of the current status of the law. *Safford* was a Ninth Circuit case, but the Court relied on cases from the Sixth and Eleventh Circuits. The Court held that the law was unsettled because other circuits (and a minority of judges in the Ninth Circuit en banc *Safford* decision) felt that the strip search was reasonable under *T.L.O.*

Using cases from around the country to address the qualified immunity question necessarily implies that school officials are expected to have a considerable awareness of the status of the law. As stated earlier, the *T.L.O.* Court got it right when it based its holding on the policy that teachers cannot be expected to remain abreast of current case law. To rely on circuit court cases outside of the jurisdiction of Safford School District all but eviscerates the *T.L.O.* policy. The reason to look to other case law in qualified immunity analysis is not to determine the current state of the law, but rather to determine if the government actor defendants should have been reasonably aware of the current law.[225] By relying on the Sixth and Eleventh Circuit cases, the Court has opened the door for future courts to reject a qualified immunity defense because of agreement among other circuits—even if the circuit governing the school district has no case law on the issue. Not only would such decisions completely reject the policy of not requiring extensive knowledge of the law, but they would also be unjust because teachers simply cannot be expected to follow the law in other circuits.

VII. THE TWO OPTIONS CURRENTLY AVAILABLE

Courts have two available options to resolve the issues left unclear by *Safford*. First, lower courts could conclude that the Court has abandoned common sense reasonableness and hold teachers and school administrators to the reasonable suspicion standard. However, as this Note has continually repeated, it defies common sense to expect teachers to remain abreast of Fourth Amendment reasonable suspicion law and know how the cases, which most commonly surround law enforcement activities, should apply to school searches.

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225. *Supra* Part III.C.

Thus I propose a second and more viable option. The Supreme Court should accept another school search case to clarify the law by granting teachers absolute immunity in school searches. Alternative remedies exist to protect primary-school children's Fourth Amendment rights, and § 1983 actions are not as necessary as they are in law enforcement or other administrative spheres; school boards often face intense political pressure from disgruntled parents and this pressure often impacts decisions made by the school board, the superintendent, and school principals. Thus, a better remedy than seeking monetary damages directly from teachers or administrators is to implement formal reprimand procedures. This is an efficient remedy because school districts routinely call and speak with previous employers of school officials. Once a teacher is fired for extremely questionable conduct, it is unlikely that teacher will find other work in the education profession.[226] Because there is this alternative remedy, the Court, or Congress, would be justified in granting teachers absolute immunity in § 1983 actions regarding the Fourth Amendment.

Granting absolute immunity, and calling it absolute immunity, is the right course of action because of the damage that results from the alternative. Calling qualified immunity plus, which results from the double reasonableness standard, mere qualified immunity increases the protections of qualified immunity to such an extent it begins to weaken student civil rights protections.

VIII. CONCLUSION

The *T.L.O.* common sense reasonableness standard, when combined with the reasonableness prong in the affirmative defense of qualified immunity grants teachers a near-absolute immunity. This is because qualified immunity is based on a reasonable understanding of the law, and under *T.L.O.*, school officials are not expected to have any understanding of the law. They cannot be put on notice by the law because they are not expected to know it. The consequences are that school officials are almost completely immune from § 1983 actions regarding Fourth Amendment searches and that any filing of future actions will be chilled by this immunity.

However, *Safford* may change the rule from common sense reasonableness to *Terry*-like reasonable suspicion. This would solve the near-absolute-immunity problem, but would also be bad law because it would unrealistically expect school officials to remain abreast of Fourth

226. This assumes that school districts contact previous employers of teachers applying for new jobs.

Amendment law. Following this track could lead to school officials being held liable for Forth Amendment violations in instances where circuit courts on the other side of the country had established case law that decreed the officials' actions unconstitutional. Such a high level of liability would be destructive to the education field and is the opposite of what the Court sought to establish in *T.L.O.*

It is now unclear how the new standard for school searches will affect qualified immunity. The best solution is to grant school officials absolute immunity regarding school searches. However, as this is an option open only to the U.S. Supreme Court or Congress. What will likely occur is that lower courts will struggle and the law will become unclear. Some courts will still apply the *T.L.O.* standard and school officials before such judges will receive near-absolute immunity. Other courts will likely apply reasonable suspicion, and in applying qualified immunity will look to the ruling of circuit courts from across the country. These judges will hold school officials to unrealistically high standard. Thus, eventually the Supreme Court will be forced to re-address this issue and hopefully will devise a clearer rule that can be applied uniformly across the nation.

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