Duke Law Journal Online

VOLUME 73 NOVEMBER 2023

ALL GROWN UP: QUALIFIED IMMUNITY, STUDENT RIGHTS, AND THE WAY FORWARD

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INTRODUCTION

Qualified immunity stifles the evolution of student rights. Until the 1960s, constitutional rights nearly disappeared at the moment of matriculation.[1] But in 1961, students at Alabama State College won due process rights after being expelled without a hearing for a civil rights protest.[2] In subsequent years, students won the rights to engage in political speech without censorship,[3] establish student

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†† Duke University School of Law, J.D. expected 2024; Harvard University, B.A. 2019. Thank you to Matthew for asking me to write this Essay with him; his creativity, dedication, and intellect made this Note happen. I also express my sincerest gratitude to the members of *Duke Law Journal* for their valuable guidance and feedback, which have immeasurably improved our writing. Finally, thank you to my professors, friends, and family, who have supported and inspired me throughout law school.

1. *See* Phillip Lee, *The Curious Life of In Loco Parentis at American Universities*, 8 HIGHER EDUC. REV. 65, 67 (2011) ("From the mid-1800s to the 1960s . . . constitutional rights stopped at the college gates . . . ."); *see also* Hoggard v. Rhodes, 210 S. Ct. 2421, 2422 (2021).

2. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 151–52 (5th Cir. 1961).

3. *See* PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: THE RISE OF THE FACILITATOR UNIVERSITY 41 (2d ed. 2013) (collecting authorities showing rights won by students); *see* Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667, 667, 670–71 (1973) (holding that a public university may not expel a student for distributing an "offensive" political cartoon in the student newspaper).

organizations,[4] be protected against unreasonable searches and seizures,[5] and be free from unlawful discrimination.[6]

Yet vindicating these rights today often proves elusive. In *Turning Point USA v. Rhodes* (*Hoggard*),[7] for example, a student at Arkansas State University-Jonesboro, Ashlyn Hoggard, set up a table to recruit students for a politically-affiliated student organization.[8] But she was soon told by university officials that she could not "table" at her present location and could only display marketing materials in campus "free expression" areas.[9] Hoggard refused and, along with a representative from the national sponsor of her student organization, expressed her beliefs about the constitutionality of "free expression areas" along with other university restrictions on speech.[10] The campus police arrived and ordered Hoggard to remove her recruiting table and for the national representative to leave campus altogether.[11]

Hoggard brought a Section 1983 claim against the University, and the Eighth Circuit agreed that the University's tabling policy was unconstitutional.[12] But the Eighth Circuit upheld the district court's grant of qualified immunity to the university officials on grounds that, though unlawful, the officials' actions did not violate a clearly established law.[13] The Eighth Circuit's decision seems at odds with the Supreme Court's establishment of First Amendment protections to public university campuses and a plethora of lower court decisions invalidating campus speech codes.[14] But the Eighth Circuit's decision

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4. *See* Healy v. James, 408 U.S. 169, 169, 194 (1972) (holding that a public university may not prevent the formation of a student organization solely because of political disagreement).

5. *See* Piazzola v. Watkins, 442 F.2d 284, 289 (5th Cir. 1971) ("[W]e must conclude that a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment.").

6. *See, e.g.*, Education Amendment Acts of 1972, Title IX, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex against students); Civil Rights Act of 1964, Title VI, 42 U.S.C. §§ 2000(d)–2000(d)(1) (prohibiting exclusion from benefits on the basis of race, color, or national origin).

7. Turning Point USA at Ark. State Univ. v. Rhodes (*Hoggard*), 973 F.3d 868, 873 (8th Cir. 2020), *cert. denied sub nom.* Hoggard v. Rhodes, 210 S. Ct. 2421 (2021).

8. *Id.* at 873.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 874, 879.

13. *Id.* at 881.

14. Brief of Amicus Curiae Foundation for Individual Rights in Education in Support of Petitioner at 3, 5 n.4, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (No. 20-1066) (citing Healy v.

was in-line with the uniform nature of modern qualified immunity doctrine, which demands that the constitutionality of the official's conduct must be "beyond debate" to invalidate a qualified immunity defense.[15]

As *Hoggard* illustrates, proving the violation of a constitutional or statutory right is no guarantee of success in litigation. At the earliest stages of a case, government officials may invoke qualified immunity as an affirmative defense to liability.[16] If the official initially demonstrates that "he was engaged in a discretionary function at the time of the challenged action[,]"[17] the burden shifts to the plaintiff to show that the defendant (1) violated her federal statutory or constitutional right and, in doing so, (2) the unlawfulness of the defendant's conduct was "clearly established at the time."[18] A court may consider the prongs in either order.[19] So, if the plaintiff fails to show her asserted right is clearly established, the court may dismiss the case without reaching the merits.[20]

Judges and commentators across the ideological spectrum have criticized the "clearly established" standard for its near-absolute

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James, 408 U.S. 169, 180 (1972) and collecting authorities showing federal courts striking down campus speech codes).

15. *Rhodes*, 973 F.3d at 880 (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741–42 (2011)).

16. Indeed, the Supreme Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." Scott v. Harris, 550 U.S. 372, 376 n.2 (2007) (quoting Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam)); *see* Pearson v. Callahan, 555 U.S. 223, 231–32 (2009) (same).

17. DANA K. MAINE, SUN S. CHOY & WESLEY C. JACKSON, SECTION 1983: ASSERTING QUALIFIED IMMUNITY, PRAC. L. PRAC. NOTE, Westlaw W-008-2777 (citing Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1264 (11th Cir. 2004)); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982) (noting that discretionary functions are those that require officials to make judgments that, unlike "ministerial tasks," are "almost inevitably . . . influenced by the decisionmaker's experiences, values, and emotions[,]" and as a result, may entitle an official to immunity).

18. District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018) (citing Reichle v. Howards, 566 U.S. 658, 664 (2012)). The Court has defined "clearly established" to mean "at the time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand what he is doing' is unlawful." *Id.* (citing Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)).

19. *See Pearson*, 555 U.S. at 236 ("[W]e now hold that the *Saucier* [ordered two-step] protocol should not be regarded as mandatory in all cases . . . .") (overruling Saucier v. Katz, 533 U.S. 194, 201 (2001)).

20. *See id.* (holding that, since "[i]n some cases, a discussion of why the relevant facts do not violate clearly established law make it apparent that in fact the relevant facts do not make out a constitutional violation at all[,]" courts may dismiss the case without reaching the constitutional issue).

protection of government officials[21] and stifling effect on the development of constitutional law.[22] Indeed, the Supreme Court has applied the "clearly established" test dozens of times but has only twice found the right at issue to be clearly established.[23] Empirical research further suggests a "constitutional stagnation" effect in which judges exercise their sequencing discretion to avoid ruling on the underlying constitutional claim.[24] Qualified immunity thus presents a complex "procedural puzzle" in which judges may dismiss Section 1983 claims by finding a right is not clearly established.[25] But paradoxically, by not adjudicating on the merits, the very right in question may never become clearly established.[26] Calls to reform the standard, or to abolish qualified immunity altogether, are widespread.[27]

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21. *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing qualified immunity has become "an absolute shield for law enforcement officers" that has "gutt[ed] the deterrent effect of the Fourth Amendment"); Ziglar v. Abbasi, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1836 (2018) ("Qualified immunity doctrine is historically unmoored, ineffective at achieving its policy ends, and detrimental to the development of constitutional law.").

22. *See, e.g.*, Schwartz, *supra* note 21, at 1800 ("[M]ultiple aspects of the [qualified immunity] doctrine . . . hamper the development of constitutional law . . . ."); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6, 27 (2015) (reviewing 800+ federal appellate cases from 2009 to 2012 and concluding "concerns about constitutional stagnation [arising from qualified immunity sequencing], while often overstated, appear to have at least some empirical foundation").

23. Both cases occurred nearly two decades ago. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 82–83 (2018) (citing Groh v. Ramirez, 540 U.S. 551, 564 (2004) and Hope v. Pelzer, 536 U.S. 730, 741–42 (2002)).

24. Nielsen & Walker, *supra* note 22, at 2, 49 ("[T]here is some reason to think [based on review of 800+ federal appellate cases] that at least certain judges . . . are more likely not to decide constitutional questions when the rights at issue are not clearly established.").

25. *Id.* at 4.

26. *Id.*

27. *See* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1340, nn.2–6 (2021) (collecting authorities showing diverse groups calling for qualified immunity reform); *see, e.g.*, Cole v. Carson, 935 F.3d 444, 472 (5th Cir. 2019) (en banc) (Willett, J., dissenting) ("Just three months ago . . . perhaps the most ideologically diverse amici ever assembled—implored the Court to push reset [on qualified immunity doctrine]."); Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner at 7, I.B. v. Woodard, 912 F.3d 1278 (10th Cir. 2019) (No. 18-1173), *cert. denied*, 139 S. Ct. 2616 (2019) ("Amici reflect an extensive cross-ideological and cross-professional consensus that this Court's qualified immunity case law undermines accountability, harming citizens and public officials alike.").

Consistent with these broader criticisms, Justice Thomas argued in an opinion dissenting from the denial of certiorari in *Hoggard* that the extension of qualified immunity to university officials is both problematic and understudied.[28] Qualified immunity shields government officials performing discretionary duties without considering their intent.[29] Based largely on contested policy considerations,[30] the same doctrine that protects a police officer in a split-second, life-threatening decision gives blanket protection to officials with months to design and implement university policies.[31] *Hoggard* became a cause célèbre among groups defending free expression on college campuses.[32] Interested parties have cited the case as reason to abolish qualified immunity,[33] to create an alternative standard for public-university officials broadly,[34] and to create an alternative standard specific to campus First Amendment cases.[35] But there exists a gap in the literature exploring why public university students—as opposed to other plaintiffs—merit an alternative to the clearly established law standard. And if a public university student does deserve an alternative, the question we must answer is: what is that alternative?

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28. *See* Hoggard v. Rhodes, 141 S. Ct. 2421, 2421–22 (2021) (Thomas, J., dissenting from denial of certiorari) (suggesting that the court should reconsider the "one-size-fits-all" aspect of the doctrine once more information and analysis is available).

29. *See* Crawford-El v. Britton, 523 U.S. 574, 588 (1998) ("Evidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense.").

30. *See* Anderson v. Creighton, 483 U.S. 635, 640 n.2 (1987) (observing that protecting government officials from frivolous claims was "the driving force behind *Harlow*'s substantial reformulation of qualified immunity") (emphasis in original). *But see* Schwartz, *supra* note 21, at 1836 ("Qualified immunity doctrine is . . . ineffective at achieving its policy ends . . . .").

31. *See Hoggard*, 141 S. Ct. at 2422 (Thomas, J., dissenting from denial of certiorari) (making this comparison).

32. *See No. 20-1066*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/20-1066.html [https://perma.cc/6VR7-SU6E] (showing more than nine public interest groups filing amicus briefs in support of petitioner).

33. *See, e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Plaintiffs-Appellants at 2–3, *Hoggard*, 141 S. Ct. 2421 (No. 20-1066) ("But in reversing the error below, the Court should also acknowledge and address the maturing contention that qualified immunity itself is unjustified.").

34. *See* Brief for Petitioner at 22–23, *Hoggard*, 210 S. Ct. 2421 (No. 20-1066) ("[C]ollege officials and administrators should be held to a higher standard than police officers and other state officials—not a lower one.").

35. *See* Kaitlin M. Kassal, *Modern Day McCarthyism: How Qualified Immunity's Protection of Campus Administrators Perpetuates the Tradition of American Censorship*, 14 ALA. C.R. & C.L. L. REV. 83, 86 (2023) ("Ultimately, an alternative standard to qualified immunity that allows monetary damages as a remedy to universities' First Amendment violations provides a stronger incentive to protect students' First Amendment rights.").

This Essay explores the tension of student rights on public university campuses and explores potential options for remedy. It argues that the intersection of current qualified immunity doctrine with the recognition of student rights at public universities creates a unique dynamic in which millions of Americans are unable to easily vindicate their rights at their place of residence and work. This tension is sufficient reason for states to intervene, and this Essay concludes by analyzing state bypasses to qualified immunity as a solution.

I. THE EVOLUTION OF STUDENT RIGHTS: FROM *IN LOCO PARENTIS* TO CONSTITUTIONAL RIGHTS

Broadly speaking, scholars have categorized the evolution of university student rights in three stages.[36] First, at common law, constitutional rights "stopped at the college gates."[37] Colleges were religious institutions founded for the instruction and moral formation of their adolescent students.[38] Because of that role, courts transposed the discretionary, privileged authority of parents to colleges acting *in loco parentis*—that is, in the place of a parent—when the student matriculated.[39] Blackstone explained that a school official had "such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."[40] Judicial review of a college's authority hinged on whether the college's official act was reasonably analogous to a parental act in the home.[41]

Most early examples of *in loco parentis* arise from cases involving private institutions. In 1866, the Illinois Supreme Court upheld

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36. *See, e.g.*, Lee, *supra* note 1, at 66 (surveying the history of *in loco parentis* in American universities in three parts); WILLIAM A. KAPLIN, BARBARA A. LEE, NEAL H. HUTCHENS & JACOB H. ROOKSBY, THE LAW OF HIGHER EDUCATION: STUDENT VERSION 343–45 (6th ed. 2017) (organizing a survey of the evolution of student rights in American universities loosely as pre-*Dixon*, post-*Dixon*, and the age of contractual rights); William W. Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 AM. J. COMP. L. 403, 405–14 (1969) (presenting the evolution of student rights in the United States as "*In Loco Parentis*," "From Status to Contract," and "From Contract to Constitutionalism").

37. Lee, *supra* note 1, at 67.

38. *See* Van Alstyne, *supra* note 36, at 407 ("A great many boys went up to college in the colonial era at the age of 13, 14, 15." (quoting Letter from Professor Henry Steele Commager to William W. Van Alstyne (May 5, 1962))).

39. *Id*. at 406.

40. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)).

41. Van Alstyne, *supra* note 36, at 406.

Wheaton College's prohibition against secret societies.[42] The Court held that "we have no more authority to interfere than we have to control the domestic discipline of a father in this family."[43] Citing *Wheaton* nearly fifty years later, the Court of Appeals of Kentucky used the same principle to uphold a student's dismissal for eating at a forbidden restaurant.[44] The court was "unable to see why" a college could not "make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose."[45] In 1924, the Supreme Court of Florida used the *Wheaton* court's paternalism language—without citation—to uphold Stetson University's dismissal of a student for "ringing cow bells" at prohibited hours.[46]

In a smaller number of cases, courts also applied the *in loco parentis* doctrine to public universities.[47] For example, the Supreme Court of Illinois upheld the University of Illinois's dismissal of a student who refused to attend daily chapel services, holding the student's voluntary entrance to the university meant surrendering his individual rights.[48] The comparatively smaller number of *in loco parentis* cases involving public universities is reflective of a historical context lacking a fully developed case law.[49] By 1860, only twenty-four public institutions of higher learning existed in the United States, as compared to 265 private institutions.[50] The passage of the Morrill Acts

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42. People *ex rel.* Pratt v. Wheaton Coll., 40 Ill. 186, 187 (1866).

43. *Id*.

44. Gott v. Berea Coll., 161 S.W. 204, 206–07 (Ky. 1913).

45. *Id*. at 206.

46. *See* John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) ("[C]ourts have no more authority to interfere than they have to control the domestic discipline of a father in his family."). Evidently, the officials standing *in loco parentis* did not favor more cowbell.

47. *See, e.g.*, Woods v. Simpson, 126 A. 882, 883 (Md. 1924) ("Only in extraordinary situations can a court of law ever be called upon to step in between [university] students and the [University of Maryland] officers in charge of them."); State *ex rel.* Ingersoll v. Clapp, 263 P. 433, 437 (Mont. 1928) (holding that courts "will not interfere with the discretion of school officials . . . unless there is a clear abuse of that discretion").

48. North v. Bd. of Trustees of Univ. of Ill., 27 N.E. 54, 56 (Ill. 1891).

49. *See* KAPLIN ET AL., *supra* note 36, at 33 ("[C]olonial colleges were often a mixture of public and private activity.").

50. *See* Claudia Goldin & Laurence F. Katz, *The Shaping of Higher Education: The Formative Years in the United States, 1890 to 1940*, 13 J. ECON. PERSP. 37, 42 (1999) (noting that, in the United States, 49 higher education institutions—of which 40 were private—were established from 1638–1819, and 240 higher education institutions—of which 225 were private—were established from 1820–1859, 432 institutions (of which 348 were private) from 1860–1899, and 200 institutions (of which 165 were private) from 1900–1934).

in 1862 and 1890 jumpstarted public universities, but by 1899, the ratio was still paltry—108 public to 613 private.[51] *In loco parentis* remained relevant for small, private liberal arts and religious institutions acting as surrogate parents to young teenagers.[52]

But by the turn of the twentieth century, *in loco parentis* was increasingly an insufficient analogy for student relations. A university could summarily dissolve its relationship with a student for violating school rules, unlike a parent, even if those rules would otherwise seem unreasonable.[53] Particularly in private university settings, where administrators derived authority from student agreements instead of state charter, the university-student relationship thus functioned more like a contract.[54] And at this second stage of evolution, students started asserting contractual rights.[55] In *Anthony v. Syracuse University*,[56] for example, the court upheld a private university's dismissal of a student because she was not "a typical Syracuse girl,"[57] explaining the student failed to establish that her dismissal was a breach of her signed Syracuse registration agreement.[58] The *in loco parentis* principle did not animate the court's decision.[59] Rather, *Anthony* followed a similar holding in *Barker v. Trustees of Bryn Mawr College*,[60] in which the Supreme Court of Pennsylvania reasoned that "the relation between

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51. *See id*. (explaining that from 1860–1899, 432 higher education institutions were established in the United States, of which 348 were private).

52. *See, e.g.*, Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913) (finding a small, Christian college to stand *in loco parentis* years after the Morrill Acts); John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (finding a small, Baptist college stood in *loco parentis* years after the Morrill Acts).

53. *See* Curry v. Lassell Seminary Co., 46 N.E. 110, 111 (Mass. 1897) (upholding a seminary's dismissal of a twenty-year old student for spending too many Sundays at home with her mother).

54. *See* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 5 (1999) ("The root of the power to be in loco parentis lay in contract and/or in delegation of sovereign power from the state via charter. Whether by explicit agreement, tacit agreement, and/or by delegated sovereign authority, the university—public or private—acquired parental rights and powers.")

55. WILLIAM A. KAPLIN, *supra* note 36, at 365. *See, e.g.*, Booker v. Grand Rapids Med. Coll., 156 Mich. 95. 589 (1909) (relying on contract theory to challenge a private college's decision to expel students on the basis of race); Koblizt v. W. Rsrv. Univ., 11 Ohio C.D. 515, 522 (1901) (challenging an expulsion from a public university on grounds that "by reason of his contract, [the plaintiff] got a right or a property that cannot be taken away from him without a full and complete trial").

56. Anthony v. Syracuse Univ., 224 A.D. 487 (N.Y. App. Div. 1928).

57. *Id.* at 489.

58. *Id.* at 491.

59. *See id.* at 491 ("She cannot recover, except upon the contract.").

60. Barker v. Trs. of Bryn Mawr Coll., 122 A. 220 (Pa. 1923).

the student and the college is solely contractual in character."[61] Courts defer less to private colleges today, but contract law remains the controlling legal paradigm for private student litigants.[62]

Finally, the recognition of constitutional rights for public university students marks a third stage in the evolution of student rights. The Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*[63] marked the path forward by extending due process rights to public university students.[64] Six Black students at Alabama State College sued after being expelled without a hearing for participating in a civil rights demonstration.[65] The district court ruled for the defendants based on a quasi-contractual analysis of the students' compliance with college rules.[66] But the Fifth Circuit reversed and remanded, holding that public universities are state actors bound by the Constitution.[67] States may not deny students "the protection given to a pickpocket" simply because they are students.[68] Instead, due process requires notice and a hearing before expulsion from a public university.[69] Crucially, the *Dixon* court limited its holding to public universities.[70] The court observed that student rights at private universities remain a "matter of contract."[71] Accordingly, constitutional rights stop at private, but not public, university gates.

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61. *Id.* at 221.

62. *See* LAKE, *supra* note 3, at 46 (citing Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984), and noting the case illustrates that courts now view the student handbook as an adhesion contract subject to the principle of fairness).

63. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

64. *Id.* at 158.

65. *See id*. at 152 n.3 (detailing the activities of the three plaintiffs that led to their expulsion).

66. *See* Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 950 (C.D. Ala. 1960) (holding that because attendance was voluntary, the college was afforded wide latitude to interpret the college catalogue), *rev'd*, 294 F.2d 150 (5th Cir. 1961).

67. *Dixon*, 294 F.2d at 158–59 (reversing and remanding the district court's holding because a hearing must be held to satisfy due process prior to expulsion from a state college or university).

68. *Id.* at 158 (citing Warren A. Seavey, *Dismissal of Students: Due Process*, 70 HARV. L. REV. 1406, 1407 (1957)).

69. *See id.* ("[We hold] that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.").

70. *Id.* at 158 (dismissing the district court's erroneous reliance on precedent concerning a "private university," citing precedent concerning "public colleges" as cases on point, and limiting its holding and guidance to "tax-supported college[s]" and "state college[s] and universit[ies]").

71. *Id.* at 157.

Dixon and its descendants guarantee that public university students are constitutional rights holders.[72]

II. THE EVOLUTION OF QUALIFIED IMMUNITY: FROM GOOD FAITH TO CLEARLY ESTABLISHED LAW

But while student rights were finally recognized on college campuses, a new doctrine at the Supreme Court prevented those rights from being fully recognized.[73] Six years after *Dixon*—in a case with facts and implications beyond a college campus—the Supreme Court first articulated qualified immunity doctrine in *Pierson v. Ray*.[74] A group of clergy members arrested under an anti-loitering statute sued the arresting officers under Section 1983, alleging false arrest and imprisonment.[75] Incorporating contemporaneous tort law,[76] the Court held the officers were immune from damages liability because they acted in good faith and with probable cause.[77] Police officers could claim a "good faith" defense to false imprisonment in a common-law action, and the Court reasoned that officers could claim the same defense in litigation arising under Section 1983.[78] The Court later extended the good faith defense into qualified immunity for state

72. *See, e.g.*, Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 87 n.4 (1978) ("This Court has been in the vanguard of the legal development of due process protections for students ever since *Dixon* . . . ."); Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975) ("Since the landmark decision . . . in [*Dixon*], the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions . . . .").

73. For a detailed review of the development of qualified immunity doctrine, *see, e.g.*, Keller, *supra* note 27, at 1388–1398; Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 208–217 (2023).

74. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

75. The clergy were Freedom Riders attempting to use segregated facilitates at a bus terminal. *See id.* at 549.

76. *See* Keller, *supra* note 27, at 1389 (noting the *Pierson* Court "cited only contemporaneous cases and treatises" to support its holding) (citing *Pierson*, 386 U.S. at 555 & n.10).

77. *Pierson*, 386 U.S. at 555 ("Under the prevailing view in this country a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.").

78. *Id.* at 557.

executive action[79] and added a test with an objective and subjective element.[80]

But in *Harlow v. Fitzgerald*,[81] the Court modified qualified immunity in three critical ways. First, citing policy concerns, the Court removed the subjective element.[82] Courts will no longer examine a government official's state of mind, thus forgoing "broad-ranging discovery and the deposing of numerous persons."[83] Second, the Court changed the remaining, objective element—a reasonableness inquiry—into the "clearly established law" standard. After *Harlow*, a government officer performing an official act is entitled to qualified immunity unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[84] Finally, writing in concurrence, Justice Brennan added that the clearly established law standard applied "to all governmental officials performing discretionary functions."[85] The Court has confirmed Justice Brennan's interpretation, and it remains the controlling interpretation of the "clearly established law" standard.[86]

III. VISIONS OF STATE REFORM

Though the path to federal reform remains bleak, states may enact analogues to Section 1983 to allow plaintiffs to sue for deprivation of

79. *See* Scheur v. Rhodes, 416 U.S. 232, 247–48 (1974) (holding qualified immunity "in varying scope" extended to Ohio state executive officials for damages relating to the deaths of students in the May 4, 1970 massacre).

80. *See* Wood v. Strickland, 420 U.S. 308, 321 (1975) ("As we see it, the appropriate [qualified immunity standard] contains elements of both [objective and subjective tests]."), *abrogated by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

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

82. *Id.* at 817–18 ("[B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. . . . [R]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption. . . .").

83. *Id.* at 816–17.

84. *Id.* at 818.

85. *Id.* at 821 (Brennan, J., concurring) (quoting *Harlow*, 457 U.S. at 818).

86. *See*, *e.g.*, Anderson v. Creighton, 483 U.S. 635, 642 (1987) ("We have emphasized that the doctrine of qualified immunity reflects a balance that has been struck 'across the board' . . . .") (citing *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)); Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("We apply this 'clearly established' standard 'across the board'. . . .") (citing *Anderson*, 483 U.S. at 641–43).

rights under state law.[87] Section 1983 provides the right to sue state and local government employees acting under color of state law for civil rights violations.[88] Qualified immunity is generally available as a defense if the law violated is not "clearly established."[89] If qualified immunity applies, money damages are not available even if a constitutional violation occurred. This Section will use a Colorado law as a case study in enacting a state analogue to Section 1983 that bans law enforcement officers from using qualified immunity as a defense. Because university students face a unique set of procedural challenges when bringing suit for civil rights violations, states should enact a similar law banning qualified immunity in the public university context.

A. A Case Study of Colorado's Law

In 2020, Colorado enacted a state analogue to Section 1983 that creates a private right of action for violations of state constitutional law by Colorado police officers and specifically prohibits the use of qualified immunity and state statutory immunities as legal defenses.[90] The law provides attorneys' fees for prevailing plaintiffs, which removes the tyranny of small decisions present in federal cases.[91] Colorado's statute also features a unique indemnification provision: local governments must indemnify their officers unless they are convicted of a crime, but officers acting in bad faith must contribute the lesser of 5 percent of the judgment or $25,000.[92] By mandating broad indemnification with a contribution requirement for bad faith actors, the law ensures that plaintiffs receive full compensation for their losses. In addition, it creates financial pressure for officers to avoid wrongdoing.

B. Intervention is Warranted in Universities

These principles should be applied to the public university context, where qualified immunity and robust procedural barriers prevent student plaintiffs from vindicating their rights in court. For

87. *See* Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 769 (2021) (discussing analogues to Section 1983).

88. 42 U.S.C. § 1983.

89. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

90. COLO. REV. STAT. §§ 13-21-131(1), (2)(b).

91. *Id.* §13-21-131(3).

92. *Id.* §13-21-131(4).

student litigants suing their universities, qualified immunity functions as absolute immunity because damages are often a student's only recourse.[93] A myriad of procedural moats surround qualified immunity's ivory tower, preventing student plaintiffs from obtaining injunctive relief. One such moat is mootness. Federal courts are unwilling to consider requests for declaratory and injunctive challenges against university policies if the plaintiff is no longer a current student affected by that policy.[94] Therefore, university officials can moot a student's declaratory and injunctive claims by delaying the litigation until the student graduates.[95] The same-plaintiff requirement prevents the "capable of repetition yet evading review" exception from helping graduating students.[96] Federal district court trials can take nearly 2.5 years, and the median time interval for a circuit court to dispose of an appeal is nearly ten months.[97] Accordingly, unless a student's

93. *See, e.g.*, Turning Point USA at Ark. State Univ. v. Rhodes (*Hoggard*), 973 F.3d 868, 874 (2020) (proceeding on damages after the university successfully mooted claims for injunctive relief); Uzuegbunam v. Preczewski, 141 S. Ct. 792, 797 (2021) (same).

94. *See* Robert Corn, *Don't be Mooted: A Student Plaintiff's Guide to Keeping Your Case Alive After Graduation*, THE STUDENT PRESS L. CTR. (Nov. 17, 2014), https://splc.org/2014/11/dont-be-mooted [https://perma.cc/4DE4-KBE7] (collecting cases in which federal courts have dismissed claims brought by students on grounds of graduation-related mootness).

95. Brief of Amicus Curiae Foundation for Individual Rights in Education in Support of Petitioner at 22–23, Hoggard v. Rhodes, 141 S. Ct. 2421 (2021) (No. 20–1066), 2021 WL 916341, at *22–23.

96. The Supreme Court has generally declined to deem moot issues that are "capable of repetition, yet evading review." *E.g.*, Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016) (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)) ("Although a case would generally be moot in such circumstances, this Court's precedents recognize an exception to the mootness doctrine for a controversy that is 'capable of repetition, yet evading review.'"); Turner v. Rogers, 564 U.S. 431, 439 (2011) (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 489 (1911) ("[T]his case is not moot because it falls within a special category of disputes that are 'capable of repetition' while 'evading review.'"). This exception to mootness applies only if (1) "the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration" and (2) "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," which is the same–plaintiff requirement. United States v. Juv. Male, 564 U.S. 932, 938 (2011) (per curiam) (alterations in original) (quoting *Spencer*, 523 U.S. at 17). However, the "capable of repetition yet evading review" doctrine "will not revive a dispute which became moot before the action commenced." Renne v. Geary, 501 U.S. 312, 320 (1991).

97. *See Table C-5: U.S. District Courts – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2021*, U.S. CTS., https://www.uscourts.gov/file/36656/download [https://perma.cc/2P4E-R5LA] (finding that the median time interval during trial was twenty nine months); *Table B-4A: U.S. Court of Appeals – Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2017*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_09

constitutional rights are violated in the first year or two when they are attending a university, the plaintiff is unlikely to obtain a court-ordered change to university policy.[98]

Universities may also moot a student's injunctive claim by temporarily suspending the challenged policy. Typically, the voluntary cessation of a challenged policy must meet a "stringent" standard for the Supreme Court to moot an injunctive claim.[99] But unlike other plaintiffs, students will face an uphill battle to win under voluntary cessation because courts give government entities and officials "considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."[100] Although university policies are much easier to enact and repeal than statutes,[101] courts equate changing a public university policy with repealing a challenged statute, which the Supreme Court has indicated "makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur."[102] Consequently, to proceed under the temporary cessation exception against a university, students must bear the burden of presenting "affirmative evidence" that their challenge is no longer moot without the benefit of discovery.[103]

Students may also lack standing in seeking forward-looking relief. Challenging official conduct requires a "real and immediate" threat of future injury, not a "hypothetical" or "abstract" concern.[104]

30.2017.pdf [https://perma.cc/HC5J-XBFE] (finding that the median time interval from filing of notice of appeal to last opinion or final order was 9.9 months); Brief of Amicus Curiae Foundation for Individual Rights in Education in Support of Petitioner, *supra* note 95, at 21–24 (making similar points in support of petitioner in *Hoggard*).

98. *See* Corn, *supra* note 94 ("In general, challenges to school policies must be raised by currently affected students. When a student graduates, a court may dismiss her claims as moot.").

99. *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) ("[T]he standard we have announced for determining whether a Case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" (citing United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

100. Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1256 (11th Cir. 2017) (quoting Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1328–29 (11th Cir. 2004)).

101. *See, e.g.*, *University Policies: Frequently Asked Questions*, CARNEGIE MELLON UNIV., https://www.cmu.edu/policies/faq/index.html [https://perma.cc/5S3B-LKKK] (describing Carnegie Mellon's process for enacting official school policy: a university committee makes recommendations to the president, whose approval is required before a policy becomes official).

102. Flanigan's Enters., 868 F.3d at 1256 (quoting Harrell v. The Fla. Bar, 608 F.3d 1241, 1265–66 (11th Cir. 2010)) (alteration in original).

103. *Id.* (quoting Nat'l Advert. Co. v. City of Miami, 402 F.3d 1329, 1334 (11th Cir. 2005)).

104. City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983).

Even if a student's claim for damages remains ripe for consideration, she is unlikely to withstand the buzzsaw of modern qualified immunity doctrine. The clearly established law standard applies "to all governmental officials performing discretionary functions" without regard to intent and therefore applies to university officials.[105] The standard "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[106] Intervention is necessary to give students a chance to have their cases heard on the merits.

C. Proposal for State Intervention

Intervention is warranted at the state level because there is no clear path to comprehensive federal reform of qualified immunity doctrine. Congress is highly unlikely to pass reform of qualified immunity,[107] and the Supreme Court is unlikely to overrule its precedent on qualified immunity because of statutory stare decisis.[108] Therefore, the Court is likely to adhere to precedent here.[109] In the

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105. District of Columbia v. Wesby, 583 U.S. 48 (2018); Harlow v. Fitzgerald, 457 U.S. 800, 818; *id.* at 821 (1982) (Brennan, J., concurring) (quoting *Harlow*, 457 U.S. at 818).

106. *Wesby*, 583 U.S. at 63 (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

107. *See, e.g.*, Aaron L. Nielsen & Christopher J. Walker, *Qualified Immunity's 51 Imperfect Solutions*, 17 DUKE J. CONST. L. & PUB. POL'Y 321, 330–33 (2022) (discussing a string of bipartisan failures to pass limited reforms, such as the Justice in Policing Act advanced by Democrats in the House and Senate); Devin Dwyer, *Supreme Court Won't Revisit Qualified Immunity for Police, Leaving It to Congress*, ABC NEWS (June 22, 2020, 12:24 PM), https://abcnews.go.com/Politics/supreme-court-wont-revisit-qualified-immunity-policeleaving/story?id=71374240 [https://perma.cc/RTE7-8GAA] (explaining that Congress did not have the votes to move forward reform on qualified immunity after the murder of George Floyd); Allison Pecorin, *Why Congress Has Failed To Pass Policing Reform in Recent Years*, ABC NEWS (Jan. 27, 2023, 5:06 PM), https://abcnews.go.com/Politics/congress-failed-pass-policing-reform-recent-years/story?id=96723272 [https://perma.cc/4TA2-P6VP] ("There are not any major talks of police reform going on in the Senate at this time, and any House effort will likely be blocked from the floor by the GOP majority."); Lee Drutman, *How Much Longer Can This Era of Political Gridlock Last?*, FIVETHIRTYEIGHT (Mar. 4, 2021, 6:00 AM), https://fivethirtyeight.com/features/how-much-longer-can-this-era-of-political-gridlock-last [https://perma.cc/D6TS-AW4W] ("[A]bsent a major change to the rules of our elections, no realignment lies in sight.").

108. When a decision interprets a statute, stare decisis carries "enhanced force" because parties may "take their objections across the street" to Congress who can "correct any mistake it sees." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1856 (2018) (quoting Kimble v. Marvel Ent., LLC, 576 U.S. 446, 456 (2015)). This heightened statutory stare decisis applies "even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute," such as qualified immunity under 42 U.S.C. § 1983. *Id.* (quoting *Kimble*, 576 U.S. at 456).

109. *See id.* (quoting *Kimble*, 576 U.S. at 456) ("Because of stare decisis, courts ordinarily do not revisit statutory issues that have been decided absent some 'special justification' beyond mere wrongness.").

absence of federal intervention by Congress or the Court, state legislatures should intervene by enacting a Section 1983 analogue that bans qualified immunity as a defense for public university officials.

This proposal would allow student plaintiffs to recover damages without deterring school officials from doing their jobs. State laws should allow plaintiffs to recover monetary damages while indemnifying officials from personal liability. Indemnification eliminates a leading policy rationale for qualified immunity: protecting government employees from financial ruin.[110] Unless an official acted in bad faith or was criminally convicted for actions triggering the lawsuit, universities should face liability for their employees' actions. Bad faith actors should contribute a percentage of the judgment.[111] This ensures that plaintiffs receive compensation for their losses even in cases with bad faith conduct that bars indemnification.

Finally, to mitigate concerns that a new civil action would open the gateway to frivolous lawsuits, state laws should allow officials to recover attorneys' fees if they successfully defend themselves. States may also consider imposing other restrictions. For example, New Mexico's law features a liability cap of $2 million, imposes a three-year statute of limitations, and requires plaintiffs to provide a written notice detailing their loss or injury to the officer's agency or department within one year after the incident.[112] Civil rights claims may merit nominal damages anyway, and we maintain that recognizing students as constitutional rights holders is an appropriate use of government resources.[113] Without a legal remedy to vindicate their rights, students harmed by university misconduct are forced to bear the cost.

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110. *See id.* at 1875–76 (noting that the *Harlow* court identified "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties'" and discussing findings that lead some scholars to argue qualified immunity "is not achieving its policy objectives" (quoting *Harlow*, 457 U.S. at 814 and Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11 (2017))).

111. *See supra* note 92 and accompanying text.

112. N.M. STAT. ANN. §§ 41-4A-6(A), 7, 13(A) (2021).

113. Indeed, Sadie Blanchard notes the importance of nominal damages, explaining:

> Today, most attention paid by courts and scholars to the question of nominal damages and costs focuses on suits against government defendants alleging violations of . . . civil rights. Fee-shifting statutes . . . make the availability of costs relevant to which party prevails. A plaintiff who receives nominal damages is a prevailing party and therefore eligible to recover statutory attorney's fees, although "ordinarily" he will not under current Supreme Court precedent.

Sadie Blanchard, *Nominal Damages as Vindication*, 30 GEORGE MASON L. REV. 228, 235 (2022) (internal citations omitted).

CONCLUSION

The tension of student rights on public university campuses is the result of colliding evolutions. Qualified immunity evolved from a "good faith" defense to the "clearly established" law standard. In tandem with mootness limitations, qualified immunity now functions as a near-absolute bar to liability for damages under 42 U.S.C. § 1983. But students evolved from second-class citizens under law to constitutional rights holders in the 1960s. The unlikelihood of federal intervention means, without state action, millions of students will spend years of their lives with a diminished capacity to vindicate their constitutional rights at their place of residence and work. Potential for reform lies in the arms of state legislatures, who are starting to enact analogues to Section 1983 and bypasses to qualified immunity.