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Abstract

Police officers stationed in public schools, commonly referred to as school resource officers (SROs), have become commonplace in the United States over the past twenty-five years. Their primary responsibility is to maintain order and safety in schools, but they also serve as counselors and mentors for students, and teach classes related to drug and alcohol abuse, gang avoidance, and other topics. SROs' presence in schools raises important legal questions because they interact with students on a daily basis and are directly involved in schools' efforts to control student behavior through school discipline and security. Additionally, a series of Supreme Court decisions has created an environment of limited rights for students in America's public schools, which is compounded by the heightened security environments found in the majority of schools. Amidst this environment, it is important to consider whether students have any recourse if SROs take actions that seemingly infringe on students' rights. This article seeks to address this specific question by analyzing students' civil rights claims against SROs under Section 1983. The available case law demonstrates that the involvement of SROs in school discipline matters can quickly escalate these situations to include aggressive, physical confrontations and arrests for relatively minor misbehavior. Yet, Section 1983 rarely provides students with viable civil rights claims against SROs, even when the SROs' behavior seems egregious. These cases lend strong support to scholars and advocates' concerns that the use of SROs, along with other heightened school security and punitive discipline measures,

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"criminalizes" public school students. They also demonstrate that changes in the ways SROs operate in schools are needed to protect students' rights.

Keywords: education law, school discipline, civil rights, school resource officers

> *If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen-year-old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention.*[2]

I. Introduction

Over the past two decades, school resource officers (SROs) have become commonplace in American public schools.[3] SROs are trained police officers stationed in schools, typically pursuant to an agreement between school districts and the officers' police departments.[4] Their primary responsibility is to maintain order and safety in schools, but they are also asked to serve as counselors and mentors for students, and to teach classes related to drug and alcohol abuse, gang avoidance, and other topics.[5] SROs' presence in schools raises important legal questions because they interact with students on a daily basis, and are directly involved in schools' efforts to control student

2. A.M. *ex rel* F.M. v. Holmes, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J., dissenting) (arguing in dissent that the school resource officer's actions were not protected by qualified immunity against a civil rights claim by the arrested student).

3. *See infra* Part I.

4. SROs are sometimes referred to as school liaison officers, school security officers, or other designations. Importantly, they are distinct from security guards employed directly by schools or school districts, though similar designations are sometimes used to refer to security personnel in these roles. SROs are employed by police departments, are answerable to their police supervisors, and operate within the confines of the agreement between their police departments and the schools/school districts in which they are stationed. *See, e.g.*, Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. CRIM. JUST. 591 (2006).

5. *See, e.g.*, Mark Keierleber, *Why So Few School Cops are Trained to Work with Kids*, THE ATLANTIC (Nov. 5, 2015), http://www.theatlantic.com/education/archive/2015/11/why-do-most-school-cops-have-no-student-training-requirements/414286/. For a discussion of the increased use of SROs over the past 25 years, see *infra* Part I.

behavior through school discipline and security efforts.[6]

Additionally, students' rights are significantly curtailed in schools because of a desire to maintain safety and order, which alters the legal rules that guide these frequent interactions.[7] A series of Supreme Court decisions has created an environment of limited rights for students in America's public schools.[8] This includes limited free speech rights, limited rights against searches and seizures, other limits on student privacy, and differing interrogation rules. The effect of these limited rights is compounded by the heightened security environments found in the majority of schools, including closely monitored student movements, strict dress codes, strict behavioral expectations, and other security apparatuses and policies.[9]

Prior legal scholarship has explored how this environment of limited rights and heightened security affects students' rights in their interactions with SROs, such as SROs' searches and interrogations of students.[10] Elizabeth Shaver and Janet Decker recently conducted a detailed analysis of interactions between SROs and students with disabilities, including a review of recent lawsuits filed against SROs by such students based on several

6. *See*, *e.g.*, *School Resource Officers*, NAT'L SCH. SAFETY & SECURITY SERVS., http://www.schoolsecurity.org/resource/school-resource-officers/ (last visited Mar. 19, 2018) [hereinafter *School Resource Officers*]; *What is a School Resource Officer?*, COPS: COMMUNITY ORIENTED POLICING SERVS., https://cops.usdoj.gov/supportingsafeschools (last visited Mar. 19, 2018).

7. *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 124 (2004). For a complete discussion of students' diminished rights in schools, see *infra* Part II.

8. *See, e.g.*, Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336 (2003); Chemerinsky, *supra* note 7, at 124-31; Barry C. Feld, *T.L.O and Redding's Unanswered (Misanswered) Fourth Amendment Questions: Few Rights and Fewer Remedies*, 80 MISS. L.J. 847, 950 (2011).

9. *See, e.g.*, AARON KUPCHIK. HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR 2-3 (2010); Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA,* 12 THEORETICAL CRIMINOLOGY 79 (2008).

10. *See* Elizabeth A. Bradenburg, *School Bullies - They Aren't Just Students: Examining School Interrogations and the Miranda Warning*, 59 MERCER L. REV. 731 (2008); Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39 (2006); Peter Price, *When is a Police Officer an Officer of the Law: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541 (2009).

different legal theories.[11] Yet, beyond students with disabilities, investigations of students' potential legal remedies against SROs who may have infringed on their rights have been rare.[12]

This article seeks to address this specific question by analyzing students' civil rights claims against SROs under Section 1983.[13] The analysis demonstrates that students' potential civil rights remedies against abuses by SROs are quite limited because of the considerable leeway provided to SROs in their interactions with students by existing student rights jurisprudence. Additionally, SROs' dual roles as law enforcement officials and school administrators have made their legal status in their interactions with students unclear. This significantly undermines students' abilities to pursue Section 1983 claims against SROs because the SROs can raise the qualified immunity defense, which defeats Section 1983 claims when the government officials' actions do not clearly violate established rights. Additionally, because applicable laws and school rules are particularly controlling of student behavior, SROs can more readily justify their more aggressive and antagonistic interactions with students.

In addition to analyzing civil rights claims against SROs under Section 1983, this article will also explain the roles of SROs in schools, the reasons for their increased presence in schools, and their place among other heightened security and strict discipline policies that have infiltrated America's public schools over the past twenty-five years. It will then detail the various ways in which student rights are limited in schools, including how these limitations affect interactions between SROs and students. Then, the article will explore Section 1983

11. Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader? Interactions Between School Resource Officers and Students with Disabilities*, 2017 UTAH L. REV. 229.

12. The only exception to this is the work of Barry Feld, who notes that the Supreme Court's jurisprudence on student's rights against unreasonable searches has significantly curtailed students' ability to recover under Section 1983 when they are searched. *See* Feld, *supra* note 8, at 950.

13. This article will focus on federal civil rights claims. Notably, there are a variety of other claims that may be available in certain situations, including state law claims and, as Shaver and Decker explore, claims under the Individuals with Disabilities Education Act (IDEA) and Americans with Disabilities Act (ADA) that students with disabilities may be able to pursue. *See generally* Shaver & Decker, *supra* note 11.

claims against SROs specifically by analyzing existing federal court opinions that have assessed such claims. Finally, this article will contend that a clear standard should be set for SROs' interactions with students in school. Rather than continuing to treat SROs as hybrids between police officers and school employees, which muddles students' rights in their interactions with SROs, courts should consistently apply the same standards that they apply to police officers working on the street to SROs in schools. SROs should also be removed from schools' disciplinary responses to minor student misbehavior. These are the most effective ways to provide protections for students' rights in their interactions with SROs.

II. Understanding SROs

The National Association of School Resource Officers (NASRO), the primary membership organization for SROs, defines SROs as "commissioned law-enforcement officers selected, trained, and assigned to protect and serve the education environment."[14] Typically, SROs are assigned to a school or set of schools based on an agreement between the local police department and the local school district.[15] According to the "triad" model of school-based policing, SROs are expected to serve three roles in their schools: law enforcement officer, counselor, and educator.[16]

In the law enforcement role, they both monitor schools for safety issues and disorder, and respond to incidents of student misbehavior, which can include taking part in the disciplinary response by the school. SROs also help schools prepare for active shooter events and other emergencies.[17] They monitor their

14. Nat'l Ass'n of Sch. Res. Officers, *To Protect and Educate: The School Resource Officer and the Prevention of Violence in Schools*, NASRO.ORG (2012), https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf.

15. For a discussion of these agreements and variations on schools' relationships with SROs and other police officers, see Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools,* 54 N.Y.L. SCH. L. REV. 977 (2009).

16. *School Resource Officers*, *supra* note 6.

17. David C. May, Stephen D. Fessel & Shannon Means, *Predictors of Principals' Perceptions of School Resource Officer Effectiveness in Kentucky*, 29

schools on a daily basis by walking the halls or watching security camera feeds.[18] They might also be involved in screening students and school visitors as they enter school buildings to ensure they are not bringing weapons, drugs, or other contraband into the schools.[19] In addition to these activities focused on maintaining safety, security and order, they also respond to incidents, such as fights, disorderly students, and other violations of criminal laws or school rules.[20] This can include playing a role in resolving these incidents, but also arresting misbehaving students for alleged violations of criminal law.[21]

In the counselor role, SROs are expected to form meaningful relationships with students to help guide them away from delinquency and towards success in school. To fulfill this role, SROs sometimes serve as coaches for schools' athletic teams or form informal mentorship relationships with students in the school.[22] In the teacher role, SROs also lead classes related to their law enforcement experience.[23] This can include Drug Abuse Resistance Education (D.A.R.E.) or similar sessions focused on drug abuse, classes on gang avoidance, or classes on criminal law and the role of police in society.[24]

AM. J. CRIM. JUST. 75 (2004).

18. Aaron Kupchik & Nicole L. Bracy, *To Protect, Serve, and Mentor? Police Officers in Public Schools*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 21-37 (Torin Monahan & Rodolfo D. Torres eds., 2009).

19. *See, e.g.*, KATHLEEN NOLAN, POLICE IN THE HALLWAYS: DISCIPLINE IN AN URBAN HIGH SCHOOL 41-44 (2011).

20. *Id.*

21. *See* Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcomes*, 9 NW. J.L. & SOC. POL'Y 58 (2013).

22. Peter Finn et al., *Comparison of Program Activities and Lessons Learned Among 19 School Resource Officer (SRO) Programs* (Mar. 2005) (unpublished report), http://www.ncjrs.gov/pdffiles1/nij/grants/209272.pdf; Kupchik & Bracy, *supra* note 18, at 23-27.

23. Ida M. Johnson, *School Violence: The Effectiveness of a School Resource Officer Program in a Southern City*, 27 J. CRIM. JUST. 173 (1999).

24. Anna Harvey, *School Resource Officer Develops Friendship with Students, Staff*, CARTERET COUNTY NEWS-TIMES (Jan. 3, 2015), http://www.carolinacoastonline.com/news_times/article_888a3794-938e-11e4-9f98-77539cba085f.html; John Rosiak, *How SROs Can Divert Students from the Juvenile Justice System*, 8 DISPATCH (Community Oriented Policing Services, D.C.), May 2015, http://cops.usdoj.gov/html/dispatch/05-2015/sros_and_students.asp.

While school-based police officers have existed for many decades, their rise to prominence began in the 1990s. During the 1980s and early 1990s, crime in the United States, including juvenile delinquency and crime in schools, became a prominent policy issue.[25] Crime rates broadly, and crime in schools more specifically, peaked in the early 1990s.[26] A wide variety of legislation was enacted at the federal and state level to combat crime, including the Violent Crime and Law Enforcement Act of 1994, which included funding for the placement of police officers in America's school through community oriented policing programs.[27] The number of SROs in schools expanded throughout the 1990s and early 2000s, due in part to highly publicized incidents such as the shootings at Columbine High School in Colorado.[28] Additional federal funding for SROs was provided by The Safe and Drug-Free Schools and Communities Act.[29] Currently, the Department of Justice estimates that there are approximately 19,000 SROs nationally.[30]

SROs are one feature of a larger trend – the "criminalization" of American public school students.[31] This term has been used by scholars to describe the incorporation of criminal justice techniques as tools to control and discipline students.[32] Beyond employing police officers in schools and using arrests to respond to student misbehavior, schools have incorporated the following: controlled access to and movement

25. Russell J. Skiba, *Reaching a Critical Juncture for Our Kids: The Need to Reassess School-Justice Practices*, 51 FAM. CT. REV. 380 (2013).

26. *See* Scott Neuman, *Violence in Schools: How Big a Problem Is It?*, NPR (Mar. 16, 2012), http://www.npr.org/2012/03/16/148758783/violence-in-schools-how-big-a-problem-is-it.

27. 42 U.S.C. § 3711 (2016).

28. Lynn A. Addington, *Cops and Cameras: Public School Security as a Policy Response to Columbine*, 52 AM. BEHAV. SCIENTIST 1426 (2009); Ben Benton, *Not All School Systems Have Resource Officers, but Most are Eyeing Them After Sandy Hook*, TIMES FREE PRESS (Mar. 11, 2013), http://www.timesfreepress.com/news/local/story/2013/mar/11/pencils-paper-and-police/102094/.

29. NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS (2013).

30. *See* Keierleber, *supra* note 5.

31. *See* Hirschfield, *supra* note 9; Matthew T. Theriot, *School Resource Officers and the Criminalization of School Behavior*, 37 J. CRIM. JUST. 280 (2009).

32. *See, e.g.*, Hirschfield, *supra* note 9.

within schools, including requiring identification badges; security cameras; metal detectors; random suspicion-less searches of persons, personal property, and lockers, sometimes with drug sniffing dogs; use of restraints such as handcuffs; and the installation of metal bars and gates.[33] Additionally, schools widely adopted strict discipline policies, including "zero tolerance" policies, which require school administrators to use exclusionary school discipline measures such as suspensions in response to a wide array of both serious and minor acts of student misbehavior.[34] These policies were encouraged by federal legislation that attached funding to schools' adoption of zero tolerance policies for weapons and drug offenses, but states and school districts expanded their scope to a wider array of less serious misbehavior.[35]

These heightened security measures and strict disciplinary approaches have received a wide array of criticisms. For example, advocates and scholars suggest that they feed "the school-to-prison pipeline" by exposing students to frequent exclusions from school that derail their academic progress and propel them towards lives of criminality.[36] Moreover, they may expose students to unfair or unreasonable treatment, such as discipline responses that are outsized compared with students' misbehavior. The media frequently covers stories of students facing suspensions for seemingly benign behavior,[37] and studies

33. *Id.*

34. ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS (William Ayers, Bernardine Dohrn & Rick Ayers eds., 2001); ADVANCEMENT PROJECT & THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE (2000); Jason P. Nance, *Students, Police and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 932-33 (2016).

35. Jeanne B. Stinchcomb, Gordon Bazemore & Nancy Riestenberg, *Beyond Zero Tolerance: Restoring Justice in Secondary Schools*, 4 YOUTH VIOLENCE & JUV. JUST. 123 (2006); *See* Nance, *supra* note 34, at 932-34.

36. *See, e.g.*, DANIEL J. LOSEN & TIA ELENA MARTINEZ, CTR. FOR CIVIL RIGHTS REMEDIES, OUT OF SCHOOL & OFF TRACK: THE OVERUSE OF SUSPENSIONS IN AMERICAN MIDDLE AND HIGH SCHOOLS (2013); SAMANTHA POWNALL, NEW YORK CIVIL LIBERTIES UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE (2013); Russell Skiba, Mariella I. Arredondo & Natasha T. Williams, *More Than a Metaphor: The Contribution of Exclusionary Discipline to a School-to-Prison Pipeline.* 47 EQUITY & EXCELLENCE EDUC. 546 (2014).

37. *See, e.g.*, Ian Urbina, *It's a Fork, It's a Spoon, It's a . . . Weapon?*, N.Y.

of the use of suspensions by schools reveal that they are frequently used for relatively minor acts of student misbehavior.[38] Additionally, some research suggests that schools that rely heavily on such measures and policies create environments that are less inclusive for students and are actually less safe.[39]

SROs have also been subject to these criticisms. For example, many SROs may not be sufficiently trained to interact with school-aged children.[40] Their training has traditionally focused on their law enforcement role, with little training on counseling, teaching, or interacting with children.[41]

Scholars have also pointed out that SROs' law enforcement and counselor roles can often conflict, as they may attempt to mentor students and then have to arrest the same students, thereby destroying any trust they had built.[42] In this respect, their dual roles as law enforcement officers and school administrators creates confusion. Even when these roles are not in direct conflict, the presence of SROs in schools can lead to an increase in student arrests, thereby feeding the pipeline.[43]

Just as suspensions have frequently been used by schools as disciplinary responses to relatively minor misbehavior, arrests of students by SROs (and other police officers called to schools)

TIMES (Oct. 11, 2009), http://www.nytimes.com/2009/10/12/education/12discipline.html.

38. *See, e.g.*, KUPCHIK, *supra* note 9, at 44-45.

39. *See* Charles Crawford & Ronald Burns, *Reducing School Violence: Considering School Characteristics and the Impacts of Law Enforcement, School Security, and Environmental Factors*, 39 INT'L J. POLICE STRATEGIES & MGMT. 455 (2016); Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior,* 36 J. SCH. PSYCHOL. 7 (1998); Jason P. Nance, *School Surveillance and the Fourth Amendment,* 2014 WIS. L. REV. 79, 104-06 [hereinafter *School Surveillance*]; ACLU & ACLU OF CONN., HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS (2008).

40. *See* Kathy E. Martinez-Prather, Joseph M. McKenna & Scott W. Bowman, *The Impact of Training on Discipline Outcomes in School-Based Policing*, 39 INT'L J. POLICE STRATEGIES & MGMT. 478 (2016); Jason P. Nance, *Rethinking Law Enforcement in Schools*, 84 GEO. WASH. L. REV. ARGUENDO 151 (2016) [hereinafter *Rethinking Law Enforcement*]; Keierleber, *supra* note 5.

41. *See, e.g.*, TEXAS APPLESEED, SCHOOL-TO-PRISON PIPELINE: TICKETING, ARREST, AND USE OF FORCE IN SCHOOLS 12 (2010); Keierleber, *supra* note 5.

42. *See* KUPCHIK, *supra* note 9.

43. *See* Nance, *supra* note 34.

overwhelmingly arise out of minor misbehavior, such as disorderly conduct and misdemeanor assault charges.[44] There have also been reports of abusive behavior by SROs against students, including acts of violence.[45] For example, several news reports have featured videos of SROs' violent treatment of students.[46] The New York Civil Liberties Union and American Civil Liberties Union documented a wide variety of abuses by school resource officers in New York City, including derogatory, abusive, and discriminatory comments, inappropriate sexual attention, and physical abuse.[47]

Despite these criticisms, SROs remain a common fixture in many American public schools. For example, the mass shooting at Sandy Hook Elementary in Connecticut led to renewed calls for the increased use of SROs in schools.[48] In the schools in which they are stationed, they will continue to have frequent contact with students, including being a primary response when students misbehave. Accordingly, it is essential to understand the civil rights remedies available to students.

44. *See* Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619 (2013); Nance, *supra* note 35; Wolf, *supra* note 21.

45. *See, e.g.*, Dana Ford, Greg Batelho & Kevin Conlon, *Spring Valley High School Officer Suspended After Violent Classroom Arrest*, CNN (Oct. 27, 2015), http://www.cnn.com/2015/10/27/us/south-carolina-school-arrest-video/.

46. *See, e.g.*, Sarah Aarthun & Holly Yan, *Student's Violent Arrest Caught on Video; Officer Under Investigation*, CNN (Oct. 27, 2015), http://www.cnn.com/2015/10/26/us/south-carolina-spring-valley-high-school-student-video/index.html; Sam Levin, *Girl Body-slammed by North Carolina Officer was Stopping a Fight, Students Say*, THE GUARDIAN (Jan. 4, 2017), https://www.theguardian.com/us-news/2017/jan/04/high-school-girl-body-slammed-police-officer-north-carolina; Avianne Tan, *2 Baltimore School Police Officers Charged in Assault of Student Caught on Video*, ABC NEWS (Mar. 9, 2016), http://abcnews.go.com/US/baltimore-school-police-officers-charged-assault-student-caught/story?id=37518067.

47. ELORA MUKHERJEE & MARVIN M. KARPATKIN, NEW YORK CIVIL LIBERTIES UNION & ACLU, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS (2007).

48. Donna St. George & Ovetta Wiggins, *Schools Taking Serious Look at Putting Armed Police in Schools After Massacre*, WASH. POST (Feb. 7, 2013), https://www.washingtonpost.com/local/education/schools-taking-serious-look-at-putting-armed-police-in-schools-after-massacre/2013/02/07/f2fcc9ec-6e11-11e2-ac36-3d8d9dcaa2e2_story.html.

III. Students' Diminished Rights in School

Before specifically considering the potential for civil rights claims against SROs, the diminished rights of American public-school students must first be explored. Students' rights against search and seizure, *Miranda* rights, and free speech rights are all limited in the school environment. Additionally, the strict discipline codes and heightened security measures that are commonplace in America's schools further limit students' rights.

A. Searches

The right against unreasonable searches by government officials springs from the Fourth (and by extension, the Fourteenth) Amendment. The standard for when a student can be searched by a school official is less stringent than the probable cause standard that applies to searches by the police in most contexts.[49] School personnel are only required to have a reasonable suspicion that a student has violated the law or a school rule. Citing the need for schools to maintain order, the Supreme Court in *New Jersey v. T.L.O.* held that requiring school officials to have probable cause to search a student would be unreasonable.[50] Instead, the Court set forth a two-part test: whether the search was justified at its inception and whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place."[51] This standard is more relaxed in two ways: first, the amount of

49. In order for a police officer to conduct a search of a person she encounters on the street, she must generally have probable cause, the standard required to obtain a warrant. However, there are some exceptions to this. If the officer's search is merely a "stop and frisk", she must only have reasonable suspicion that the search will produce evidence of a crime or contraband, such as illicit drugs or weapons. *See* Terry v. Ohio, 392 U.S. 1 (1968). During such a stop, in order to perform a search that goes beyond a pat down, such as reaching into pockets or clothes or opening bags, the officer must have probable cause (which sometimes is obtained from evidence gathered during the pat down). *Id.* at 19. Probable cause is also not required when "exigent circumstances" require the search and when police are conducting certain routinized searches. *See* Mincey v. Arizona, 437 U.S. 385 (1978).

50. *See generally* 469 U.S. 325 (1985).

51. *Id.* at 341.

evidence that is required is less;[52] and second, school officials can suspect the student of violating the law or a school rule,[53] which can include a much wider swath of behavior, such as possessing cell phones and other items considered contraband in school, but are permissible elsewhere.

Following *T.L.O.*, the Court expanded the ability of schools to search students, even when individualized suspicion is not present. First, in *Vernonia School District v. Acton*, the Court held that random drug testing of students participating in athletics was permissible, based in part on evidence that student drug abuse was a problem in the school.[54] The Court emphasized that the school's effort to deter and detect drug use both protected students from drug's ill effects and prevented disruption of the educational process.[55] Then, in *Board of Education v. Earls*, the Court upheld a school's random drug testing regime that applied to all participants in extracurricular activities.[56] The school offered no proof of a drug problem in the school, but instead contended that it was attempting to curb student drug use generally.[57]

General, suspicionless searches of students beyond the drug testing programs that were at issue in *Acton* and *Earls* are also commonplace, with little restrictions on their use. For example, during the 2013-2014 school year, close to one quarter of all public schools[58] in the United States reported the use of drug

52. *Id.* at 341 ("We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

53. *Id.* at 341-42 ("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*." [emphasis added]).

54. *See* 515 U.S. 646 (1995).

55. *Id.* at 661-62.

56. *See* 536 US 822 (2002).

57. *Id.* at 835-36.

58. This includes elementary, middle and high schools. Presumably, the use of drug sniffing dogs is concentrated in middle and high schools.

sniffing dogs.[59] Courts have frequently permitted schools to stage unannounced searches with drug sniffing dogs and then search students' personal effects if the dog signals that drugs may be present. Generally, students do not have an expectation of privacy when they are in school, beyond their personal effects. As such, courts do not view dog sniffing of exteriors of lockers, cars, and other objects in the school as searches requiring any level of suspicion.[60] Then, if a drug sniffing dog signals that an object may contain contraband, the signal provides sufficient evidence for a search, regardless of whether the reasonable suspicion or probable cause standard applies.[61] Schools perform general, suspicionless searches of students in other ways as well, including the use of metal detectors and bag searches as students enter school, and random sweeps for contraband.[62] Recently, a lawsuit was filed on behalf of numerous students who were subject to a mass, suspicionless search of their persons by police officers during a four-hour lockdown at their school. The officers were searching for illegal drugs. They were most concerned about thirteen students at the school, but decided to search all students.[63]

59. *Digest of Educational Statistics*, NAT'L CTR. FOR EDUC. STAT., tbl. 233.50, https://nces.ed.gov/programs/digest/d15/tables/dt15_233.50.asp.

60. *See, e.g.*, *In re* Dengg, 724 N.E.2d 1255, 1259 (Ohio Ct. App. 1999) ("[T]he use of a drug sniffing dog to detect the presence of contraband, by sniffing the exterior of an object, is not a 'search' within the meaning of the Fourth Amendment."); Rudolph *ex rel.* Williams v. Lowndes Cty. Bd. of Educ., 242 F. Supp. 2d 1107, 1120 (M.D. Ala. 2003) ("Clearly, the activity of the drug-sniffing dog walking up and down the aisles sniffing for contraband is not a Fourth Amendment search.").

61. *See, e.g.*, Marner v. Eufaula City Sch. Bd., 204 F. Supp. 2d 1318 (M.D. Ala. 2002) (holding that once drug sniffing dog signaled that a car contained contraband, a search was permitted without a warrant); Dengg, 724 N.E.2d at 1260 (dog alerted to student's car during a school–side sweep constituted probable cause for police officers conducting the search). *See also* Feld, *supra* note 8, at 905-11.

62. *Digest of Educational Statistics*, *supra* note 59 (finding that approximately 11 percent of schools perform random sweeps for contraband and approximately 2 percent use metal detectors).

63. Jacey Fortin, *'How Far Can They Go?' Police Search of Hundreds of Students Stokes Lawsuit and Constitutional Questions*, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/us/georgia-police-patdown-students.html.

In *Safford Unified School District #1 v. Redding*, the Court identified some limits on schools' ability to search students.[64] This case arose out of a strip search of a female high school student.[65] The school administrator who directed the search was investigating a report of drugs being distributed in school.[66] The strip-searched student was known to associate with a delinquent group of students and her planner was found containing contraband while in the possession of another student.[67] After the contraband was discovered, the student was questioned and her backpack was searched yielding no additional drugs or other contraband.[68] A school administrator then ordered a strip search, which also did not produce any contraband.[69] The Court held that the search of the backpack was reasonable, but the strip search went too far.[70] The Court identified strip searches as particularly intrusive, requiring individualized suspicion that contraband was being concealed on the student's person.[71] Thus, while this search was reasonable at its inception, the scope of the search was excessive.

While *Redding* identified some limits of schools' ability to search students, the reasonable suspicion standard has permitted invasive searches of students to occur based on relatively benign behavior. For example, a search of student's backpack was deemed permissible based only on student's proximity to a fire that had been set in the school and the student pulling his hood up to cover part of his face after encountering a teacher.[72] A search of a student's car by a school security officer similarly did not violate the Fourth Amendment when the student was seen going to his car without a proper pass and when students smoking in the parking lot was an ongoing problem at the school.[73] Thus, the standard for searching a

64. *See* 557 U.S. 364 (2009).
65. *Id.*
66. *Id.* at 368.
67. *Id.*
68. *Id.* at 368-69.
69. *Id.* at 369.
70. *Safford Unified Sch. Dist.*, 557 U.S. at 375-77.
71. *Id.* at 376-77.
72. Vassallo v. Lando, 591 F. Supp. 2d 172, 195 (E.D.N.Y. 2008).
73. Anders v. Fort Wayne Cmty. Schs., 124 F. Supp. 2d 618, 624 (N.D. Ind. 2000).

student is quite low, and can be triggered by suspicions of a wide array of suspected misbehavior, whether it be illegal or in violation of school rules.

B. Searches by SROs

The presence of school resource officers in schools presents two intriguing constitutional questions relating to searches. First, when working in concert with school resource officers to investigate alleged student misconduct, are school officials beholden to the reasonable suspicion or probable cause standard? Second, do SROs, who fill both law enforcement and educational roles in their schools, need probable cause or reasonable suspicion to conduct a constitutionally permissible search of a student in school? Notably, the Supreme Court in *T.L.O.* expressly avoided deciding these questions: "This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."[74]

Courts have held that school administrators must have probable cause to conduct a search of a student when the search is done at the direction or request of a police officer because the administrator is an agent of law enforcement under these circumstances.[75] However, this analysis quickly becomes murky when the relationship between the school official and police officer is not as clear cut. For example, in *State v. Heirtzler,* the New Hampshire Supreme Court confirmed a trial court's finding that school administrators were agents of law enforcement when they investigated student drug offenses because the school resource officer had "delegated the responsibility of investigating less serious, potential criminal matters – drug

74. New Jersey v. T.L.O., 469 U.S. 325, 341 n.7 (1985). The Court has not addressed this issue subsequently. *See also* Jacqueline A. Stefkovich & Judith A. Miller, *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L.J. 25 (1999) (discussing the standards that apply to searches performed by police officers in schools in the wake of *T.L.O.*).

75. Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1089-90 (2003).

cases – to school officials."[76] In the school in question, the school resource officer had an agreement with school officials that he would handle larger scale investigations and the school officials would handle investigations of the less serious offenses.

Courts are divided regarding the question of whether school resource officers need probable cause or reasonable suspicion to conduct a search of a student on school grounds.[77] For example, in *People v. Dilworth*, the Supreme Court of Illinois ruled that an SRO needed only reasonable suspicion to conduct a search of a student because the search was conducted in furtherance of preserving order in the school, not as a law enforcement function.[78] Similarly, the Pennsylvania Superior Court and a Florida Court of Appeals ruled that SROs only needed reasonable suspicion to conduct a search on school grounds because they are school officials, not law enforcement agents.[79] Conversely, in *State v. Tywayne H.*, where a gun was found on a student by an SRO at a school dance, the Court of Appeals of New Mexico determined that probable cause was required for a valid search of the student because the officer was a law enforcement agent.[80] New Mexico seems to be in the minority, however. The Tennessee Supreme Court summarized the various jurisdictions' stances on school resource officer searches as follows:

> The majority of jurisdictions which have faced the issue of what standard to apply to SROs or law enforcement officers assigned to schools have applied the reasonable suspicion standard. . . . In contrast, where law enforcement officers, not associated with the school system, initiate a search, or where school officials act at the behest of law enforcement agencies, the probable cause

76. 789 A.2d 634, 640 (N.H. 2001).

77. *See* Price, *supra* note 10; Beger, supra note 8.

78. 661 N.E.2d 310 (Ill. 1996).

79. T.S. v. State, 863 N.E.2d 362 (Ind. Ct. App. 2007); Commonwealth v. J.B., 719 A.2d 1058 (Pa. Super. Ct. 1998); State v. D.S., 685 So. 2d 41 (Fla. Dist. Ct. App. 1996).

80. 933 P.2d 251 (N.M. Ct. App. 1997).

standard is generally applied.[81]

On this basis, the Court determined that in Tennessee:

> [T]he reasonable suspicion standard is the appropriate standard to apply to searches conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of a[n] ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled an "SRO" or not. However, if a law enforcement officer not associated with the school system searches a student in a school setting, that officer should be held to the probable cause standard.[82]

Thus, as the *R.D.S.* decision indicates, in most states probable cause is only required for searches of students by police officers when the investigation is strictly a law enforcement action. With SROs increasingly present at schools, most searches conducted by them and school officials need only be prompted by reasonable suspicion because the SROs can readily claim their searches arose out of their school official role. Most relevant to potential Section 1983 claims against SROs for unconstitutional searches, the shifting roles of SROs – between police officer and school official – render the level of suspicion needed for a search unclear in many situations.

Even if the probable cause standard is applied to SROs, school officials and SROs can easily circumvent it by choosing to have a school official search the student, as long as it is not clearly done at the SRO's behest. Bracy found this to be a strategy employed in the schools she observed during her ethnographic observations of SROs.[83] Bracy noted that SROs and administrators were sometimes purposeful in their efforts

81. R.D.S. v. State, 245 S.W.3d 356, 367-68 (Tenn. 2008).

82. *Id.* at 369.

83. Nicole L. Bracy, *Circumventing the Law: Students' Rights in Schools with Police*, 26 J. CONTEMP. CRIM. JUST. 294 (2010).

to ensure that the lesser reasonable suspicion standard applied to their searches of students by ensuring that the search was conducted by a school official.[84]

C. Interrogations in School

Students' *Miranda* rights are also somewhat limited in the school context. Courts have consistently held that students are not in custody when being questioned by school administrators because, as in search situations, school officials are not law enforcement agents.[85] Therefore, students need not be read the *Miranda* warning. This is the case even when the administrator plans to turn evidence gathered during the questioning over to the police.[86]

For example, in *State v. Barrett*, a Louisiana appellate court found that a *Miranda* warning was not required when a student was questioned by a school administrator following a police-led search of a classroom with drug-sniffing dogs.[87] The dogs focused on the student's wallet in which a large amount of cash was found.[88] Then, a beeper was found in his backpack.[89] The school administrator asked the student why he had so much money and the student admitted to drug dealing.[90] The court in *Barrett* opined that even though the police and administrator were working together to conduct the drug sweep, at the time of the questioning the student "had not been taken into custody, detained, or deprived of his freedom of action, other than as appropriate considering his status as a student at school."[91]

Similarly, in *In the matter of V.P.*, a Texas court held that a school official was not required to provide a *Miranda* warning nor stop questioning a student even after he asked for a lawyer.[92]

84. *Id.*

85. *See, e.g.*, State v. Tinkham, 719 A.2d 580 (N.H. 1998); State v. Biancamano, 666 A.2d 199 (N.J. Super. Ct. App. Div. 1995); *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

86. *See, e.g.*, *Tinkham*, 719 A.2d at 580.

87. State v. Barrett, 683 So.2d 331 (La. Ct. App. 1996).

88. *Id.* at 334.

89. *Id.*

90. *Id.*

91. *Id.* at 339.

92. *In re* V.P., 55 S.W.3d 25, 31 (Tex. App. 2001).

Another student had reported to a school resource officer that V.P. had brought a gun to school.[93] Upon hearing this information, the school resource officer and a hall monitor removed V.P. from his class, asked him about the gun, and then frisked him.[94] Then, the officer brought V.P. to an assistant principal's office.[95] The school resource officer left the room and the assistant principal and hall monitor questioned V.P. about the gun.[96] During the questioning, V.P. asked for a lawyer and his mother, but the questioning continued.[97] He eventually confessed to having the gun.[98] Following the confession, the school resource officer retrieved the gun, arrested V.P., and read him the *Miranda* warning.[99] In explaining why V.P's confession to the vice principal was admissible, the court stated:

> Even assuming appellant was in custody as he walked with [the S.R.O.] from his classroom to [the vice principal]'s office, once [the S.R.O.] left the office, V.P. was no longer in custody as [the vice principal] questioned him about the gun. [The vice principal] questioned V.P. about the gun primarily because he was concerned about the safety of the other students and faculty. Until the gun was located and the matter turned over to [the S.R.O.], [the vice principal] was conducting a school investigation, not a criminal investigation. . . . That [the vice principal] questioned appellant on the basis of a tip from [the S.R.O.] did not transform the questioning into custodial interrogation, and we have not found any case law indicating that a student has the constitutional right to remain silent or to consult with a lawyer in the face of questioning by a school principal. Because V.P. was not in official custody

93. *Id.* at 27.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *In re V.P.*, 55 S.W.3d at 28.
99. *Id.*

> when questioned, he did not have the legal right to remain silent or to speak to his lawyer.[100]

Thus, even when an SRO is directly involved in the investigation into student misconduct, a *Miranda* warning is often not required if a school administrator performs the task of questioning the student.

When SROs question students in school about alleged criminal conduct, courts have often, but not always, concluded that a *Miranda* warning was required. For example, the Pennsylvania Supreme Court held that a *Miranda* warning was required when school resource officers conduct custodial interrogations in school.[101] A Court of Appeals of Texas similarly held that a *Miranda* warning was required when as student was questioned by a school resource officer with his office door closed.[102] The court noted that the officer had probable cause to make an arrest at the time of the questioning (at least fifteen students had reported that the student had a gun) and the circumstances of the questioning would not have led the student to believe he was free to leave.[103]

However, some courts have found that students are not in custody when questioned by SROs because school is not a threatening environment, like a police station, where coercion is likely to occur.[104] For example, in *In re Marquita M.,* the Appellate Court of Illinois held that a student who was questioned by an SRO in a school administrator's office was not in custody, pointing to the lack of badgering questions, the relatively short duration of questions, and the school environment.[105] Similarly, in *State v. C.D.,* the Indiana Appellate Court determined that a student was not in custody when he was questioned by a school administrator and an SRO

100. *Id.* at 33.

101. *In re* R.H., 791 A.2d 331 (Pa. 2002).

102. *In re* D.A.R., 73 S.W.3d 505 (Tex. App. 2002).

103. *Id.* at 510.

104. *See, e.g.*, *In re* Erik E., No. 1 CA-JV 08-0024, 2008 WL 4216544 (Ariz. Ct. App. Sept. 11, 2008); *In re* J.H., 928 A.2d 643 (D.C. 2007); *In re* Welfare of B.M.K., No. A07-0852, 2008 WL 1972488 (Minn. Ct. App. 2008).

105. 970 N.E.2d 598 (Ill. App. Ct. 2012).

about being under the influence of drugs.[106] The court reasoned that the questioning was done for educational purposes, and not as part of a criminal justice investigation (even though the student's admissions led to eventual delinquency charges).[107]

While some courts have found that *Miranda* warnings are required when SROs question students about illegal conduct at school, some have concluded otherwise. Just like the law regarding searches of students conducted by SROs, this area of law is unsettled and therefore does not provide clear guidance to SROs in their interactions with students.

D. Other Limitations on Students' Constitutional Rights

The limits on students' rights are not limited to searches and seizures, and interrogations. For example, even though students have some rights to free speech in school, the limitations on student speech are relatively stringent.

In *Tinker v. Des Moines Community Independent School District*,[108] the Supreme Court declared that students have free speech rights in school. In that case, the Court confirmed two students' right to wear black arm bands to protest the Vietnam War, but noted that student speech could be limited if it caused substantial disruption to the school environment.[109] While this decision seemed to bestow a wide array of rights on students, subsequent Supreme Court decisions that considered student free speech rights eroded those rights considerably.

For example, in *Bethel School District No. 403 v. Fraser*, the Court stated that a school did not violate a student's free speech rights when it sanctioned him for giving a profane speech during an assembly related to student elections.[110] The Court cited a school's interest in teaching values as the rationale for limiting student speech.[111] In *Hazelwood School District v. Kuhlmeier*, the Court confirmed a school's censorship of a student newspaper, reasoning that the newspaper was a school

106. 947 N.E.2d 1018 (Ind. Ct. App. 2011).
107. *Id.* at 1022-23.
108. 393 U.S. 503 (1969).
109. *Id.*
110. 478 U.S. 675 (1986).
111. *Id.*

sponsored tool of pedagogy and, therefore, the school could exercise editorial control over its content.[112] Then, in *Morse v. Frederick*, the Court ruled that a free speech violation had not occurred when a school suspended a student for declining to follow a directive to take down a "Bong Hits 4 Jesus" banner during an extracurricular event, reasoning that speech that encouraged drug use could be censored by schools because it was contrary to existing anti-drug policies at the school.[113] What emerges from these cases are free speech protections for students that fall far below those enjoyed outside of the school context. The Court relies on the "special circumstances" of the school to place significant limits on speech. For example, the speech in *Tinker* was allowed because it was political and non-disruptive. In the subsequent cases, the Court confirmed that schools may limit speech that threatens to disrupt the school environment or that interferes with the pedagogical mission of the schools, such as teaching values or proper behavior.

Thus, students' free speech rights are significantly diminished in schools. Erwin Chemerinsky characterized this line of Supreme Court decisions as "part of a larger failure on the part of the judiciary to enforce the Constitution when it comes to schools."[114] While actions by SROs are unlikely to infringe on students' free speech rights, the limitations on those rights further demonstrate the restricted rights environment of American public schools.

E. Other Restrictions on Students' Privacy and Freedoms

The increasingly strict, broad, and sometimes vague codes of student conduct that have become more common in schools over the past twenty-five years[115] further diminish students' privacy and freedoms. As mentioned above, student searches by

112. 484 U.S. 260 (1988).

113. 551 U.S. 393 (2007).

114. Chemerinsky, *supra* note 7, at 124.

115. *See, e.g.*, CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM 79-80 (2010); Kerrin Wolf, Mary Kate Kalinich & Susan DeJarnatt, *Charting School Discipline*, 48 URB. LAW. 1 (2016) (detailing strict and vague codes of conduct in charter schools); KUPCHIK, *supra* note 9.

school administrators and SROs can be predicated on suspected violations of school rules. So, when school rules restrict the use and possession of cell phones and other devices, and make broad restrictions on "disorderly" behavior, they provide broad authority for schools to search students. When schools rely on SROs to conduct these searches, they create adversarial encounters between SROs and students that can quickly escalate and lead to criminal charges against students. Some of the cases discussed below demonstrate how a relatively benign violation of a school rule can quickly escalate when SROs become involved, and lead to student arrests and civil rights claims against SROs.[116]

Heightened security measures further limit students' rights in school. For example, the widespread use of security cameras in schools inhibits students' privacy throughout the day. Likewise, the use of drug-sniffing dogs and random locker searches further comprise student privacy.[117] Some schools also feature metal detectors that aid schools' efforts to search students for contraband as they enter school each day.[118] Thus, in many ways, American public school students have significantly curtailed rights when they are in school and, as the cases below demonstrate, these diminished rights are in full display in their interactions with SROs, leaving them with little recourse when their rights seem to have been violated by an SRO.

116. *See infra* Part III.C.

117. For a discussion of students' privacy interests when confronted with drug-sniffing dogs, see, e.g., Todd Feinberg, *Suspicionless Canine Sniffs: Does the Fourth Amendment Prohibit Public Schools from Using Dogs to Search Without Individualized Suspicion?*, 11 U.C. DAVIS J. JUV. L. & POL'Y 271 (2007). *See also infra* Part III.A.

118. *See, e.g.*, NOLAN, *supra* note 19.

IV. Establishing Civil Rights Claims Against School Resource Officers

Section 1983 creates a federal cause of action against public officials who violate a person's civil rights.[119] Plaintiffs who assert these claims must meet a high bar to succeed – they must both establish that one of their rights was violated and that the law in place at the time clearly established that the public official's actions violated a constitutional right. In *Saucier v. Katz*, the Supreme Court established this two-part test for analyzing civil rights claims: "[T]he first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established," the court must address "whether the right was clearly established . . . on a . . . specific level" at the time of the official's actions.[120]

The Supreme Court modified the *Saucier* two-part test slightly in *Pearson v. Callahan*, holding that the two-step analysis must not be strictly adhered to in every case.[121] Specifically, it allowed courts to first answer the question of whether the right that was allegedly violated was clearly established, thus sometimes avoiding having to make a determination if a right was in fact violated in the case at hand.

The second part of the test is commonly referred to as qualified immunity. The justification for this defense rests on the belief that police officers and public officials should feel free to take actions that are not in clear violation of the law without fear of lawsuit. As the Court explained in *Harlow v. Fitzgerald*:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to

119. 42 U.S.C. § 1983 (2012) ("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").

120. 533 U.S. 194, 200 (2001).

121. 555 U.S. 223 (2009).

> hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."[122]

Civil rights claims against SROs most commonly arise out of the Fourth Amendment violations for unreasonable searches or unreasonable seizures. The latter may come in the form of an unlawful/wrongful arrest or through the use of excessive force. In order to establish whether a constitutional right was clearly established, courts evaluate whether a reasonable SRO would have understood that what he was doing violated a constitutional right.[123] Courts look for precedential cases that feature similar fact patterns and claims. However, plaintiffs do not have to produce prior case law that matches their claims exactly; rather, the question is whether the law provides fair and clear notice that the SROs' actions violated the law.[124] As one court explained, qualified immunity allows SROs to make mistakes in judgment, but does not protect "the plainly incompetent or those who knowingly violate the law."[125]

Thus, plaintiffs pursuing Section 1983 claims against SROs (and other public officials) are fighting an uphill battle. Even when a student's rights were likely violated, her claim will not be successful without establishing that a reasonable officer in the SRO's position would have known that his actions were a violation of the law.

122. 457 U.S. 800, 819 (1982) (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

123. Johnson *ex. rel.* Smith v. City of Lincoln Park, 434 F. Supp. 2d 467 (E.D. Mich. 2006).

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

125. G.M. *ex rel.* B.M. v. Casalduc, 982 F. Supp. 2d 1235, 1241 (D.N.M. 2013) (quoting Hunter v. Bryant, 502 U.S. 224, 229 (1991)).

A. Section 1983 Claims Against SROs Arising Out of Alleged Violations of Students' Fourth Amendment Rights Against Unreasonable Searches

As discussed above, courts have frequently, but not consistently, determined that SROs are beholden to the reasonable suspicion standard that applies to school officials when conducting searches of students. Due to existing jurisprudence that holds that this lower level of suspicion is all that is required in many SRO searches of students, it is relatively easy for an SRO to demonstrate that his actions did not clearly violate a student's rights when facing a 1983 claim arising out of a student search.

For example, in *James v. Unified School District No. 512*, a student's Section 1983 claim against an SRO who took part in the search of the student's car was dismissed because the court found that existing case law was unclear as to whether an SRO needed reasonable suspicion or probable cause to conduct a search.[126] According to the student's claims, the only evidence that supported the need for a search was an anonymous call from someone claiming to be a parent of a student at the school that the plaintiff kept a gun in his car.[127] While the court determined that the probable cause standard applied to the SRO's search in this circumstance, it nonetheless held that prior case law was insufficiently clear as to which standard applied to SROs, thereby supporting the SRO's qualified immunity defense.[128]

Similarly, in *Thomas v. Roberts*, the Eleventh Circuit found that a mass strip search of fifth graders was unconstitutional, but qualified immunity protected the SRO and school officials who conducted the search from Section 1983 liability.[129] The case arose out of an incident in which twenty-six dollars in an envelope went missing from a teacher's desk and the students in her class were suspected of taking it.[130] The students were led to bathrooms and males were searched by the SRO, who was also

126. 959 F. Supp. 1407, 1413 (D. Kan. 1997).
127. *Id.*
128. *Id.*
129. 323 F.3d 950 (11th Cir. 2003).
130. *Id.* at 952.

male, and females were searched by a female teacher.[131] The students were required to pull down their pants and underwear, and expose their private parts.[132] The court concluded that the search was unconstitutional because the SRO and school officials lacked individualized suspicion.[133] However, prior case law did not clearly establish this and the constitutional violation was not so egregious to overcome statutory immunity in light of the lack of clear precedent.[134]

In *Burlison v. Springfield Public Schools*, the Eighth Circuit dismissed a Section 1983 claim against an SRO and others that arose out of a suspicionless search of students' belongings with a drug sniffing dog.[135] The students were forced to leave their classroom while the dog sniffed their belongings, and the plaintiff student claimed that his bag had been opened and searched, though he had no further evidence that this had occurred.[136] In dismissing the claim, the court cited the officer's adherence to drug sniffing dog procedures, the existing drug problem at the school where the search was conducted, and the minimized rights of students in school against searches.[137] Further, the court rejected the plaintiff's claim that individualized suspicion was needed under these circumstances.[138]

The wide array of behaviors that are prohibited by school codes of conduct also preclude successful Section 1983 claims against SROs for unreasonable searches. For example, in *G.M. ex rel. B.M. v. Casalduc*, a search of a student for a cell phone by an SRO was deemed justified at its inception because use of a cell phone by students during teaching time was a violation of school rules.[139] The court applied the reasonableness standard to the search and found that the student's alleged violation of

131. *Id.*

132. *Id.* (this case was decided before *Redding*, which likely renders mass strip searches such as this one are unconstitutional).

133. *Id.* at 956.

134. *Id.*

135. 708 F.3d 1034 (8th Cir. 2013).

136. *Id.* at 1036-37.

137. *Id.* at 1039-40.

138. *Id.* at 1040.

139. 982 F. Supp. 2d at 1235; *see also infra* Part III.C (discussing Johnson *ex rel.* Smith v. City of Lincoln Park, 434 F. Supp. 2d 467 (E.D. Mich. 2006)).

the cell phone policy was enough to justify the search.[140]

Thus, the high bar set by qualified immunity is seemingly insurmountable for students seeking compensation under Section 1983 against SROs for unreasonable searches. First, cases that grapple with the question of whether SROs are law enforcement officers, as opposed to school officials, when searching students are relatively rare. Second, the existing case law that more frequently applies the reasonable suspicion standard to SRO searches of students renders the law unclear enough to support qualified immunity defenses for the SROs in almost all cases, as all they need is reasonable suspicion to justify the search.[141] Additionally, because SROs are often viewed as school officials responding to violations of school rules, the wide array of behavior that is forbidden by school codes of conduct provides a remarkably wide array of justifications for searches, even though criminal behavior may not be suspected. That mass suspicionless searches are also permitted in schools further protects SROs against such claims.

B. Section 1983 Claims Against SROs Arising Out of Alleged Violations of Students' Fourth Amendment Rights Against Unreasonable Seizures

Students have found greater success in Section 1983 claims against SROs arising out of their Fourth Amendment rights against unreasonable seizure. However, claims that survive motions to dismiss and motions for summary judgment still only arise in very limited circumstances.

In *Gray v. Bostic*, the Eleventh Circuit Court of Appeals found that a SRO violated a fourth-grade student's Fourth Amendment right against unreasonable seizure when he handcuffed her after she threatened her gym teacher.[142]

140. The court also found that the search was justified because it was incident to arrest. *G.M. ex rel. B.M.*, 982 F. Supp. 2d at 1248.

141. *Developments in the Law – Policing: Chapter Two: Policing Students*, 128 HARV. L. REV. 1747, 1753 (2015) ("Cases where courts find that a search of a student required probable cause are rare and usually involve either an outside police search only tangentially related to the school setting, or an SRO who has a purely law enforcement role.").

142. 458 F.3d 1295 (11th Cir. 2006).

Importantly, the threatened coach testified that he did not actually fear that the young student would harm him.[143] The SRO admitted that he handcuffed her to teach her the potential severe consequences of her actions.[144] The court found that a Fourth Amendment violation occurred, based on *T.L.O.*'s two-step analysis, which focuses on whether the search or seizure was justified at its inception and "reasonably related in scope to the circumstances which justified interference in the first place."[145] Since the student committed a misdemeanor when she threatened her teacher, the seizure was justified at its inception.[146] Here, the court found that the SRO was acting within his duties as an SRO because detaining students was something SROs sometimes did when students committed crimes in school (and threatening bodily harm is a misdemeanor).[147] However, the handcuffing of the student was not reasonably related in scope because she did not pose a threat, a fact that was bolstered by the SRO's admission that the handcuffing was done only to teach the student a lesson.[148] The court further concluded that the SRO was not entitled to qualified immunity because the handcuffing was contrary to clearly established law, stating: "Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable."[149] Notably, there was not any precedential case law that was factually similar to this case, but the court nevertheless found that the handcuffing was clearly outside the bounds of legality.[150]

In *Jordan v. Blackwell*, a Section 1983 claim was brought against an SRO who physically restrained a thirteen-year-old female student in order to extricate her from a fight in which she was the aggressor and transport her to the principal's office.[151] The SRO took hold of the student's arms, allegedly in a

143. *Id.* at 1302.
144. *Id.* at 1301.
145. *Id.* at 1304.
146. *Id.*
147. *Id.* at 1295.
148. *Gray*, 458 F.3d at 1306.
149. *Id.* at 1307.
150. *Id.*
151. No. 5:06-cv-214, 2008 WL 4449576, at *1 (M.D. Ga. 2008).

chokehold, and broke her shoulder.[152] The United States District Court for the Middle District of Georgia found that an issue of fact remained regarding whether the SRO's use of force violated the student's Fourth Amendment rights.[153] The SRO and student offered different descriptions of the force that was used, leading the court to leave the key factual determination in the hands of the factfinder at trial.[154] The court similarly found that the question of qualified immunity was also dependent on the resolution of this factual dispute, as the circumstances of the force that was used would determine whether the SRO reasonably believed his use of force complied with existing legal standards.[155]

Likewise, in *Williams v. Morgan,* the Sixth Circuit affirmed a district court's denial of an SRO's motion for summary judgment on the grounds that issues of fact remained regarding whether the student posed a threat and whether the SRO used excessive force.[156] In *Williams,* an SRO broke a thirteen-year-old student's arm when he used an arm hold to restrain her.[157] The student had been in a verbal argument with another student earlier in the day and had torn posters off the walls of the school after receiving her punishment for the argument (a five-day suspension).[158] Later that day, the SRO confronted the student about the posters in a stairwell.[159] He believed she acted defiantly "by putting one foot behind her and putting her hands on her hips," and proceeded to push her against the wall and bend her arm behind her back with enough force to break her arm.[160] A video camera recorded a significant part of this altercation, including a moment when the SRO applied enough force while holding her arm behind her back to lift the student off the ground.[161] The court also noted that the student's crimes ("criminal damaging and disorderly conduct" according to the

152. *Id.*
153. *Id.* at *3.
154. *Id.* at *5.
155. *Id.* at *6.
156. 652 Fed. App'x. 365 (6th Cir. 2016).
157. *Id.* at 367.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 367.

SRO) were not serious enough to warrant an arrest or prosecution.[162] Based on this evidence, the court confirmed that a jury was the proper arbiter of whether the student's rights were violated.[163]

While these cases reveal certain circumstances in which Section 1983 claims based on unreasonable seizure can be successful, other decisions demonstrate that the scope of such circumstances is quite limited. For example, in *Hoskins v. Cumberland County Board of Education*, parents of an eight-year-old second grader alleged that an SRO had violated their son's Fourth Amendment right against unreasonable seizure when the SRO handcuffed the student for forty-five minutes.[164] The handcuffing followed a series of events in which the student swung his fist in the vicinity of a teacher and threatened to hit the principal and SRO.[165] In order to determine if the student's Fourth Amendment rights were violated, the court considered "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight."[166] The court determined that the seizure was unreasonable because of the child's young age, the relatively minor nature of his crime, and the fact that he did not pose a serious threat to anyone.[167] The court further reasoned that the special nature of the school environment that often lessens students' civil rights did not apply in this case because the handcuffing was clearly related to a law enforcement function (the SRO planned to charge the student with a misdemeanor and take him to juvenile detention).[168] However, the court ultimately determined that the student's parents failed to meet their burden of proving that the SRO was not entitled to qualified immunity because they failed to demonstrate that the SRO clearly violated the law.[169] The court pointed to the lack of

162. *Williams*, 652 Fed App'x at 374.
163. *Id.*
164. No. 2:13-cv-15, 2014 WL 7238621, at *6 (M.D. Tenn. 2014).
165. *Id.* at *3.
166. *Id.* at *6 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).
167. *Id.* at *7.
168. *Id.* at *11.
169. *Id.* at *13.

evidence regarding what occurred during the forty-five minute handcuffing and whether the principal and SRO could have reasonably feared for their safety.[170] Notably, the court pointed to *Bostic* (discussed above) as a case in which the plaintiffs demonstrated that an SRO was not entitled to qualified immunity when he handcuffed a fourth grader because there was evidence that the child was sitting quietly while handcuffed and school staff testified that they were not afraid of the student at the time.[171] This case highlights yet another challenge in bringing successful Section 1983 claims against SROs – gathering reliable evidence is often difficult because it often rests on the testimony of minors.

In *Hayenga v. Nampa School District No. 131,* an SRO was alleged to have violated the Fourth Amendment rights of an eleven-year-old developmentally disabled student.[172] The SRO used force to subdue the student when he attempted to leave his classroom after tapping on his desk and being verbally aggressive.[173] The SRO took the student to the ground, "hobbled" the student's legs, and handcuffed the student (with the help of other officers).[174] The student was then transported to the hospital on a mental hold, but continued to struggle against his confinement and complained of pain.[175] The Ninth Circuit affirmed the trial court's granting of the SRO's motion for summary judgment, even though it concluded that the SRO used excessive force in subduing the student (based on the student's version of the facts).[176] Because there was not prior case law that "squarely" fit the facts of this case, and the SRO's actions "fell into the 'hazy border between excessive and acceptable force,'" the SRO was entitled to qualified immunity according to the court.[177]

170. *Hoskins*, No. 2:13-cv-15, 2014 WL 7238621, at *6, 13.
171. *Id.* at *12.
172. 123 Fed. App'x. 783 (9th Cir. 2005).
173. *Id.* at 786.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 786. In a more recent, reported decision, the Ninth Circuit affirmed a trial court's verdict in favor an 11-year-old elementary school student with ADHD who asserted similar Section 1983 claims against police officers (not SROs) who handcuffed him at school. *See* C.B. v. City of Sonora,

Likewise, in *J.H. ex rel. J.P. v. Bernalillo County*, the Tenth Circuit affirmed a summary judgment in favor of a SRO who arrested and handcuffed an eleven-year-old female student after the SRO observed her kicking a teacher in her special needs classroom.[178] While the student's act of kicking her teacher clearly constituted a crime and justified her arrest under the law, whether it was appropriate to handcuff the student is a closer question, given her age and special needs. Yet, the court concluded that her young age did not undermine the SRO's concern for safety and need to maintain control; therefore, the use of handcuffs was justified.[179]

C. The Extraordinary Result: Benign Misbehavior Leading to Permissible Searches and Seizures

In *Johnson v. City of Lincoln Park*, the United States District Court for the Eastern District of Michigan granted an SRO's motion for summary judgment in a case in which the SRO twice tased a fourteen-year-old student who had previously been diagnosed as emotionally impaired.[180] The events leading up to the tasing demonstrate how the involvement of an SRO in routine school discipline matters can escalate quickly and result in potentially abusive behavior against students, yet leave those students without legal recourse.[181] *Johnson* arose from an occurrence in which a student brought a Gameboy into school, in clear violation of school rules. When he was brought to the principal's office, he repeatedly and loudly refused to surrender

769 F.3d 1005 (9th Cir. 2014). On the day in question, the student had forgotten to take his medication that helped regulate his symptoms, and was sitting quietly and unresponsively on the playground at recess. *Id.* When a school official directed the student to go inside, the student did not move. *Id.* Eventually, the official called the police and the officer that arrived handcuffed the student, placed him in a police car, and transported him to his uncle's business. *Id.* Notably, the student remained quiet during each encounter, and complied with all of the officer's requests. *Id.* The court held that existing law clearly established that the seizure of the student was unreasonable under the circumstances. *Id.*

178. 806 F.3d 1255 (10th Cir. 2015).

179. *Id.* at 1258.

180. Johnson *ex rel.* Smith v. City of Lincoln Park, 434 F. Supp. 2d 467 (E.D. Mich. 2006).

181. *Id.* at 469.

the Gameboy.[182] The SRO was called in to assist in the situation, but the student continued to refuse. The SRO then stood the student up and began to pat the student down in search of the Gameboy.[183] This physical contact agitated the student who took a swing at the SRO and a struggle ensued; the student bit the officer three times during the struggle.[184] The SRO eventually handcuffed the student, but the student continued to thrash in an attempt to prevent the SRO from searching him.[185] After a warning, the officer tased the student once through his clothing and then on his bare skin, leading the student to stop struggling.[186]

The student was ultimately charged with assaulting an officer and with resisting arrest, which seems understandable given his actions towards the SRO.[187] However, that these events arose out of the student's possession of a Gameboy and the SRO's decision to physically search an emotionally impaired and noticeably agitated student raises serious concerns. Additionally, the SRO's decision to tase the student twice *after* handcuffing him also calls the SRO's actions into question. Yet, the decision to grant the SRO's motion for summary judgment on the student's Section 1983 claims based on unreasonable search and seizure was straightforward to the court.[188] First, the search for the Gameboy was justified because the student was reasonably suspected of breaking a school rule.[189] Second, the student's argument that he should not be arrested was easily defeated by the fact that he swung at and bit the SRO.[190] Third, the court found that the SRO did not use excessive force when he tased the handcuffed student because the student continued to struggle despite being handcuffed.[191] The court further noted that the student's injuries – a rug burn and small bruise from

182. *Id.* at 470.
183. *Id.*
184. *Id.*
185. *Johnson*, 434 F. Supp. 2d at 470.
186. *Id.* at 470-71.
187. *Id.* at 471.
188. *Id.* at 478-80.
189. *Id.* at 477.
190. *Id.* at 477-78.
191. *Johnson,* 434 F. Supp. 2d at 478-81.

the taser – suggested that the use of force was not excessive.[192] So, a case that started with the possession of a Gameboy by an emotionally-impaired student ultimately led to his being tased twice, despite being handcuffed. Yet, the student's 1983 claim was far from being viable.

The dismissal of a student's Section 1983 claims for unreasonable seizure in *G.M. ex rel. B.M. v. Casalduc* raised similar concerns.[193] There, a student was arrested by an SRO and charged with a misdemeanor for "willfully interfering with the educational process . . . by committing, threatening to commit, or inciting others to commit any act that would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedure or functions of a public . . . school."[194] The arrest resulted from the student's possession and use of a cell phone in school – she had used it to text in class and refused to turn it over after she was removed from class.[195] After warnings from the SRO, the student continued to refuse to give him her cell phone and she was handcuffed, searched, and then arrested.[196] The student remained calm during the entire series of events.[197] While the court recognized that the above statutory language did not clearly apply to the student's behavior because it did not seem like she was intending to disrupt the educational process at her school, it concluded that the SRO was entitled to qualified immunity because the language of the statute arguably applied to her behavior and no prior case law existed to clearly dispute his interpretation.[198] Much like *Johnson*, the involvement of an SRO in a routine and benign disciplinary incident quickly escalated in to an arrested and handcuffed student.

A.M. ex rel. F.M. v. Holmes offers another instance of childish, relatively benign behavior quickly turning into criminal charges against the student.[199] However, in that case, the student did little to contribute to the escalation. The

192. *Id.* at 478-80.
193. 982 F. Supp. 2d 1235 (D.N.M. 2013).
194. *Id.* at 1240-43.
195. *Id.* at 1240.
196. *Id.*
197. *Id.*
198. *Id.*
199. 830 F.3d 1123 (10th Cir. 2016).

student's arrest stemmed from his classroom behavior, which consisted of him burping and laughing along with his classmates.[200] His teacher removed him from the class to the hallway, but the student continued to burp into the classroom.[201] At this point, the school's SRO intervened and walked the student to his office.[202] The student complied, waited for the SRO to retrieve his computer from his car, and then was charged with "interfering with the educational process."[203] The officer then walked the student to his patrol car, searched the student, handcuffed him, and then drove him to a detention center.[204] The student's mother brought a civil rights claim against the SRO, based on unlawful arrest and excessive force claims. However, the Tenth Circuit affirmed a summary judgment order in the SRO's favor based on qualified immunity.[205] The court concluded that there was not any clear case law that placed the student's disruptive burping outside the scope of the law against interfering with the educational process. Rather, the court determined the statute in question was worded broadly and could have been reasonably interpreted to apply to the student behavior, as his burping and laughing "stopped the flow of student educational activities, thereby injecting disorder into the learning environment . . ."[206] Even though this interpretation of the law could feasibly apply to any small act of student disruption, such as speaking out of turn or passing notes in class, the court used it to conclude that qualified immunity applied in this case.[207]

In almost every other context, the arrest and handcuffing of a person who calmly refused to turn over their cell phone would obviously raise significant civil rights concerns. Likewise, applying criminal sanctions for burping and laughing seems unimaginable outside of the school context. However, the

200. *Id.* at 1129-30.
201. *Id.*
202. *Id.* at 1130.
203. *Id.*
204. *Id.*
205. A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123, 1130 (10th Cir. 2016).
206. *Id.* at 1142.
207. *Id.* at 1169. (Gorsuch, J., dissenting) (highlighting case law that suggests the officer should have reasonably known the statute did not apply to the student's behavior).

primacy that legislatures and courts place on maintaining order in schools allows interactions such as these between SROs and students to occur. Additionally, because SROs serve in dual law enforcement/school official roles, they are able to rely on the broad scope of school rules to justify searching and seizing students. Likewise, schools' reliance on SROs to address challenging incidents of student misbehavior, including minor issues such as Gameboy possession, cell phone use, and burping, creates frequent interactions between SROs that can easily escalate, such that arrests and handcuffs arise out of relatively benign behavior. As trained police officers, SROs often rely on justice system responses to student misbehavior, instead of more therapeutic responses that could resolve misbehavior without such extreme outcomes. It appears that Section 1983 claims are of limited utility for students seeking to push back against criminalized responses to their misbehavior.

D. Important Limitations

There are certain limitations inherent in analyzing the current state of legal claims based on reported court decisions (and unreported decisions available on legal databases). First, they do not include claims that were made, but were resolved without producing any court opinions, most commonly through settlement or dismissal. It is safe to assume that most of settled cases were based on clear violations of students' civil rights. For example, a handful of videos have surfaced that document SROs body slamming, hitting, and dragging students in clear displays of excessive force that would lead to successful claims.[208]

Second, these decisions do not include potential Section 1983 claims against SROs that were never made. As Barry Feld noted, students and their parents may opt against pursuing such claims for a variety of reasons, including being unaware of the potential for such claims, the power dynamics between schools, SROs, and students, and fear of reprisal if the student must

208. *See, e.g.*, Lindsey Bever, *School Officer Fired After Video Showed Him Body-Slamming a 12-Year-Old Girl*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/news/education/wp/2016/04/11/school-officer-fired-after-video-showed-him-body-slamming-a-12-year-old-girl/; Ford, Botelho & Conlon, supra note 45.

remain enrolled in the school after filing suit.[209]

V. Strengthening Students' Section 1983 Claims

Since the Roberts Court began to re-fortify the qualified immunity defense, legal scholars have worried that it has become too formidable and undermines the purpose of Section 1983.[210] Some contend that it provides too much protection for government officials.[211] Others worry that its current configuration, which relieves the courts of having to determine if a plaintiff's constitutional rights were violated as long as it determines that the right in question was not clearly established, may slow the development of constitutional standards.[212]

More recently, William Baud argued that the legal justifications for this defense that the Court has offered are all faulty.[213] For example, the Court has commonly suggested that qualified immunity is supported by the traditional "good faith" defense that protected government actors from tort liability if they were acting in good faith that they were following established law (such as making an arrest when they mistakenly believed they had probable cause to make the arrest).[214] Baud notes that the Court initially rejected this defense when considering a Section 1983 claim.[215] He then goes on to detail how, despite this initial rejection, this defense was retroactively used (and then expanded) to support the qualified immunity defense against Section 1983 claims.[216] Baud proceeds to

209. Feld, *supra* note 8.

210. *See, e.g.*, William Baud, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. REV. 139, 141; Karen Blum et. al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013).

211. Baud, *supra* note 210, at 46-47 (citing Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1522-24 (2016)).

212. *Id.* at 47 (citing Aaron Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015)).

213. *Id.*

214. *Id.* at 53.

215. *Id.* at 57-58.

216. *Id.* at 59-61.

critique other justifications for qualified immunity found in Supreme Court opinions, concluding:

> The Court's crusade to enforce the doctrine of qualified immunity does not serve congressional intent or the rule of law. . . . If qualified immunity leads to bad consequences, it can be fixed . . . . [I]t can be overruled. And even if it the Court does not overrule it, it can stop expanding the legal error.[217]

The current prominence of citizens' violent encounters with the police suggest that the qualified immunity defense may be ripe for serious reconsideration.[218] The cases detailed here add further support to this notion, as several illustrate how the doctrine has shielded SROs from liability for seemingly egregious behavior.

Beyond the potential reform of qualified immunity, which may be unrealistic given the Court's consistent support of it, reforms in the way SROs are permitted to operate could also strengthen students' ability to bring successful Section 1983 claims against SROs and fortify their rights in schools.

The unique role of SROs and the diminished rights of students in schools limit students' abilities to bring successful civil rights claims against SROs to only the most egregious of cases. Specifically, the minimal protections students have against being searched seems to have made Section 1983 claims against SROs for unreasonable searches nonviable. Conversely, students' youth (and their diminished physical prowess) do not seem to restrict SRO's ability to use force when arresting students for even the most minor misbehavior. The only situations found in court opinions that suggest that unreasonable force may have been used by SROs involved a docile fourth grader who was handcuffed to "teach her a lesson" and students who suffered broken bones while being restrained by SROs. Qualified immunity proves to be a strong defense for

217. *Id.* at 88.

218. The current make-up of the Court is unlikely to pull back its breadth, however.

SROs, largely because existing case law is inconsistent and favorable to SROs' ability to search students based on minimal information and use force against students even if they seemingly do not pose a real threat.

Therefore, the most effective way to strengthen students' ability to bring successful Section 1983 claims against the oppressive actions of SROs is through state or federal legislation governing the actions of SROs. Legislation that provides clear guidelines for SROs' interactions with the students they serve is the most evident way to protect students against invasive and aggressive actions by SROs. The clarity of these guidelines will also give meaningful power to Section 1983 claims by students because they will undermine SROs' qualified immunity defenses. Many states have already passed legislation relating to SROs, so legislation on a state level is a possibility.[219] Likewise, because federal funding provides millions of dollars to support many SRO programs throughout the country, the federal government can link this funding to limits on SROs' roles in schools.[220] Notably, the Department of Education already has provided recommendations for the use of SROs in schools,[221] but binding guidelines that are attached to funding for SROs provide much clearer standards for SRO behavior.

Three provisions should be the centerpieces of such legislation: (1) clear delineation of SROs as law enforcement officials in all interactions with students; (2) limits on when SROs may use physical force against students, including when they may handcuff students; and (3) requirements for SRO training focused on their interactions with students that caters

219. THE COUNCIL FOR STATE GOV'TS JUSTICE CTR., *Officers in Schools: A Snapshot of Legislative Action* (2014), https://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Police-Brief.pdf.

220. *See* Nance, *supra* note 34, at 947 (detailing the significant costs of SROs and the hundreds of millions of dollars spent by the federal government).

221. U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE (2014), https://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf (stating, among other recommendations, "To ensure the proper functioning of any school-based law enforcement program and to avoid negative unintended consequences, schools should provide clear definitions of the officers' roles and responsibilities on campus, written documentation of those roles, proper training, and continuous monitoring of the program's activities through regular data collection and evaluation.").

to the social, emotional, and intellectual realities of the student populations that SROs serve.

Delineating SROs as law enforcement officials in all interactions with students would clarify searches and interrogations of student when SROs are involved.[222] In the realm of searches, SROs' clear status as law enforcement officials would render probable cause (of criminal conduct) the standard. The reasonable suspicion standard that applies to school officials would not apply in certain situations, as it does now. Additionally, suspected violations of school codes of conduct would also be insufficient justification for searches that involve SROs. Likewise, *Miranda* warnings would always be required when SROs are involved in questioning students (assuming that the students are deemed "in custody" at the time of questioning). Importantly, legislation considering this rule should also include guards against collusion by school officials and SROs in searches and interrogations so that SROs cannot defer these tasks to school officials, who are beholden to different rules.

Along with this delineation, SROs should also be removed from schools' disciplinary responses to minor misbehavior.[223] While SROs may have the training and ability to stop a fight that is in progress and deal with threats to safety in the school, such as weapons on campus, they do not need to be involved in common student misbehavior. Even the disciplinary responses to schoolyard fights can be handled by school administrators instead of by SROs.[224]

222. Price, *supra* note 10, at 567-569 (arguing that a bright-line rule that SROs always be considered police officers in their interactions with students would provide clarity and protect students' rights); *see also* CATHERINE Y. KIM & I. INDIA GERANIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 8-13 (2009).

223. This solution was also suggested by the ACLU in a white paper on developing governance documents on SROs roles in schools. *See* KIM & GERANIMO, *supra* note 222.

224. *See, e.g.*, Aaron M. Thompson & Michelle E. Alvarez, *Considerations for Integrating School Resource Officers into School Mental Health Models*, 35 CHILD. & SCHS. 131, 134 (2013) ("Developing a stepwise discipline system and criteria for what constitutes a school discipline issue, an arrest, and what events should always be subjected to review may alleviate confusion and protect student rights.").

Placing restrictions of the use of force by SROs would provide clarity to interactions between SROs and students who are under arrest or who SROs otherwise desire to physically control. A legal standard that restricts the use of force, including restraints, to only situations in which the student poses a danger or is an identifiable flight risk would curtail the use of handcuffs in many situations.

Some precedent for such policy exists. Many states have begun to limit the use of handcuffs on juveniles in other situations. For example, in several states, courts and legislators have considered limitations of when juveniles can be handcuffed and shackled when they face delinquency charges. Delaware recently passed a law forbidding the shackling of juveniles facing delinquency charges in the state's family court, unless the court makes a finding that shackling is necessary.[225] Other states have arrived at this policy through court decisions.[226] A similar standard could be applied to SROs in their interactions with students – handcuffs and other restraints should only be used when the officer determines the student is a threat or a flight risk, even when the student is under arrest.

Finally, legislation that requires thorough training of SROs that would provide specific guidance to SROs in their interactions with students could help protect students' rights.[227] Catering training to the social, emotional, and intellectual

225. *Juvenile Justice Reform Bills Signed into Law*, DEL. HOUSE DEMOCRATS (2016), http://www.dehousedems.com/press/juvenile-justice-reform-bills-signed-law; *see also* Anne Teigen, *States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 15, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx.

226. Teigen, *supra* note 225.

227. *See, e.g.*, George W. Timberlake, *Cops in Schools Need Special Training About Children and Trauma*, JUV. JUST. INFO. EXCHANGE (Nov. 5, 2015), http://jjie.org/2015/11/05/cops-in-schools-need-special-training-about-children-and-trauma/; BARBARA RAYMOND, CMTY. ORIENTED POLICING SERVS. OFF., U.S. DEP'T OF JUSTICE, PROBLEM-ORIENTED GUIDES FOR POLICE RESPONSE GUIDES SERIES NO. 10, ASSIGNING POLICE OFFICERS TO SCHOOLS 23-24 (2010), http://www.popcenter.org/Responses/pdfs/school_police.pdf; Matthew T. Theriot & Matthew J. Cuellar, *School Resource Officers and Students' Rights*, 19 CONTEMP. J. REV. 363, 374 (2016); Lisa H. Thurau & Jonathon Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools,* 54 N.Y.L. SCH. L. REV. 977, 1019-1020 (2009/2010).

realities of the student populations that SROs serve could result in fewer searches, less frequent handcuffing, and reduced physical contact between SROs and students. Additionally, such training could provide clearer standards for SROs' actions in these situations, and these standards could be used to buttress and Section 1983 claims that arise after the training is initiated. This training would also equip SROs with better knowledge and resources for the students they serve.[228] Notably, some states already include training requirements in their SRO legislation, so such a policy is not outside the realm of possibility.

VI. Conclusion

Students' Section 1983 claims against SROs provide another window into the criminalization of America's school children. The cases detailed above, most of which result in unsuccessful claims against SROs, illustrate the hallway-level effects of both the criminalization trend in American education and the diminished rights of students. They demonstrate how the involvement of police in routine school discipline matters can quickly escalate these situations to include aggressive, physical confrontations and arrests. They also illustrate the extreme limits on students' rights to control their persons and possessions in the name of maintaining order in their schools. While Section 1983 claims theoretically offer an avenue for students to push back when criminalization and rights suppression go too far, this remedy proves to be insufficient because the laws are so strongly tilted in favor of student control. Applicable laws and school rules commonly proscribe student behavior that is barely disruptive, permitting SROs and other school officials to search, restrain, arrest, and otherwise punish students under color of law. Likewise, the treatment of SROs as school officials blurs their role in school and the permissible parameters of their interactions with students, which further frustrates seemingly viable civil rights claims against them.

228. *See* John Rosiak, *How Mental Health Training Helps School Resource Officers*, 9 COMMUNITY POLICING DISPATCH (Feb. 2016), https://cops.usdoj.gov/html/dispatch/02-2016/mental_health_and_sros.asp.

Therefore, legislation at either the state or federal level that specifically guides the conduct of SROs is needed. Such legislation should clarify their status as law enforcement officers in their interactions with students. This would make it clear that they must have probable cause to search students and that the *Miranda* rules apply when they question students. Legislation should also place restrictions on SROs' use of force against students, including limitations on shackling, which will better protect students against excessive use of force by SROs. Finally, comprehensive training that specifically speaks to the social, emotional, and intellectual realities of the student population is needed. This will enable SROs to more frequently avoid justice system responses to student misbehavior. Collectively, these changes will both bolster students' rights in their interactions with SROs and empower SROs to better serve the students that they have agreed to protect, guide, and counsel.