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THOMAS EX REL. THOMAS V. ROBERTS:
ANOTHER PHOTO FINISH WHERE SCHOOL OFFICIALS
WIN THE RACE FOR QUALIFIED IMMUNITY

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**THOMAS EX REL. THOMAS V. ROBERTS: ANOTHER
PHOTO FINISH WHERE SCHOOL OFFICIALS WIN
THE RACE FOR QUALIFIED IMMUNITY**

I. INTRODUCTION

[D]emeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission . . .¹

At least 100 courts have referred to this quote when describing the appalling effects of a strip search upon an individual.² The practice of school officials strip searching a student is repugnant, yet all too common. Many cases document school officials conducting warrantless strip searches on students younger than eighteen-years-old in an attempt to recover small amounts of drugs or nominal amounts of missing money.³ In at least five documented cases, school officials or personnel conducted strip searches of elementary school children when ten dollars or less allegedly went missing.⁴

1. *Mary Beth G. v. City of Chi.*, 723 F.2d 1263, 1272 (7th Cir. 1983) (quoting *Sala v. County of Suffolk*, 479 F. Supp. 491 (E.D.N.Y. 1978) (unpublished)) (describing strip searches involving the visual inspection of the anal and genital area that invade personal dignity and privacy to a magnitude that causes serious emotional distress).

2. *E.g. Wash. v. Whitaker*, 451 S.E. 2d 894, 899 (S.C. 1994); *U.S. v. Ford*, 232 F. Supp. 2d 625, 631 (E.D. Va. 2002). A search for the words demeaning, dehumanizing, and undignified in all federal and state cases reported one hundred cases where the court referenced the quotation. Search of LEXIS (Oct. 12, 2004).

3. *E.g. Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1319 (7th Cir. 1993) (School officials subjected a sixteen-year-old student to a strip search without a warrant because they suspected the student of carrying drugs in the crotch area of his pants.); *Bellnier v. Lund*, 438 F. Supp. 47, 50 (N.D.N.Y. 1977) (School officials strip searched a fifth-grade class without a warrant when they suspected that someone in the class stole another child's \$3.00.).

4. *See generally Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 822-23 (11th Cir. 1997) (Two second-grade students were strip searched to find \$7.00.); *Oliver v. McClung*, 919 F. Supp. 1206, 1211 (N.D. Ind. 1995) (A group of eighth-grade female students was strip searched to find \$4.50.); *Bellnier*, 438 F. Supp. at 50 (School officials strip searched a fifth-grade class when they suspected someone wrongfully

Despite the public disgust with strip searches, only six states, California,⁵ Iowa,⁶ Oklahoma,⁷ South Carolina,⁸ Washington,⁹ and Wisconsin¹⁰ specifically prohibit strip searches by school officials. Unbelievably, courts generally exempt school officials from liability when a minor is strip searched based on the doctrine of qualified immunity.¹¹ In 2003, the Eleventh Circuit held in *Thomas ex rel. Thomas v. Roberts* that it would grant qualified immunity to school officials even when the search was unconstitutional.¹² *Thomas II* raised the issue of whether a strip search of an entire fifth grade class conducted by school officials to find twenty-six dollars violated the students' Fourth Amendment rights.¹³

This note examines the court's sparse analysis in *Thomas II*. Section II discusses the facts of the strip search and the procedural history of the case, noting that the Supreme Court remanded the case back to the Eleventh Circuit in light of the Court's ruling on qualified immunity in *Hope v. Pelzer*.¹⁴ Section III restates the issue and holding of *Thomas II*. Section IV summarizes the court's analysis of whether the strip search was constitutional and examines the court's determination of the students' qualified immunity claims against school officials and the school district. Section V provides a brief historical progression of students' rights in the school environment and a

possessed \$3.00.); *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 894 (S.D. Ohio 2003) (A school official strip searched a third-grade student suspected of wrongfully possessing \$10.00.).

5. Cal. Educ. Code Ann. § 49050 (West 1993 & Supp. 2004).

6. Iowa Code Ann. § 808A.2 (West 2003).

7. Okla. Stat. Ann. tit. 70, § 24-102 (West 1998 & Supp. 2004).

8. S.C. Code Ann. § 59-63-1140 (2004).

9. Wash. Rev. Code Ann. § 28A.600.230 (West 1997 & Supp. 2004).

10. Wis. Stat. Ann. § 118.32 (West 2004).

11. *E.g. Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) (granting qualified immunity to school officials who strip searched two second-grade girls for \$7.00).

12. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 951, 956 (11th Cir. 2003) [hereinafter *Thomas II*], reinstating, *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) [hereinafter *Thomas I*].

13. *Thomas II*, 323 F.3d at 952.

14. *Id.* at 951-52; *Hope v. Pelzer*, 536 U.S. 730, 745-46 (2002) (holding that qualified immunity did not apply to the prison official's actions because they were so egregious).

discussion of the court's improper application of qualified immunity to an unconstitutional search.

II. FACTS

On the morning of October 31, 1996, school at the West Clayton Elementary School began like any other day.¹⁵ In a fifth-grade classroom, Sergio Evans placed an envelope containing twenty-six dollars from candy sales on a table near the desk of his teacher, Tracey Morgan.¹⁶ A few minutes later, the envelope was missing.¹⁷ Morgan questioned the class regarding the whereabouts of the money, but none of the students indicated that they knew where it was.¹⁸ Before the search of the class began, Sergio checked his belongings for the money, and Morgan attempted to call Sergio's mother at home to confirm he actually brought the money to school.¹⁹ Unable to contact Sergio's mother, and with the assistant principal's authorization, Morgan commenced the search anyway.²⁰

Morgan believed the missing envelope presented a serious situation, because twenty-six dollars was a large sum of money for her students, who were "too poor to afford their school lunches."²¹ Assistant Principal, R.G. Roberts, permitted Morgan to conduct a limited search of only the girls' purses and the boys' pockets; however, Morgan's search also included the students' backpacks, desks, and shoes, which did not yield the money.²² Morgan then involved Officer Zannie Billingslea, an officer with the Clayton County Police Department who was on campus teaching a drug awareness class, to assist with the investigation.²³

Against the assistant principal's explicit limited authorization, Morgan conducted an invasive strip search of the entire class.²⁴

15. *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1163 (11th Cir. 2001), vacated *sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, *Thomas II*, 323 F.3d 950.

16. *Thomas*, 261 F.3d at 1163.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1163.

23. *Id.* at 1163-64.

24. *Id.* Roberts only authorized a search "of the girls' purses and the boys'

Morgan separated the children by sex and sent them to the bathroom in groups for a strip search.²⁵ Once inside the boys' bathroom, Officer Billingslea pulled down his own pants and underwear to demonstrate what the boys must do to avoid suspension or even jail.²⁶ The boys removed most of their clothing and Officer Billingslea visually inspected the underwear of each boy.²⁷ Two female classmates observed one boy stripping as they walked by the open door of the boys' bathroom.²⁸

In the girls' bathroom, Morgan instructed the girls to lower their pants or raise their dresses and lift their brassieres for inspection, which exposed their breasts.²⁹ Morgan threatened to send the girls to juvenile hall if they did not comply with her instructions.³⁰ Ultimately, none of these unbelievable searches located the missing envelope or money.³¹

After learning about the strip searches, several angry parents contacted the school the next day.³² The Clayton County School District performed its own investigation of the events and concluded that the students were not strip searched at all.³³ After investigating the conduct of Officer Billingslea, the Clayton County Police Department issued a letter of reprimand against him and reduced his pay.³⁴

The parents of thirteen students filed suit against the teacher Tracey Morgan, Officer Zannie Billingslea, Assistant Principal R.G. Roberts, Principal Ralph Matthews, Clayton County, and the Clayton County School District.³⁵ Pursuant to title 42 of the United States Code, section 1983, the complaint alleged that the children were deprived "of their rights to privacy, to be secure in their persons and

pockets." *Id.* at 1163.

25. *Id.* at 1164.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 1164-65 (The District reached this conclusion after it reviewed the students' statements and met with Roberts, Matthews, and Morgan.).

34. *Id.* at 1165.

35. *Id.* at 1162.

to be free from unreasonable searches and seizures as protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.’³⁶

Although the district court held that the strip searches of the students were unconstitutional under the Fourth Amendment, it found that Morgan, Officer Billingslea, Roberts, and Matthews were entitled to qualified immunity and granted summary judgment in their favor.³⁷ The district court in *Thomas I* also concluded that neither the school district nor the county were liable for the searches and granted them qualified immunity as well.³⁸ The plaintiffs appealed, and in 2001, the Eleventh Circuit in *Thomas II* affirmed the lower court’s application of qualified immunity to the defendants and upheld the grant of summary judgment.³⁹

The United States Supreme Court granted certiorari, vacated the prior judgment of *Thomas I* and remanded the case back to the Eleventh Circuit for reconsideration on the issue of qualified immunity in light of the Supreme Court’s holding in *Hope v. Pelzer*.⁴⁰ In *Hope*, the Supreme Court denied a grant of qualified immunity to a prison official after it determined that the official’s conduct was so egregious that he should have known his actions were unconstitutional.⁴¹

III. THE COURT’S ISSUE AND HOLDINGS

The issue facing the *Thomas II* court on remand was whether qualified immunity applied to Morgan, Officer Billingslea, and Roberts.⁴² After examining *Hope*, in *Thomas II*, the court held that nothing in *Hope* required a change in its conclusion that the school officials’ conduct was not egregious.⁴³ In *Thomas II*, the court reinstated its prior holding where it previously found the defendants were not liable and granted them qualified immunity.⁴⁴

36. *Id.* at 1165 (citing 42 U.S.C. § 1983 (2000)) (quoting plaintiffs’ amended complaint).

37. *Thomas I*, 261 F.3d at 1162-63.

38. *Id.* at 1177.

39. *Id.* at 1163.

40. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 951-52 (11th Cir. 2003), reinstating, *Thomas ex rel. Thomas I*, 261 F.3d 1160.

41. 536 U.S. 730, 745-46 (2002).

42. 323 F.3d at 952.

43. *Id.* at 956.

44. *Id.*

IV. DECISION OF THE COURT

In its initial appellate review in *Thomas I*, the court analyzed the issues in this case in a two-step process.⁴⁵ First, it considered the constitutionality of the search by discussing whether the search was justified at its inception and whether the search was reasonably related to its objective.⁴⁶ Next, the court addressed whether qualified immunity insulated the defendants and the school district from liability.⁴⁷

A. *THE CONSTITUTIONALITY OF THE STRIP SEARCHES*

The court in *Thomas I* initiated its constitutional inquiry by applying the Fourth Amendment standards for student searches set forth in *New Jersey v. T.L.O.*⁴⁸ to the student strip searches conducted by the school officials in *Thomas*.⁴⁹ To determine whether the search was reasonable, the *Thomas I* court utilized the balancing test created in *T.L.O.* which weighs “ ‘the need to search against the invasion the search entails.’ ”⁵⁰

Thomas I reasoned that the need to recover twenty-six dollars must be greater than the invasion a strip search places on an entire fifth grade class.⁵¹ The *Thomas I* court concluded that the need to recover twenty-six dollars was not so great as to outweigh the students’ Fourth Amendment rights, and found that the strip search was unconstitutional.⁵²

Yet, because the decision in *T.L.O.* only addressed the application of a Fourth Amendment right in the context of its given facts, the *Thomas II* court felt *T.L.O.* did little to assist in its analysis.⁵³ The court in *Thomas II* distinguished its facts from *T.L.O.* and determined that

45. 261 F.3d 1160, 1165 (11th Cir. 2001), *vacated sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated, Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

46. *Thomas I*, 261 F.3d at 1166-70.

47. *Id.* at 1170-75.

48. 469 U.S. 325, 333-34 (1985) (The Supreme Court recognized students’ Fourth Amendment rights in schools for the first time in this case.).

49. 261 F.3d at 1166-67.

50. 261 F.3d at 1166 (quoting *T.L.O.*, 469 U.S. at 337).

51. 261 F.3d at 1168-69.

52. *Id.* at 1177.

53. 323 F.3d at 954.

T.L.O.'s balancing test does nothing more than call for school officials to speculate whether a court applying the balancing test would find a search unreasonable.⁵⁴

In addition to the balancing test, the *T.L.O.* Court created a two-prong test to determine when a search of a student is reasonable.⁵⁵ The first part of the test requires the court to determine whether the search was justified at its inception.⁵⁶ To satisfy this test, the school official must have reasonable grounds to believe that the search will reveal evidence that the particular student is violating a law or school rule.⁵⁷ Under *T.L.O.*'s first prong, the *Thomas I* court considered whether individualized suspicion existed.⁵⁸ Individualized suspicion is the belief that a particular individual engaged in misconduct.⁵⁹ In contrast, non-individualized suspicion is a general suspicion which is directed at a large portion of the student population.⁶⁰ In this case, the plaintiffs interpreted the facts in *T.L.O.* as setting a standard that school officials may only conduct searches if individual suspicion is present.⁶¹ The plaintiffs argued that because there was no individualized suspicion present here, the search was unreasonable.⁶²

The court held in *Thomas I* that the money in the envelope disappeared in a manner in which Morgan could reasonably believe a student in her classroom was responsible for its disappearance.⁶³ Yet, the court held that theft of twenty-six dollars did not present an extreme threat to school discipline or safety required to conduct the strip search.⁶⁴ The court recognized that the only situation where Morgan would not need to possess individualized suspicion would be when her

54. 323 F.3d at 954.

55. *Id.* at 1166 (citing *T.L.O.*, 469 U.S. at 341).

56. *Thomas I*, 261 F.3d at 1166 (citing *T.L.O.*, 469 U.S. at 341).

57. *Thomas I*, 261 F.3d at 1166 (citing *T.L.O.*, 469 U.S. at 341-42).

58. 261 F.3d at 1167.

59. Jacqueline A. Stefkovich, *Twenty-Five Years After Tinker: Balancing Students' Rights: Students' Fourth and Fourteenth Amendment Rights After Tinker: A Half Full Glass?*, 69 St. John's L. Rev. 481, 487 (1995).

60. *Id.* at 487-88.

61. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003) reinstating, *Thomas I*, 261 F.3d 1160.

62. *Thomas II*, 323 F.3d at 952-53.

63. 261 F.3d at 1167.

64. *Id.* at 1169.

ability to maintain classroom discipline would be jeopardized.⁶⁵ However, the court concluded that requiring Morgan to possess individualized suspicion before conducting a mass strip search of the entire class would not have jeopardized the classroom atmosphere in this situation.⁶⁶ The court agreed with the plaintiffs' argument and held that there was no individualized suspicion.⁶⁷

The second step in analyzing whether the search was constitutional was for the court to determine whether the search was reasonably related to the circumstances and objectives of the search.⁶⁸ To determine if a search will satisfy the second part of this test, the intrusiveness of the search must be related to the objective of the search and the age and sex of the child.⁶⁹ Again, the plaintiffs in *Thomas II* cited the holding in *T.L.O.*, that searches without individualized suspicion only apply in a very limited context where the privacy interests that are invaded by the search are minimal.⁷⁰ Even though suspicionless searches are a limited exception to the requirement of individualized suspicion, the search must still be conducted in a manner that ensures personal privacy.⁷¹

The plaintiffs cited *T.L.O.* as the basis of their argument that only minimally intrusive searches do not require individualized suspicion.⁷² The court in *Thomas I* examined the students' argument and agreed that the strip searches were highly intrusive of the students' personal rights.⁷³ The court concluded that this intrusion could only be justified by an important interest, which was not satisfied by the need to recover twenty-six dollars missing from the classroom.⁷⁴ Ultimately, the *Thomas I* court concluded the searches violated the Fourth Amendment

65. *Id.*

66. *Id.*

67. *Id.* at 1167.

68. *Id.* at 1166 (citing *N.J. v. T.L.O.*, 469 U.S. 325, 341 (1985)).

69. *Thomas I*, 261 F.3d at 1166 (citing *T.L.O.*, 469 U.S. at 342).

70. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 952 (11th Cir. 2003), reinstating, *Thomas I*, 261 F.3d 1160.

71. *Thomas II*, 323 F.3d at 952.

72. *Id.* (citing *T.L.O.*, 469 U.S. 325).

73. *Thomas I*, 261 F.3d at 1168 (quoting *Justice v. City of Peachtree*, 961 F.2d 188, 192 (11th Cir. 1992)).

74. *Thomas I*, 261 F.3d at 1169.

because Morgan did not possess individualized suspicion and the searches were not reasonably related to the objective of the search.⁷⁵

B. *THE APPLICATION OF QUALIFIED IMMUNITY*

After the court in *Thomas I* determined that a constitutional violation occurred, it then examined whether qualified immunity protected the actions of the school officials.⁷⁶ In this case, the school officials were entitled to qualified immunity only if their conduct did not violate the constitution.⁷⁷ After examining a few different factors, the court held, on remand in *Thomas II*, that the school officials were not on notice and therefore, not liable for the unconstitutional strip search they conducted.⁷⁸

First, the court determined there was no existing case law that put the school officials on notice that this search was unconstitutional.⁷⁹ Next, the court supported its holding by asserting that other cases were too factually distinct to provide any guidance to the school officials.⁸⁰ According to the court in *Thomas I*, qualified immunity applies as long as the officials' "conduct violates no clearly established statutory or constitutional rights."⁸¹ The *Thomas I* court recognized that in instances where the official knows, or should know, of the illegality of his actions, qualified immunity will not apply.⁸²

The court in *Thomas I* considered whether these officials had fair and clear warning that their actions were egregious and therefore unconstitutional.⁸³ The egregiousness exception to qualified immunity appeared in *Hope v. Pelzer*, where qualified immunity was not extended to an official whose behavior was so egregious that it was clearly unconstitutional.⁸⁴ The holding in *Hope* was the basis for the

75. *Id.*

76. *Id.* at 1170-72.

77. *Id.* at 1170.

78. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 956 (11th Cir. 2003), reinstating, *Thomas I*, 261 F.3d 1160.

79. *Thomas II*, 323 F.3d at 953.

80. *Id.*

81. 261 F.3d at 1170 (quoting *Lassiter v. Ala. A&M Univ.*, 28 F. 3d 1146, 1149 (11th Cir. 1994).

82. 261 F.3d at 1170.

83. *Id.*

84. 536 U.S. 730, 746 (2002).

Supreme Court's decision to remand *Thomas I*, where it instructed the Eleventh Circuit to reconsider the issue of qualified immunity.⁸⁵

In *Hope*, a prison guard handcuffed the petitioner to an outside hitching post during a hot, summer day for seven hours.⁸⁶ A hitching post is made of a sturdy material and is between forty-five and fifty-seven inches from the ground.⁸⁷ Most inmates' hands rest at face level with the hitching post, but because the petitioner was only slightly taller than the post, his arm was above shoulder height the entire time.⁸⁸ The guard removed the petitioner's shirt before handcuffing him to the hitching post, which resulted in a sunburn on the petitioner's back, and did not allow him to drink any water or use the restroom during the entire seven-hour period.⁸⁹ The petitioner brought a claim under title 42 of the United States Code, section 1983 against the guard contending that the cruelty was so obvious that the guard should have known at some level that his actions were unconstitutional.⁹⁰ The Supreme Court agreed and ruled in favor of the petitioner, holding that qualified immunity did not protect the guard's egregious conduct.⁹¹

Hope assists in clarifying the doctrine of qualified immunity in the *Thomas II* case by asking "whether the state of the law [at the time of the action in question] gave [Roberts, Morgan and Billingslea] fair warning that their alleged [actions were] unconstitutional."⁹² The decision in *Hope* indicated that qualified immunity will not apply to egregious actions that violate clearly established law.⁹³ *Hope* further specified that a known constitutional right provides the official with fair and clear warning of the right.⁹⁴ Ultimately, the *Thomas II* court disregarded the Supreme Court's instructions and determined that "nothing in *Hope* changes the outcome in this case."⁹⁵

85. 323 F.3d at 951-52.

86. 536 U.S. at 734-35.

87. *Id.* at 734 n. 1.

88. *Id.* at 734.

89. *Id.* at 734-35.

90. *Id.* at 735.

91. *Id.* at 747.

92. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003), reinstating, *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

93. *Thomas II*, 323 F.3d at 953 (citing *Hope*, 536 U.S. at 740).

94. *Id.*

95. *Thomas II*, 323 F.3d at 956.

After rejecting the precedent set out in *Hope*, the court dismissed the case law offered by the plaintiffs.⁹⁶ The plaintiffs argued that *T.L.O.* put the officials on notice that strip searches were unconstitutional.⁹⁷ The court in *Thomas II* reasoned that *T.L.O.* was not particularly clear on the issue of strip searches and held that the school officials were neither required to be creative when interpreting case law nor obligated to construe legal formulations.⁹⁸

The plaintiffs cited six cases to support their contention that the school officials had fair warning that individualized suspicion was required prior to strip searching the entire class of students.⁹⁹ Among the cases cited by the plaintiffs were *Jenkins v. Talladega City Board of Education*,¹⁰⁰ *Justice v. City of Peachtree*,¹⁰¹ and *Vernonia School District 47J v. Acton*.¹⁰² The court rejected the authority of four of the cases because they were decided after the strip search in *Thomas I*, and declined to analyze the other two because they were outside the district's jurisdiction and therefore not binding on the court.¹⁰³

The plaintiffs also argued that the strip search conducted by the school officials was so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness was readily apparent.¹⁰⁴ In contrast to the plaintiffs' contention, the school officials argued that the search of the class was not egregious and that clarifying case law was still necessary.¹⁰⁵ The court agreed with the school officials and concluded that a strip search at its core is not so egregious as to invoke the qualified immunity exception.¹⁰⁶

96. *Id.* at 952, 955.

97. *Id.* at 954.

98. *Id.*

99. *Id.* at 955.

100. *Id.* at 954 (citing *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 828 (11th Cir. 1997) where the court recognized that school officials were on notice that strip searches were unconstitutional).

101. *Thomas II*, 323 F.3d at 955 (citing *Justice v. City of Peachtree*, 961 F.2d 188, 192 (11th Cir. 1992) where the court recognized that the school officials were on notice of the unconstitutionality of the strip search).

102. *Thomas II*, 323 F.3d at 954 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 (1995) which held that suspicionless searches are only allowed in a limited context).

103. *Thomas II*, 323 F.3d at 955 n. 7.

104. *Id.* at 955.

105. *Id.* at 953.

106. *Id.* at 956.

The plaintiffs further argued in *Thomas I* that the school district should be held liable for failing to properly train the school officials about the constitutional rights of students and the limits of school searches.¹⁰⁷ Schools are required to “train and supervise” employees about constitutional issues when either: Employees continually encounter situations where clear constitutional issues arise, or when these constitutional violations create a pattern that puts the school district on notice that corrective measures are needed.¹⁰⁸ The students presented evidence that searches occurred in the Clayton County School District prior to this case and that school officials conducted most of these searches.¹⁰⁹ The court in *Thomas I* disregarded this evidence and held the district was not required to train its employees because it could not have predicted *this* constitutional violation.¹¹⁰

V. AUTHOR’S ANALYSIS

A. HISTORICAL PERSPECTIVE

The primary enforcement mechanism for constitutional violations against school children by public school officials is title 42 of the United States Code, section 1983.¹¹¹ The statute originated after the Civil War as part of the *Ku Klux Act of 1871*,¹¹² which created a mechanism to enforce the Fourteenth Amendment’s guarantee against unreasonable searches and seizures.¹¹³ This statute provided a remedy for civil rights discrimination, specifically when a public official or employee violated a federally protected right.¹¹⁴ Section 1983 provides in part:

107. *Thomas v. Roberts*, 261 F.3d 1160, 1172 (11th Cir. 2001), *vacated sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, *Thomas II*, 323 F.3d 950.

108. *Thomas I*, 261 F.3d at 1173.

109. *Id.*

110. *Id.* at 1174 (emphasis added).

111. 42 U.S.C. § 1983 (2000).

112. See Patsy Thimmig, *Not Your Average Day—Reading, Writing and Strip Searching: The Eleventh Circuit’s Decision in Jenkins v. Talladega City Board of Education*, 42 St. Louis U. L.J. 1389, 1391 (1998) (citing *Monroe v. Pape*, 365 U.S. 167, 171-73 (1961) which provides extensive information and legislative history on the Ku Klux Act).

113. Thimmig, *supra* n. 112, at 1391 (citing *Monroe*, 365 U.S. at 171-73).

114. Thimmig, *supra* n. 112, at 1392.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 redress¹¹⁵

This statute contains two essential elements that must be met in order for a claim to proceed.¹¹⁶ First, there must be a deprivation or violation of the plaintiff's constitutional rights.¹¹⁷ Second, the plaintiff must support this claim by identifying the specific law that guarantees this right.¹¹⁸ Although the statute provides redress for constitutional violations, case law illustrates that courts were reluctant to apply this section to children because of the *in loco parentis* doctrine.¹¹⁹

The first obstacle preventing courts from applying the Fourth Amendment to children and school officials was the doctrine of *in loco parentis*.¹²⁰ This doctrine advanced the concept that school officials acted in the place of the children's parents, who delegated their parental authority to the teacher.¹²¹ Section 1983 was not available as a remedy to students because school officials were not recognized as actors of the state, but rather as private officials who were not subject to the Fourth Amendment.¹²² It was not until 1985 that the Supreme Court finally rejected the doctrine of *in loco parentis* in *New Jersey v. T.L.O.*¹²³

115. 42 U.S.C. § 1983.

116. *Id.*

117. *Id.*

118. *Id.*

119. *E.g. N.J. v. T.L.O.*, 469 U.S. 325, 333 n.2 (1985) (citing *D.R.C. v. State*, 646 P.2d 252, 255 (Alaska App. 1982); *In re G.*, 90 Cal. Rptr. 361, 363064 (App. 1st Dist. 1970); *In re Donaldson*, 75 Cal. Rptr. 220, 221 (App. 3d Dist. 1969); *R.C.M. v. State*, 660 S.W.2d 552, 554 (Tex. App. 1983); *Mercer v. State*, 450 S.W.2d 715, 717 (Tex. Civ. App. 1970)).

120. David C. Blickenstaff, *Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?*, 99 Dick. L. Rev. 1, 9 (1994).

121. Tricia Kirkby, Student Author, *Vernonia School District 47J v. Acton: An Unacceptable Intrusion into Student Privacy*, 13 Thomas .M. Cooley L. Rev. 643, 652 (1996).

122. *Id.*

123. 469 U.S. 325, 336-37 (1985).

In the landmark case of *T.L.O.*, the Fourth Amendment became an issue for the Supreme Court when school officials suspected a female high school student of smoking a cigarette in violation of school policy.¹²⁴ The school officials searched her purse for cigarettes after she denied smoking.¹²⁵ The search initially produced rolling papers, which are typically used for smoking marijuana, followed by a pipe, a large amount of money, and a list of students who owed the plaintiff money.¹²⁶ The Court held that because the initial search yielded the rolling papers, which created grounds for reasonable suspicion of a crime, the continuation of that search was acceptable.¹²⁷ The Court further explained that the limited search of the plaintiff's purse was justified given the objective of the search, the school's interest in preventing drug use by students, and the minimally intrusive nature of the search.¹²⁸

The *T.L.O.* Court did not require the school officials to meet the probable cause requirement for criminal searches and instead adopted a lower reasonableness standard.¹²⁹ The *T.L.O.* Court concluded that the school officials' interest in maintaining the educational environment is great enough to exempt them from conducting searches without a warrant or based on probable cause.¹³⁰ The Supreme Court adopted a balancing test to measure the reasonableness of student searches.¹³¹ The inherent problems of the balancing test were immediately obvious to Justices Brennan and Marshall, who dissented in *T.L.O.* after concluding that a vague reasonableness standard did not provide school officials with a systematic way to predict when their conduct might violate the law.¹³²

Many courts found that strip searches of students violated the Constitution but, unfortunately, allowed school officials to search students based on *T.L.O.*'s less than probable cause standard.¹³³ The

124. *Id.* at 328.

125. *Id.*

126. *Id.*

127. *Id.* at 347.

128. *Id.* at 341-42, 347.

129. *Id.* at 333, 341.

130. *Id.* at 340-41.

131. *Id.* at 341.

132. *Id.* at 354, 366.

133. See e.g. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993);

purpose of this low standard is to avoid placing an undue burden on school officials by requiring them to know the intricacies of the law concerning probable cause and searches.¹³⁴

Even after courts recognized that the Fourth Amendment applied to students, qualified immunity was another obstacle standing in the way of students' claims under section 1983. The purpose of qualified immunity is to require that officials have notice that certain conduct is unlawful before holding them liable for the actions taken in their official capacities.¹³⁵ The issue of qualified immunity first appeared in 1975, in *Wood v. Strickland*, when the Supreme Court granted school officials immunity from damages after finding they were not on notice that their actions were unconstitutional.¹³⁶ Over the years, the Supreme Court determined that the increase of litigation based on section 1983 was overwhelming and began granting qualified immunity as an obstacle to plaintiffs seeking redress under this section.¹³⁷ However, qualified immunity will not protect school officials when the conduct violates clear constitutional rights, even if case law has not clearly established that the conduct was unconstitutional.¹³⁸

B. ANALYSIS

The court's analysis in *Thomas I* and *II* of the constitutionality of the strip search began with the strength of a racehorse fresh out of the starting gate. Unfortunately, in the backstretch, the court lost its focus and failed to conduct the proper examination of authority and case law, resulting in an unjustified grant of qualified immunity for the school officials and the school district. During the appellate court's initial

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 824-25 (11th Cir. 1997); *Justice v. City of Peachtree*, 961 F.2d 188, 191, 193 (11th Cir. 1992); *Wynn v. Bd. of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1172 (Ala. 1987); *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 888 (N.D. Ill. 2001); *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 899 (S.D. Ohio 2003).

134. Rosemary Spellman, *Strip Searches of Juveniles and the Fourth Amendment: A Delicate Balance of Protection and Privacy*, 22 J. Juv. L. 159, 168 (2001/2002).

135. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

136. 420 U.S. 308, 330-31 (1975).

137. Blickenstaff, *supra* n. 120, at 19.

138. See generally *Oliver v. McClung*, 919 F. Supp. 1206, 1212-13 (N.D. Ind. 1995); *Bellnier v. Lund*, 438 F. Supp. 47, 52-53 (N.D.N.Y. 1977).

inquiry into the search in *Thomas I*, it accurately applied the balancing test of *T.L.O.* and held the search was unconstitutional.¹³⁹ The court's holding on the constitutional issue was unfortunately the end of its rational application of case law and was followed by a weak examination of qualified immunity. The court's holding on the issue of qualified immunity undermined its holding that the search was unconstitutional by protecting school officials from liability for an obvious constitutional violation.

1. *Constitutionality of the Search*

The *Thomas I* court properly recognized that the need to recover twenty-six dollars did not diminish the privacy rights of the students.¹⁴⁰ The court's decision on this issue supports the notion that the Fourth Amendment rights of the students are present in every school and will be protected by the judicial system. The court's own determination that strip searches should not be used for petty theft provided the foundation for its holding that a strip search of a minor child violated the student's Fourth Amendment rights.¹⁴¹ The thought of a young child forced to remove her clothing to locate a small amount of money should motivate every court to inquire into the constitutionality of the search even without case law telling the court to do so. In the end, the vague *T.L.O.* balancing test provided the mechanism by which the *Thomas I* court analyzed the search and concluded it was unconstitutional.¹⁴²

The court's conclusion on the issue of individualized suspicion was easy to reach, because it was obvious that the school officials clearly did not suspect any single child. If the officials had individualized suspicion, they would not have conducted a mass strip search of the entire class. Relying on precedent, the court correctly determined that Morgan's ability to maintain the discipline in her class would not have been jeopardized by first obtaining individualized suspicion.¹⁴³ The school officials could have easily achieved

139. *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1169-70 (11th Cir. 2001), vacated *sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

140. 261 F.3d at 1169-70.

141. *Id.* at 1168-69.

142. *Id.* at 1169.

143. *Id.*

individualized suspicion by first asking the students in private if they knew anything about the missing money. The court in *Bell v. Marseilles Elementary School* addressed the issue of individualized suspicion and wisely concluded that students might be more willing to reveal what they know about a situation if they are not surrounded by their peers.¹⁴⁴

Case law indicates that a strip search conducted to recover money is unconstitutional unless individualized suspicion is present.¹⁴⁵ One such case is *Bellnier v. Lund*, where a teacher conducted a strip search of his entire class when three dollars were missing.¹⁴⁶ Because there was no reasonable suspicion to believe any one student in the class possessed the money, the court concluded that the search lacked individualized suspicion and was therefore unconstitutional.¹⁴⁷

In other cases, courts have upheld searches only when individualized suspicion was present and the search was limited.¹⁴⁸ In *Wynn v. Board of Education of Vestavia Hills*, the court upheld a search of two fifth-graders for six dollars because the search was limited and the teacher had individualized suspicion.¹⁴⁹ In that case, six dollars were discovered missing after a fifth-grade class returned from physical education.¹⁵⁰ During that time, two students remained in the room unattended, thus creating individualized suspicion that one of those two students possessed the money.¹⁵¹ The teacher instructed both students to remove their shoes while the other students went through their belongings.¹⁵² The search did not progress any further.¹⁵³ Under these circumstances, the court held the search was reasonable considering there was individualized suspicion and the intrusiveness of the search was limited.¹⁵⁴

144. 160 F. Supp. 2d 883, 888 n. 5 (N.D. Ill. 2001).

145. *Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1207 (D.S.D. 1998).

146. 438 F. Supp. 47, 50 (N.D.N.Y. 1977).

147. *Id.* at 54.

148. See e.g. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir. 1997); *Wynn v. Bd. of Educ. of Vestavia Hills*, 508 So. 2d 1170, 1171-72 (Ala. 1987).

149. 508 So. 2d at 1171-72.

150. *Id.* at 1170.

151. *Id.* at 1171-72.

152. *Id.* at 1171.

153. *Id.* at 1171-72 (inferred from the facts).

154. *Id.* at 1172.

Unlike these cases, the school officials in *Thomas* did not possess individualized suspicion, and the strip search of an entire fifth grade class was in no way limited. This outrageous violation of the students' privacy is disturbing because it could have been prevented by a simple individual inquiry conducted between Morgan and the students of her class. It is likely that a school official who possesses individualized suspicion may choose to search the entire class to spare the feelings of the one child suspected. Unfortunately, these good intentions may cause the other children psychological harm. It may also provide additional support for a constitutional violation claim. The growing number of searches of an entire class indicates that school officials are unaware that individualized suspicion is a necessary prerequisite for searching a student. This ignorance is unacceptable. The school district must provide school officials with information about the students' Fourth Amendment rights in order to protect both the students and the school officials.

While the *Thomas I* court was reluctant to label this search a strip search,¹⁵⁵ there was no other way to define a search that required fifth grade boys to lower their underwear and girls to show their breasts to a school official.¹⁵⁶ The court recognized what was already clear, that this search was highly intrusive into the children's physical privacy.¹⁵⁷ The court held that, "Students in the school environment have lesser expectations of privacy than members of the general public," but children do retain "an important privacy interest in not being unclothed involuntarily."¹⁵⁸ One court agreed that students have an expectation they will be able to avoid the unwanted exposure of their bodies, especially their "private parts."¹⁵⁹ After the *Thomas I* court examined the search conducted by Morgan and Officer Billingslea, it concluded the search violated the children's constitutional rights.¹⁶⁰ The court's

155. *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1165, 1169 (11th Cir. 2001), vacated sub nom. *Thomas v. Roberts*, 536 U.S. 953 (2002), opinion reinstated, *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003) (The court incorporated the school district investigator's conclusion that the students were not strip searched into its analysis, but ultimately held that the conduct was an unreasonable strip search.).

156. *Thomas I*, 261 F.3d at 1164.

157. *Id.* at 1168.

158. *Id.*

159. *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 900 (S.D. Ohio 2003) (quoting *Thomas I*, 261 F.3d at 1168).

160. 261 F.3d at 1169.

holding on the constitutional issue reflected the end to an accurate application of the law.

2. *The Court's Misapplication of Qualified Immunity*

At its core, qualified immunity is an obstacle standing between every plaintiff with a section 1983 claim and a favorable verdict. The obstacle to section 1983 claims presents two serious problems. First, courts disregard the duty to protect the children who rely on section 1983 for redress after they have suffered in circumstances outside their control. It is clear that if children are not sufficiently protected from strip searches conducted by officials, these searches will continue.

Second, by granting qualified immunity time and again, courts reward officials who are ignorant of the law and violate the clear constitutional rights of the students entrusted to their care. Unsuccessful section 1983 claims send a message to school authorities that they are permitted “ ‘to trench upon constitutional rights of the students in their charge without meaningful restraint or fear of adverse consequences.’ ”¹⁶¹ The decision to grant qualified immunity to the school officials in this case sends that very message.

The Eleventh Circuit limited its review of case law to decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state in which the case arose.¹⁶² In *Thomas I* and *II*, the court's prerequisite that only case law from these courts can provide clear warning for already obvious constitutional violations is the source of the growing application of qualified immunity to situations where school officials would normally be liable. The court in *Thomas II* refused to examine factually similar cases merely because the cases did not come under a jurisdiction suitable for the Eleventh Circuit to review.¹⁶³

161. Scott A. Gartner, *Strip Searches of Students: What Johnny Really Learned at School and How Local School Boards Can Help Solve the Problem*, 70 S. Cal. L. Rev. 921, 941 (1997) (quoting *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 239 (E.D. Tex. 1980)).

162. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003), reinstating, *Thomas I*, 261 F.3d 1160.

163. *Thomas II*, 323 F.3d at 955 (The doctrine of *stare decisis* allows the Eleventh Circuit to take this position. However, it is the author's argument that in the absence of binding precedent, the Eleventh Circuit should have been willing to look beyond its jurisdiction.).

The *Thomas II* court determined that the Supreme Court's holding in *T.L.O.* offered it little guidance in addressing whether the school officials had fair warning of the unconstitutionality of the strip search.¹⁶⁴ According to the *Thomas II* court, the difficulty arose because the facts of the two cases were too different and because the *T.L.O.* Court did not address individualized suspicion or strip searches.¹⁶⁵ By relying so heavily on *T.L.O.* and ignoring other cases, the court limited the conclusion it could reach. Unfortunately, the court rejected the cases relied upon by the plaintiffs, further limiting the court's review of the students' position.¹⁶⁶ The court was complacent in its own analysis of case law, evident by its decision to ignore the holdings in *Hope* and other pertinent cases not addressed by the plaintiffs.¹⁶⁷

The *Thomas* court began its review of qualified immunity by concluding that there was no case law prior to October 1996 that would have given the school officials fair and clear warning that a mass strip search of elementary school students was unconstitutional.¹⁶⁸ This conclusion is in direct conflict with the holdings in *Konop*¹⁶⁹ and *Bell*,¹⁷⁰ two courts that held blanket strip searches of students were clearly unconstitutional since the Seventh Circuit's decision in *Cornfield v. Consolidated*.¹⁷¹ Even though *Konop* and *Bell* were decided after *Thomas*, those courts relied on cases prior to *Thomas* to conclude that school officials were on notice that strip searches of students were unconstitutional when performed without individualized suspicion or reasonable cause.¹⁷²

In *Cornfield*, school officials sought qualified immunity when they subjected a male student to a strip search after noticing a bulge in

164. *Id.* at 954.

165. *Id.* at 953-54.

166. *Id.* at 953-55.

167. *Id.* at 956.

168. *Id.*

169. 26 F. Supp. 2d 1189, 1196-97 (D.S.D. 1998).

170. 160 F. Supp. 2d 883, 891 (N.D. Ill. 2001).

171. *Cornfield v. Consol. High Sch. Dist.*, 991 F.2d 1316, 1320, 1327-28 (7th Cir. 1993).

172. See *Bell*, 160 F. Supp. 2d at 888 (citing *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980); *Bellnier v. Lund*, 438 F. Supp. 47, 53-54 (N.D.N.Y. 1977)); *Konop*, 26 F. Supp. 2d 1189, 1195-98 (citing *Cornfield*, 991 F.2d 1316; *Oliver v. McClung*, 919 F. Supp. 1206, 1217-18 (N.D. Ind. 1995)).

his crotch, which they believed to be drugs.¹⁷³ That court held that because the school officials possessed individualized suspicion and were searching for drugs, the officials were entitled to qualified immunity.¹⁷⁴ Courts interpreted the holding in *Cornfield* as an indication that blanket strip searches, or searches without individualized suspicion, are clearly unconstitutional.¹⁷⁵

In *Konop*, the court relied on the holdings in *Cornfield* and *Oliver v. McClung* to reach its holding that the school officials were on notice that the strip search of eighth grade students for ten dollars was unreasonable and a violation of their Fourth Amendment rights.¹⁷⁶ In *Bell*, the court rejected an officer's argument that group suspicion satisfies individualized suspicion by citing to *Cornfield*, *Doe v. Renfrow*, and *Bellnier*.¹⁷⁷ The *Thomas* court should have at least discussed the reasoning of these courts before granting qualified immunity to the defendants.

Additionally, in 1984, the court in *Bilbrey v. Brown* held that despite the lack of rulings by the Supreme Court or other courts in that district, the basic Fourth Amendment rights of students were sufficiently established.¹⁷⁸ In that case, the plaintiffs brought a section 1983 claim against a school official who conducted a strip search of a fifth grade student.¹⁷⁹ The plaintiffs argued that qualified immunity should not extend to the school official because the law was clearly established at the time of the search, which put the school official on notice that the search he conducted was unconstitutional.¹⁸⁰ The court agreed and refused to grant qualified immunity, holding that violating a student's constitutional rights cannot be justified by ignorance of settled legal principles.¹⁸¹

The *Thomas* court should have utilized the reasoning of the court in *Bilbrey* in its own quest to determine whether the school officials

173. 991 F.2d at 1319, 1323.

174. *Id.* at 1323-24.

175. *E.g.* *Bell*, 160 F. Supp. 2d at 891; *Konop*, 26 F. Supp. 2d at 1197.

176. *Konop*, 26 F. Supp. 2d at 1207 (citing *Cornfield*, 991 F.2d at 1323; *Oliver*, 919 F. Supp. at 1211).

177. *Bell*, 160 F. Supp. 2d at 888 (citing *Doe*, 451 U.S. at 1027 (Brennan, J., dissenting); *Cornfield*, 991 F.2d 1320; *Bellnier*, 438 F. Supp. at 54).

178. 738 F.2d 1462, 1466 (9th Cir. 1984).

179. *Id.* at 1464.

180. *Id.* at 1465.

181. *Id.* at 1469.

were actually on notice that a mass strip search was unconstitutional. Instead, the Eleventh Circuit was complacent in its analysis and conducted only a brief review of cases before it granted qualified immunity to the defendants.

The decisions of *Cornfield*, *Bell*, *Bellnier*, and *Konop* laid a foundation for future courts to stop applying qualified immunity to school officials who claim ignorance as a defense.¹⁸² A court communicates its decision not only to the parties but also to the entire public, and its lasting importance is not without purpose.¹⁸³ *U. S. v. Lanier*, though not a case involving student searches, advanced the concept that general principles of law can provide fair warning to officials seeking to invoke qualified immunity.¹⁸⁴ Here, the court's decision on the issue of whether the defendants were on notice is unfounded after considering the contrary holdings of other courts.

The school officials' argument that previous cases are too factually distinguishable to put them on notice is also without merit.¹⁸⁵ Although the *Thomas II* court concluded that the cases cited by the plaintiffs were too factually different, the court further stated that there was "no case law" that would have warned the officials that their conduct was unreasonable.¹⁸⁶ The Eleventh Circuit's conclusion is inaccurate, because *Bellnier v. Lund* is a case with a factual situation almost identical to *Thomas* and thus, could have provided notice to the *Thomas* officials.¹⁸⁷

In *Bellnier*, a class of fifth-grade students was strip searched when three dollars were missing.¹⁸⁸ A male school official escorted the boys to the boys' bathroom and a female official escorted the girls to the girls' bathroom where the children were forced to strip to their

182. See generally *Cornfield*, 991 F.2d at 1323-24; *Bell*, 160 F. Supp. 2d at 890-91; *Bellnier*, 438 F. Supp. at 53-54; *Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1206-07 (D.S.D. 1998).

183. *Bilbrey v. Brown*, 738 F.2d 1462, 1471 (9th Cir. 1984).

184. 520 U.S. 259, 270-71 (1997) (explaining that a general principle of law may be used to determine qualified immunity even if that question of law has not been answered).

185. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 953 (11th Cir. 2003), reinstating, *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001).

186. 323 F.3d at 953.

187. *Id.* at 956; See *Bellnier*, 438 F. Supp. at 50.

188. *Bellnier*, 438 F. Supp. at 50.

underwear.¹⁸⁹ The *Bellnier* court held that the search was invalid under the Fourth Amendment due to lack of individualized suspicion, but granted qualified immunity to the school officials anyway.¹⁹⁰

The factual similarities between *Bellnier* and *Thomas* are striking and support the plaintiffs' claim that mass strip searches are frequently conducted in schools and will continue to occur until courts stop granting qualified immunity to schools officials. Despite the fact that the *Bellnier* court's grant of qualified immunity does not advance the *Thomas* plaintiffs' position, that case presents the factual similarities the Eleventh Circuit claimed it was looking for. Yet, it ignored *Bellnier* and agreed with school officials on the issue. If the Eleventh Circuit was content with a factually analogous case, it would have recognized that *Bellnier* put the Clayton County school officials on notice and would have held in favor of the students.

In its review on remand, the *Thomas II* court boldly declared that it would not apply the Supreme Court's decision in *Hope* to the defendants' conduct.¹⁹¹ The court failed to recognize that *Hope* supported the position that the defendants' conduct was so outrageous that they should have known it violated the students' constitutional rights.¹⁹² By remanding *Thomas I* back to the Eleventh Circuit in consideration of *Hope*, the Supreme Court directed the court to determine whether the school officials had fair and clear warning.¹⁹³ Although the circumstances in *Hope* occurred in a prison, the case still embodies the essence of when qualified immunity must not apply.¹⁹⁴ By comparing the facts of these two cases, it is evident that a violation of basic human dignity occurred. In both instances, the official had clear warning that the conduct was unreasonable. Yet, unlike in *Hope*, the *Thomas II* court refused to classify the officials' conduct as egregious.¹⁹⁵

The Eleventh Circuit should have recognized that the constitutional violation conducted by the prison guard was similar to

189. *Id.*

190. *Id.* at 54-55.

191. *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 952 (11th Cir. 2003), reinstating, *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160 (11th Cir. 2001).

192. See *Hope v. Pelzer*, 536 U.S. 730, 745-46 (2002).

193. 323 F.3d at 951-52.

194. 536 U.S. at 733.

195. 323 F.3d at 956.

the constitutional violation inflicted by the school officials. The *Thomas II* court's refusal to use *Hope* was undermined by its statement that, "In this circuit, rights are 'clearly established' by decisions of the Supreme Court."¹⁹⁶ In this statement, the *Thomas II* court established that it should have considered the *Hope* case in its reasoning. If convicted prisoners do not forfeit their constitutional protections when they are imprisoned,¹⁹⁷ then the constitutional rights of children do not diminish when they are at school.

After renouncing the application of *Hope*, the *Thomas II* court rejected all the cases cited by the plaintiffs.¹⁹⁸ Unfortunately, the plaintiffs in *Thomas II* weakened their argument by citing cases that were too factually different and ignoring cases that were in their favor.¹⁹⁹ The *Thomas II* court disregarded *Jenkins*, because it could not have provided the school officials with clear warning, as it was decided after 1996.²⁰⁰ It is important to note that in order for the court in *Jenkins* to conduct its analysis of the constitutionality of the search in that case, it relied on the decision in *T.L.O.*,²⁰¹ where the Court validated the more intrusive search of the student's purse for drugs only after rolling papers were found.²⁰² The Eleventh Circuit should also have used *T.L.O.*'s holding that intrusive searches can only be conducted after a minimally intrusive search reveals evidence as its basis for determining that the defendants were on notice.²⁰³

The *Thomas II* court also disregarded *Justice*,²⁰⁴ which although factually different from the *Thomas* case, strengthens the plaintiffs' argument by its holding that only an illegal activity such as possessing drugs justifies an intrusive strip search.²⁰⁵ The Eleventh Circuit chose to reject the relevant legal concepts advanced by *Justice*. Instead, it

196. *Id.* at 953 (citing *Hamilton v. Cannon*, 80 F.3d 1525, 1532 n. 7 (11th Cir. 1996)).

197. *Bell v. Wolfish*, 441 U.S. 520, 545 (1979).

198. 323 F.3d at 952-56.

199. *Id.*

200. *Id.* at 954; *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir. 1997) (The events surrounding the *Thomas* case occurred in 1996.).

201. *Jenkins*, 115 F.3d at 823-24.

202. *N.J. v. T.L.O.*, 469 U.S. 325, 325-47 (1985).

203. *Id.* at 347.

204. 323 F.3d at 955.

205. *See Justice v. City of Peachtree*, 961 F.2d 188, 193 (11th Cir. 1992).

claimed that because the student in *Justice* was searched in a detention center, the decision was not relevant to *Thomas II*.²⁰⁶

The strongest case cited by the *Thomas* plaintiffs was *Vernonia School District 47J*, where the court allowed searches without individualized suspicion only because drugs were suspected and the safety of other students was at risk.²⁰⁷ The *Thomas I* court concluded it could not use *Vernonia School District 47J* in its analysis because that decision conflicted with the *T.L.O.* decision.²⁰⁸ Actually, both cases held that searches with or without individualized suspicion will be upheld only if the school officials are looking for drugs.²⁰⁹ Therefore, both *Vernonia School District 47J* and *T.L.O.* put the defendants here on notice that a search without individualized suspicion would only be reasonable if the students were searched for drugs.

The Eleventh Circuit's practice of ignoring cases that were only slightly factually dissimilar is inappropriate considering that in *United States v. Lanier*, the Supreme Court concluded that factual differences between cases did not require "automatic immunity."²¹⁰ The flaw with the Eleventh Circuit's position on this issue is that it is unlikely that two cases will ever be factually identical, and as discussed above, even when a case is factually similar, the court may not consider it. As the dissent in *Jenkins* pointed out, if a court "require[d] factual identity between prior and subsequent cases . . . that would create absolute immunity."²¹¹ Moreover, the *Jenkins* dissent reiterated that in *Lanier*, the Supreme Court held that civil rights liability requires only a fair warning of constitutional rights and neither prior Supreme Court

206. 323 F.3d at 955.

207. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648-66 (1995).

208. *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1169 (11th Cir. 2001), *vacated sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, *Thomas II*, 323 F.3d 950.

209. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 648-65 (holding that school officials may conduct a search for drugs without individualized suspicion); *N.J. v. T.L.O.*, 469 U.S. 325, 347 (1985) (holding that school officials may conduct a search with individualized suspicion for drugs).

210. *U.S. v. Lanier*, 520 U.S. 259, 269-72 (1997) (The Supreme Court stated that using a "'fundamentally similar' standard would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling."); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 830 (11th Cir. 1997) (Kravitch, J., dissenting).

211. *Jenkins*, 115 F.3d at 829 (Kravitch, J., dissenting).

precedent nor factually similar precedent is necessary to provide such warning.²¹² Following this principle, one court that did not grant a school official qualified immunity held that, "[T]he official is not protected by qualified immunity just because this *very* action previously has not been held unlawful."²¹³

The detriment of relying so heavily on case law to provide notice to school officials that strip searches are unconstitutional is that even if a prior case is factually identical, a court is likely to ignore the precedent and find in favor of the school official unless the prior case appeared in the same district as the current case. The courts' continued practice of applying limited case law, which results in narrow applications in future cases, has the unfortunate effect of expanding the use of qualified immunity. If it were up to the Eleventh Circuit, the first section 1983 claim in a jurisdiction would never succeed since school officials would not be on notice until after the case is decided. This position calls for increased litigation by distinguishing cases based on factual differences and demands that at least one child in every judicial district be the martyr for every other child in that same district.

The *Thomas* courts' decisions not to consider case law from other districts conflicts with the Eighth Circuit's holding in *Konop*.²¹⁴ In *Konop*, the defendants argued that the law prohibiting strip searches was not clearly established because neither the Supreme Court, nor any other court in the Eighth Circuit had previously decided a strip search case.²¹⁵ The Eighth Circuit rejected that argument and recognized that such a view would allow school officials to claim immunity for constitutional violations already decided by other courts merely because the same issue had not arisen in their governing jurisdiction.²¹⁶ The court explained this would allow a teacher to chain a student to a desk and claim immunity simply because that situation had never been decided by the court in that judicial district.²¹⁷

212. *Id.* at 830.

213. *Watkins v. Millennium Sch.*, 290 F. Supp. 2d 890, 903 (S.D. Ohio 2003) (citing *Anderson v. Creighton*, 483 U.S. 635, 635 (1987)).

214. *Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1194-95 (D.S.D. 1998).

215. *Id.* at 1194.

216. *Id.* at 1194-95 (citing *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1049 (8th Cir. 1989)).

217. *Konop*, 26 F. Supp. 2d at 1195.

Konop also stands for the proposition that previous holdings are not required to be factually identical.²¹⁸ The *Konop* court realized that such a position would result in *absolute immunity* not qualified immunity, which would provide too much freedom to school officials who engaged in conduct that was obviously inappropriate but was not previously addressed in case law.²¹⁹ The *Konop* court did not believe that the Supreme Court intended its objective test for determining what is clearly established to be so narrow that officials would receive immunity for similar issues decided by other courts.²²⁰ Instead, the *Konop* court held that in the absence of binding precedent, a court should look to relevant decisions by other courts in the country.²²¹

The Eleventh Circuit's backward application of section 1983 is promoted when other courts hold that, "Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases."²²² Courts that grant school officials qualified immunity stand for the proposition that a school official's duty to control the educational environment is more important than their duty to respect the Fourth Amendment rights of students.²²³ This practice fails because "schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."²²⁴

While many courts recognize that the privilege of qualified immunity does not extend to obvious constitutional violations, these courts are reluctant to include a strip search of a child within this exception.²²⁵ The egregiousness exception of qualified immunity

218. *See Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 827 (11th Cir. 1997) (quoting *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1575 (11th Cir. 1992) (Edmonson, J., dissenting)).

223. *See e.g. Doe v. Renfrow*, 451 U.S. 1022, 1024-25 (1981) (Brennan, J., dissenting); *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993); *Jenkins*, 115 F.3d at 823; *Bell v. Marseilles Elementary Sch.*, 160 F. Supp. 2d 883, 889 (N.D. Ill. 2001); *Watkins v. Millenium Sch.*, 290 F. Supp. 2d 890, 897, 899 (S.D. Ohio 2003).

224. *Doe*, 451 U.S. at 1027-28 (Brennan, J., dissenting).

225. *See Cornfield*, 991 F.2d at 1321; *Jenkins*, 115 F.3d at 824; *Watkins*, 290 F. Supp. 2d at 900.

assumes that the actor knows or should know the illegality of their actions. Although the thought of a child strip searched for money is repugnant, it appears from the outcome of this case, that violating the Fourth Amendment rights of students is not an obvious constitutional violation.

The plaintiffs' final argument that the school officials' conduct exemplified the core of what the Fourth Amendment prohibits is best described in the holding of *Cornfield*, three years prior to *Thomas*. That court concluded, "[it] does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude."²²⁶ The *Cornfield* court further recognized that strip searches in general are "a violation of any known principle of human decency."²²⁷ The *Cornfield* court validated the school officials' request for qualified immunity because the search was for drugs, and the officials had individualized suspicion.²²⁸ Despite holding in favor of the school officials, the *Cornfield* court's decision supports the *Thomas* plaintiffs' argument and should have received some acknowledgment by the Eleventh Circuit.

In *Doe*, the court generally held that when school officials permit or commit acts of nude searches, the acts should be deemed unlawful and outrageous under "indisputable principles of law."²²⁹ There is a strong conviction in our culture that people hold a reasonable expectation to remain clothed and untouched by public officials even when questioned or investigated.²³⁰ A public official, particularly a school official, must understand that conducting a strip search is a violation of the student's rights, unless the student committed a crime.²³¹ Even absent case law, the court should have determined that the strip search of minors is so egregious that its unconstitutionality is readily apparent. The fact that anyone is strip searched for a small amount of missing money is disturbing. However, due to the inherent vulnerability of children, a child strip searched by an authority figure is even more disturbing.

226. *Cornfield*, 991 F.2d at 1321 (quoting *Doe*, 631 F.2d at 92-93).

227. *Id.*

228. *Cornfield*, 991 F.2d at 1323-24.

229. 631 F.2d at 93.

230. *Justice v. City of Peachtree*, 961 F.2d 188, 191 (11th Cir. 1992).

231. *Konop v. Northwestern Sch. Dist.*, 26 F. Supp. 2d 1189, 1207 (D.S.D. 1998).

The plaintiffs' argument that a pattern of constitutional violations by school officials exists in the school setting is clearly supported by the number of cases where students are strip searched. By refusing to extend liability to the school district, the Eleventh Circuit effectively guaranteed that the Clayton County School District is not required to educate its school officials, who will remain ignorant of the constitutional rights of their students. At the very least, courts should extend liability to the district to send a message that school officials must be made aware of what type of searches are permissible and how to conduct them.

The outcome of this case supports the contention that strip searches usually do not reveal the missing item.²³² Instead, it is likely that this strip caused emotional trauma to the young children subjected to it, while it promoted the school officials' ignorance of pertinent legal issues by granting them qualified immunity for an unconstitutional search.

C. PSYCHOLOGICAL EFFECTS OF STRIP SEARCHES ON CHILDREN

A strip search is an inspection of an individual's entire body, and has even been defined as a "visual rape."²³³ Courts typically agree that strip searches have no place in the school and express concern over the psychological effects strip searches have on children.²³⁴ The nominal amounts of money for which school officials search children are grossly disproportionate to the psychological effects on the children searched.

Courts have recognized that a strip search of a school age child has a greater psychological impact than it would have on an adult.²³⁵ The *Justice* court noted that, "Children are especially susceptible to possible traumas from strip searches."²³⁶ The court in *Cornfield* noted that the student's age represented a time when he would be self conscious about his body and that the potential impact of a strip search

232. Gartner, *supra* n. 161, at 925.

233. *Justice*, 961 F.2d at 192 (quoting Paul R. Shuldiner, *Visual Rape: A Look at the Dubious Legacy of Strip Searches*, 13 J. Marshall L. Rev. 273, 308 (1980)).

234. See generally *Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984); *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 824 (11th Cir. 1997).

235. Spellman, *supra* n. 134, at 172.

236. 961 F.2d at 192 (quoting *Flores v. Meese*, 681 F. Supp. 665, 667 (C.D. Cal. 1988)).

was substantial.²³⁷ That court boldly noticed that “no one would seriously dispute that a nude search of a child is traumatic.”²³⁸ In *Konop*, female high school students were strip searched when fifty-seven dollars were missing from the girls’ locker room.²³⁹ The obvious emotional trauma inflicted on the girls was apparent when the girls cried through the entire search.²⁴⁰ The *Bellnier* court held that the necessity of a school search will not make courts tolerate the psychological damage to children searched at random.²⁴¹

Because it is presumed that strip searches have a traumatic effect on children, they should be conducted only with extreme care and sensitivity.²⁴² Here, the *Thomas I* court found it was not necessary to strip search the class to recover twenty-six dollars.²⁴³ Unfortunately, courts that recognize the negative effects of strip searches on children are limited by section 1983 as to the redress available to the victims of the search.

VI. CONCLUSION

The decision in this case was unfavorable for the plaintiffs, but will have a positive effect on future claims under title 42 of the United States Code, section 1983 in Georgia. Now every school official in the state is on notice that a mass strip search without individualized suspicion for money is unconstitutional. Until courts stop seeking cases that are factually identical to the case before them, case law will be unable to provide any assistance to other courts. Additionally, courts must not limit their analyses to only those cases decided by the Supreme Court or other courts in that particular state. A strip search of a child is a serious intrusion of personal rights and all available case law must be considered to determine the outcome of section 1983 cases.

237. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1323 (7th Cir. 1993).

238. *Id.* at 1321.

239. *Konop v. Northwestern School District*, 26 F. Supp. 2d 1189, 1201-02 (D.S.D. 1998).

240. *Id.* at 1203.

241. *Bellnier v. Lund*, 438 F. Supp. 47, 54 (N.D.N.Y. 1977).

242. Spellman, *supra* n. 134, at 172.

243. *Thomas ex rel. Thomas v. Roberts*, 261 F.3d 1160, 1166 (11th Cir. 2001), *vacated sub nom. Thomas v. Roberts*, 536 U.S. 953 (2002), *opinion reinstated*, *Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950 (11th Cir. 2003).

The outcome of the Eleventh Circuit's *Thomas* decisions make it clear that many school officials are not provided with the necessary information or training about the Fourth Amendment rights of students. These officials are also unaware of what is required before conducting a search and the proper protocol for how to conduct it. Courts cannot continue to promote this ignorance by granting qualified immunity to school officials and school districts. The school officials' lack of knowledge on this issue endangers the school environment, the school officials and, more importantly, the students. The education and well being of students is a precious responsibility delegated to school officials, and courts must make school officials accountable for their actions by limiting the application of qualified immunity for obvious constitutional violations.

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