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Emily Suski
*University of South Carolina - Columbia*, esuski@law.sc.edu

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Emily F. Suski
*Georgia State University College of Law*

# DARK SARCASM IN THE CLASSROOM: THE FAILURE OF THE COURTS TO RECOGNIZE STUDENTS' SEVERE EMOTIONAL HARM AS UNCONSTITUTIONAL

EMILY F. SUSKI*

ABSTRACT

Sometimes the very people who are supposed to teach, nurture, and protect students in public schools—the students' teachers, principals, coaches, and other school officials—are instead the people who harm them. Public school officials have beaten students, causing significant physical harm. They have also left students suffering from depression, suicidal ideation, and Post-Traumatic Stress Disorder. When school officials cause such severe harm to students, all the federal courts of appeals to consider the issue have concluded that the Fourteenth Amendment at least in theory protects them, regardless of whether the form of the harm is emotional or physical. Yet, an analysis of the cases across the circuits reveals that the courts have yet to actually find that a case of severe emotional harm on its own violates the Constitution, even though they have been willing to find physical harm unconstitutional. Not only do the courts not find stand-alone emotional harm sufficient to make out a constitutional violation, they also collectively evaluate students' emotional harm very differently than their physical harm.

This Article explores the distinction in the way the courts treat stand-alone emotional harm in public school students' Fourteenth Amendment cases. It contends that if the courts are going to recognize that the Constitution protects students from severe harm regardless of its physical or emotional form, as they do, then the distinction in treatment of emotional harm is untenable. Drawing on substantive due process theory, psychology, and law and emotions theory, this Article argues that the distinction in treatment is the result of emotions stigma, analogous to the long-recognized phenomenon of mental illness stigma, that discredits students' emotions-based claims. It proposes a paradigm for evaluating students' emotional harm that responds to and helps to overcome emotions stigma so the Constitution will protect students when school officials cause them severe emotional harm.

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In *T.W. v. School Board of South Seminole County*,[1] T.W., a student with autism, developmental delays, anxiety, and other psychological disabilities, suffered severe emotional harm as the result of abuse by his teacher, Kathleen Garrett.[2] Over a period of several months, Garrett taunted T.W. and called him vulgar names, including "lazy, an asshole, a pig, and a jerk."[3] Garrett would provoke T.W. into acting out by "pick[ing] and nag[ging] at him until he would just get to the point where he couldn't take it anymore" and would act out.[4] Then Garrett would physically restrain him.[5] Garrett restrained T.W. even though she knew from psychological evaluations that physical restraints would be counterproductive as a disciplinary method and could cause T.W. psychological harm.[6] As a result of Garrett's abuse, T.W. did suffer psychological harm. His psychological disabilities got worse.[7] His maladaptive behaviors intensified. He began "'urinating all over the place.'"[8] He would cry on his way to and from school.[9] He also developed symptoms of a new disability, Post-Traumatic Stress Disorder ("PTSD"), and he ultimately dropped out of school entirely because of Garrett's abuse.[10] Despite this harm and an acknowledgement that emotionally harming students could violate the Constitution, the Eleventh Circuit found the infliction of emotional harm on T.W. to be constitutional.[11]

When public school officials harm students either emotionally or physically, it can implicate the students' substantive due process rights.[12] The *T.W.* outcome notwithstanding, all of the federal courts of appeals that have heard students' claims have concluded that the Fourteenth Amendment protects them from severe harm imposed by school officials.[13] In doing so, the courts have found students' physical

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[1] T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588 (11th Cir. 2010).

[2] *Id.* at 593.

[3] *Id.* at 594.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 608 n.6.

[7] *Id.* at 596.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 602.

[12] Hall v. Tawney, 621 F.2d 607, 611 (4th Cir. 1980) (finding that excessive corporal punishment in school violates students' substantive due process rights).

[13] Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 252 (2d Cir. 2001); Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988); *Hall*, 621 F.2d at 611; Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987); Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988); P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996); Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987); Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1075 (11th Cir. 2000). The Fifth Circuit recognizes "a student's liberty interest in maintaining bodily integrity" but will find it violated only in the absence of any legitimate state interest, such as a disciplinary interest. Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 875 (5th Cir. 2000). The

harm unconstitutional.[14] No federal court of appeals, however, has found a student's severe emotional harm alone unconstitutional.[15]

This lack of stand-alone success does not represent a wholesale refusal by the courts to acknowledge that emotional harm meted out by public school officials

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First and District of Columbia Circuits have not heard a case based on a student's substantive due process claims. In *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1014 (7th Cir. 1995), the Seventh Circuit considered facts giving rise to both a Fourth Amendment unreasonable seizure claim and a Fourteenth Amendment substantive due process claim. It analyzed and rejected the claim under the Fourth Amendment and did not address the Fourteenth Amendment claim in any substantive way. *Id.* The Supreme Court has never ruled on the matter. However, it denied certiorari in the Tenth Circuit case *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650, 655 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). In *Garcia,* the Court concluded that students have "'the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court.'" *Id.* at 655 (quoting *Hall*, 621 F.2d at 613).

[14] *See, e.g*., *Johnson*, 239 F.3d at 252 (finding allegations that a gym teacher dragged a student across the gym floor, choked him, and slammed his head against the bleachers sufficient to make out a substantive due process claim); *Metzger*, 841 F.2d at 519-20 (allegations that a teacher held student from behind in such a way that the student lost consciousness and broke his nose sufficient for a substantive due process case); *Hall*, 621 F.2d at 613 (allegations of paddling at school established a substantive due process claim); *Webb*, 828 F.2d at 1154 (allegations that principal grabbed a student, slapped her, and threw her against bathroom wall made out a substantive due process claim); *P.B.*, 96 F.3d at 1299 (allegations a principal slapped, punched, and choked students sufficient for a substantive due process claim); *Garcia*, 817 F.2d at 655) (finding allegations that a principal beat a student twice with a split wood paddle established a substantive due process claim); *Neal*, 229 F.3d 1076-77 (allegations that a coach hit a student in the eye with a metal lock, resulting in the loss of the eye, made out a substantive due process claim). Although the federal courts of appeals have been thus far unwilling to find students' emotional harm unconstitutional, some federal district courts have been willing to find allegations of emotional harm unconstitutional. *See, e.g.* W.E.T. v. Mitchell, No. 1:06CV487, 2007 U.S. Dist. LEXIS 68376, at *17 (E.D.N.C Sept. 14, 2007) (explicitly finding that allegations of severe mental and emotional harm meet the severe injury requirement for a student's substantive due process claim).

[15] Seven of the nine Circuits that have heard students' substantive due process claims have reviewed cases in which the claims have been based in whole or in part on allegations of emotional harm. *Johnson*, 239 F.2d at 252; H.H. v. Moffett, 335 Fed. Appx. 306, 309 (4th Cir. 2009); Meeker v. Edmunson*,* 415 F.3d 317, 319 (4th Cir. 2005); Jefferson v. Ysleta Indep. Sch. Dist., 817 F.2d 303, 305-06 (5th Cir. 1987); Costello v. Mitchell, 266 F.3d 916, 920-21 (8th Cir. 2001); *P.B.*, 96 F.3d at 1304; Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 1, 77 F.3d 1253, 1257 (10th Cir. 1996); T.W. v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588, 601 (11th Cir. 2010). None of the claims have been successful on the basis of emotional harm alone. The Fifth Circuit in *Jefferson* heard the substantive due process claim of a student who alleged only emotional harm as a result of being tied to a chair in school for nearly two days, and the Court let it go forward. *Jefferson*, 817 F.2d at 304-05. However, the Court based its conclusion solely on the conduct of the school officials in physically restraining the student and did not consider the emotional harm alleged. *Id.* Later, the Fifth Circuit reiterated that it did not decide "whether non-physical injuries (which are all that were *alleged* in *Jefferson,* although the claimed constitutional wrongs clearly involved prolonged physical distress) would satisfy the . . . 'severe injury' requirement. Instead, we focused on the outrageous [physical] conduct of the defendants." Petta v. Rivera, 143 F.3d 895, 906 (5th Cir. 1998).

could violate students' substantive due process rights.[16] Indeed, two circuits have explicitly recognized that stand-alone emotional harm inflicted on students could theoretically be unconstitutional.[17] Others have implicitly recognized it as unconstitutional.[18] Yet even in cases like *T.W.*, where the emotional harm alleged was very severe and as or more severe than physical harm alleged in meritorious substantive due process claims, the theoretical has not become the actual: emotional harm is still found insufficient to establish a constitutional violation.[19]

This Article draws and expands upon relevant scholarship, including substantive due process theory, law and emotions, and psychology, to argue that students like T.W. who suffer severe stand-alone emotional harm at the hands of public school officials should be more than theoretically protected by the Constitution.[20] The courts' distinction in treatment between emotional and physical harm is untenable and reflects that an emotions stigma is at work in these cases. What this Article calls "emotions stigma" is analogous to the long-recognized phenomenon of mental illness stigma.[21] It is the skeptical, even negative, view of the operation of emotions and emotional harm that discredits emotions-based legal claims. Emotions stigma is rooted in the historic understanding of reason as capable of taming emotions and is

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[16] Even in rejecting specific allegations of emotional harm brought by public school students, the courts have acknowledged psychological harm could make out a Fourteenth Amendment liberty interest claim. For example, in *Abeyta*, the Tenth Circuit rejected a student's substantive due process claim based in emotional harm but stated, "we are unwilling to hold that actions which inflict only psychological damage may never achieve the high level of 'a brutal and inhuman abuse of official power literally shocking to the conscience,' necessary to constitute a substantive due process violation." *Abeyta*, 77 F.3d at 1257-58 (quoting *Hall*, 621 F.2d at 613).

[17] *Id.* at 1257-58; *T.W.*, 610 F.3d at 601-02. Significantly, no Circuit has found that emotional harm could never violate students' substantive due process rights.

[18] The courts have implicitly recognized emotional harm violates the Constitution by finding concomitant allegations of both physical and emotional harm sufficient to make out a substantive due process claim. *See infra* note 64.

[19] *See, e.g.*, *T.W.*, 610 F.3d at 602.

[20] *See, e.g.*, Kathryn Abrams & Hila Keren, *Who's Afraid of Law and Emotions*, 94 MINN. L. REV. 1997 (2010); William J. Brennan, *Reason, Passion, and "The Progress of the Law"*, 10 CARDOZO L. REV. 3 (1988–89); David B. Feldman & Christian S. Crandall, *Dimensions of Mental Illness Stigma: What About Mental Illness Causes Social Rejection?*, 26 J. OF SOC. & CLINICAL PSYCHOL. 137 (2007); Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623 (2009); Terry A. Maroney, Essay, *The Persistent Script of Judicial Dispassion*, 99 CAL. L. REV. 629 (2011) [hereinafter Maroney, *Judicial Dispassion*]; Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009) [hereinafter Maroney, *Common Sense*]; Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006); Bernard Weiner, Raymond P. Perry & Jamie Magnusson, *An Attributional Analysis of Reactions to Stigmas*, 55 J. PERSONALITY & SOC. PSYCHOL. 738 (Nov. 1988).

[21] Mental illness stigma is the perception of persons with mental illnesses as other. Weiner, Perry & Magnusson, *supra* note 20, at 738-39. One of its primary causes is a lay perception that the responsibility for mental illness lies with the individual with mental illness. *Id.* One of its primary effects is a desire to achieve social distance from the person with mental illness. *Id.*

evidenced in courts' shallow analyses of students' emotional harm claims. By naming and defining emotions stigma, this Article seeks to make it visible so it can be raised and overcome. It also aims to fill a hole in legal scholarship that has yet to identify the distinct treatment of emotional harm in students' substantive due process cases.[22]

Part I of this Article explores specifically how the federal courts of appeals have treated students' emotional harm differently than their physical harm and why that is problematic. It begins by explaining the liberty interest at stake in students' substantive due process cases and the standard for determining when it has been violated, regardless of whether students raise emotional or physical harm allegations. Even though that standard is ostensibly the same for students' physical and emotional harm, and the courts implicitly or explicitly recognize that emotionally harming students could violate the Constitution, emotional harm on its own has never been found unconstitutional. This Part identifies the problems that result from this distinction in treatment to show that the Constitution should protect students from severe stand-alone emotional harm. Part II analyzes potential rationales for why the federal courts of appeals treat students' emotional and physical harm distinctly and rejects those rationales as inadequate to explain the treatment of emotional harm. It then offers an alternative explanation for the federal courts of appeals' collective treatment of emotional harm in students' substantive due process cases—it contends that an emotions stigma is at work in the courts' decisions. Part III proposes ways to overcome emotions stigma by offering a paradigm for evaluating students' emotional harm that works within the existing analytic framework for assessing students' substantive due process claims. It also advocates for raising emotions stigma in students' substantive due process litigation.

## I. A COLLECTIVE DISTINCTION IN TREATMENT ACROSS THE CIRCUITS: EMOTIONAL AND PHYSICAL HARM IN STUDENTS' SUBSTANTIVE DUE PROCESS CLAIMS

Although any public school student who asserts a substantive due process claim faces an uphill battle to survive even summary judgment,[23] physical harm allegations have surmounted that hurdle. Emotional harm allegations on their own have not. This is true even though the federal courts of appeals recognize that both physical and emotional harm of students by school officials could violate the Constitution. While the federal courts of appeals have not heard vast numbers of these cases, the

[22] A great deal of scholarship has directly or indirectly addressed the emotional harm imposed by students on other students through cyber bullying. *See, e.g.*, Matthew Fenn, *A Web of Liability: Does New Cyberbullying Legislation Put Public Schools in a Sticky Situation?*, 81 FORDHAM L. REV. 2729 (2013); Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 181 (2011); Renee L. Servance, *Cyberbullying, Cyber-harrassment, and the Conflict Between Schools and the First Amendment*, 2003 WIS. L. REV. 1213 (2003). However, very little scholarship has addressed the emotional harm of students by school officials. *See, e.g.*, Lewis M. Wasserman, *Corporal Punishment in K-12 Public School Settings: Reconsideration of its Constitutional Dimensions Thirty Years After* Ingraham v. Wright, 26 TOURO L. REV. 1029 (2011).

[23] A student must allege facts to support a finding that a school official's actions "literally . . . shock the conscience," a high bar. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980); *see also* Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 1, 77 F.3d 1253, 1257 (10th Cir. 1996) (noting the "shock the conscience" bar is a "high level").

cases they have heard establish a pattern of distinct treatment of students' emotional harm. As this Part will show, the distinction in treatment leaves students who suffer even severe, unavoidable emotional harm at the hands of state officials, the very type of the harm the Constitution is uniquely capable of addressing, virtually unprotected by the Constitution. First, though, the Part will explain students' substantive due process rights in school and how those rights apply at least in theory to both emotional and physical harm.

### *A. Students' Substantive Due Process Rights in School*

In *Ingraham v. Wright*, the Supreme Court concluded that public school students subjected to corporal punishment have Fourteenth Amendment liberty interests giving rise to procedural due process rights.[24] In *Ingraham*, the Supreme Court left open the question of "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause."[25] Since then, the vast majority—i.e., nine—of the federal circuit courts have heard cases where students have alleged that school officials violated their substantive due process rights.[26] All have found students to have substantive due process rights in school.[27] All but one of those courts[28] have followed the seminal Fourth Circuit case *Hall v. Tawney* in both

[24] Ingraham v. Wright, 430 U.S. 651, 683 (1977). The Court went on to find that the state of Florida had sufficient common law "constraints and remedies" in place to satisfy the procedural due process requirements of the Fourteenth Amendment. *Id.* at 682-83.

[25] *Id.* at 679 n.47.

[26] *See supra* text accompanying notes 12-15.

[27] *Id.*; Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 251-52 (2d Cir. 2001) (finding students have a "constitutional 'right to be free from the use of excessive force'" in school (quoting Rodriguez v. Phillips, 66 F.3d 470, 476 (2d Cir. 1995)); Metzger v. Osbeck, 510 F.2d 518, 520 (3d Cir. 1988) (determining that "a decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute . . . a violation of substantive due process prohibited by the Fourteenth Amendment"); Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987) (quoting *Hall v. Tawney*, 621 F.2d at 613, in identifying that "'the right of students to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience'"); Wise v. Pea Ridge Sch. Dist., 855, F.2d 560, 564 (8th Cir. 1988) (concluding that "at some point the administration of corporal punishment may violate a student's liberty interest in his personal security and substantive due process rights"); P.B. v. Koch, 96 F.3d 1298, 1302-03 (9th Cir. 1996) ("[E]xcessive force by a principal against a student violated the student's constitutional rights. The Fourteenth Amendment protects against the government's interference with 'an individual's bodily integrity.'" (quoting Armendariz v. Penman, 75 F.3d 1311, 1319 (9th Cir. 1996) (en banc))); Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) (finding students have "'the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court'" (quoting *Hall*, 621 F.2d at 613)); Neal v. Fulton Cty. Bd. of Ed., 229 F.3d 1069, 1075 (concluding that when "an exercise of corporal punishment is 'so brutal, demeaning, and harmful as to literally shock the conscience of the court' . . . a student's substantive due process rights are implicated" (quoting *Hall*, 621 F.2d at 613)).

[28] *See supra* text accompanying note 15 (explaining the Fifth Circuit's substantive due process decisions with respect to claims by public school students).

defining the right and, with some minimal variation,[29] the elements for analyzing whether a school official has violated it.[30]

In *Hall*, the Fourth Circuit heard a substantive due process claim based on allegations of excessive corporal punishment in school. The Court concluded that students have "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience."[31] The Court grounded its conclusions in the understanding that "the existence of this right to ultimate bodily security the most fundamental aspect of personal privacy is unmistakably established in our constitutional decisions as an attribute of ordered liberty."[32] The *Hall* Court, however, also observed "that the substantive due process right is quite different than a claim of assault and battery under tort law."[33] It noted that "not every violation of state tort and criminal assault laws will be a violation of [substantive due process], but some of course may be."[34] To determine whether this right has been violated, *Hall* directed that courts should inquire into:

> Whether the force applied [by the school official] caused injury so severe, was so disproportionate to the need presented, and was inspired by malice or sadism rather than a merely unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.[35]

Although *Hall* involved allegations of excessive corporal punishment, its progeny in the Fourth Circuit and beyond have followed it irrespective of whether the case involved corporal punishment.[36] Whether a school official acts to discipline

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[29] For a review of courts' use of the *Hall* standard in corporal punishment cases specifically, see Wasserman, *supra* note 22.

[30] *Johnson*, 239 F.3d at 252 (citing *Hall* in setting forth the factors to be considered in students' excessive force claims); *Metzger*, 510 F.2d at 620 (citing *Hall* in finding the substantive due process rights under the Fourteenth Amendment implicated); *Webb*, 828 F.2d at 1158 (quoting *Hall* in full when setting forth the substantive right and the factors to be considered in determining a student's substantive due process claim); *Wise*, 844 F.2d at 564 (citing *Hall* in finding a substantive due process right for students in school and in setting forth the factors to consider in evaluating whether it was violated); *P.B.*, 96 F.3d at 1302 (citing *Hall* in setting forth that students have a substantive due process liberty right to bodily integrity in school); *Garcia*, 817 F.2d at 655 (quoting *Hall* in "defining the constitutional tort" and the factors for determining it); *Neal*, 229 F.3d at 1075 (quoting *Hall* in defining the substantive due process right and citing *Hall* in outlining the factors to consider in assessing it, though separating them in to objective and subjective components).

[31] *Hall*, 621 F.2d at 613.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] The courts often fail to even make a point of distinguishing whether the acts in question were for the purpose of corporal punishment or not—they simply apply the *Hall* test. *See, e.g.*, Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 251-52 (2d Cir. 2001) (finding a substantive due process right under the *Hall* test without discussing whether the test applies to

or not, if the actions transgress "the right to be free of state intrusions into realms of personal privacy and bodily security" through means that shock the conscience, then the official has violated a student's substantive due process rights.[37] In addition, the courts use the *Hall* framework irrespective of whether the students have alleged physical or emotional harm and have thereby found concomitantly alleged physical and emotional harm (but not stand-alone emotional harm) unconstitutional.[38] They have thus either implicitly or explicitly found that both physical and emotional harm of students by state officials could be unconstitutional.

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actions intended as corporal punishment for disciplinary purposes or not); Meeker v. Edmunson*,* 415 F.3d 317, 319, 321-22 (4th Cir. 2005) (applying the *Hall* test without considering whether beating a wrestling teammate with the approval of a coach was corporal punishment); Costello v. Mitchell Pub. Sch. Dist., 266 F.3d 916, 921 (8th Cir. 2001) (finding a student's allegations that a teacher called her names and threw a book at her face insufficient to make out a substantive due process claim without regard for whether it was corporal punishment or not); P.B. v. Koch, 96 F.3d 1298 (9th Cir. 1996) (finding a principal's treatment of students sufficient to establish substantive due process claims without considering whether the actions were intended as corporal punishment); Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 19, 77 F.3d 1253, 1257-58 (10th Cir. 1996) (not finding a constitutional violation based on emotional harm claims but stating "we are unwilling to hold that actions which inflict only psychological damage many never achieve the high level of 'a brutal and inhuman abuse of official power literally shocking to the conscience'" without regard for whether the harm resulted from corporal punishment). In *T.W*., the student alleged that the verbal abuse he suffered was not corporal punishment, but the court did not analyze this contention—it ignored it. T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588, 598-99 (11th Cir. 2010). It only addressed whether the teacher's physical abuse of T.W. was for the purpose of discipline. *Id.* It concluded all incidents save one potential use of force were for the purpose of discipline and therefore were corporal punishment. *Id.* With respect to the one use of force that may not have been for discipline, tripping T.W., the Court stated that it would still apply a "shocks the conscience" test even if it were not a disciplinary use of force. *Id.* It then concluded that use of force did not meet that standard without articulating a more precise analysis. *Id.*

[37] Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987) (quoting *Hall*, 621 F.2d at 613); *see also* Nolan v. Nashville City Sch., 589 F.3d 257, 269 (6th Cir. 2009) (reiterating that students' substantive due process rights protect them whether or not a school official acts with the purpose of imposing corporal punishment).

[38] *See, e.g., Johnson*, 239 F.3d at 252 (noting that "various emotional injuries" were included among the injuries alleged by the students, but following the *Hall* test); *Meeker*, 415 F.3d at 319 (noting the student's abuse resulted in Post-Traumatic Stress Disorder treatment, among other things, and following *Hall* to analyze those emotional and also physical harm allegations); *Costello*, 266 F.3d at 920 (noting that the student suffered mentally as a result of her treatment in school but not varying the substantive due process analysis in any way based on that allegation); *P.B.*, 96 F.3d at 1304 (identifying emotional harm as among the harm suffered by the student-plaintiffs as a result of the treatment they received from a school official but not changing the analysis as a result); *Abeyta*, 77 F.3d at1257-58 (acknowledging that psychological damage could violate substantive due process if it met the "shock the conscience" threshold set by *Hall*); *T.W.*, 610 F.3d at 598-600 (considering allegations of emotional harm but still following *Neal v. Fulton Cty. Bd. of Ed.*, 229 F.3d 1069, which followed *Hall*).

### *B. Different Treatment of Emotional Harm: An Undefined Torture Standard and Summary Analyses*

Despite the courts' implicit or explicit acknowledgement that both emotional and physical harm could violate the Constitution and use of the same analytic framework for both emotional and physical harm, they treat students' emotional and physical harm in very different ways. Some courts hold students' emotional harm to a torture standard that they do not define. Others fail to do more than summarily analyze the emotional harm. Significantly, the courts do not consistently, if ever, treat physical harm in either way.[39]

#### 1. The Undefined Torture Standard

Two Circuits, the Tenth and Eleventh, have held students' emotional, but not physical, harm to an undefined torture standard. The Tenth Circuit first articulated this undefined standard, and the Eleventh Circuit followed it. In *Abeyta v. Chama Valley Independent School*, the Tenth Circuit heard the claim of a twelve year-old girl who alleged that her teacher repeatedly called her a prostitute in front of the class for over a month and a half.[40] The teacher's taunts caused her classmates to also call her a prostitute repeatedly over the same period of time.[41] In rejecting the girl's emotional harm as insufficient to make out a Fourteenth Amendment claim, the court did not reject the notion that emotional harm could violate the Constitution.[42] To the contrary, it stated that it could "imagine a case where psychological harassment might be so severe that it would amount to torture equal or greater to the stomach pumping abuse condemned [by the Supreme Court] in *Rochin*" and therefore would violate the Constitution.[43] Finding that the emotional harm did not rise to this level, though, the Court rejected the substantive due process claim.

The Eleventh Circuit followed the Tenth Circuit's lead in *T.W. v. School Board of South Seminole County*, the case described briefly in this Article's Introduction. In *T.W.*, the Eleventh Circuit held the allegations of emotional harm to the same undefined torture standard used by the Tenth Circuit. It quoted the Tenth Circuit in

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[39] While occasionally courts fail to do more than a cursory analysis of physical harm, they also do fully analyze it. For example, in *Kirkland v. Greene County Board of Education*, the Eleventh Circuit analyzed the student's allegations of physical harm in one sentence. *Kirkland*, 347 F.3d 903, 904 (11th Cir. 2003). However, in *T.W.* the Eleventh Circuit analyzed each instance of physical force independently over the course of multiple paragraphs and pages. *T.W.*, 610 F.3d at 599-601. Therefore, the courts' occasional failure to fully analyze the students' physical harm does not constitute the pattern it does with respect to their treatment of emotional harm.

[40] *Abeyta*, 77 F.3d at 1254-55.

[41] *Id.* The opinion did not detail the harm the student suffered; the opinion only identified the harm as psychological harm. *Id.*

[42] *Id.* at 1257-58.

[43] *Id.*

asserting this vague standard.[44] It then rejected the emotional harm in *T.W.* as insufficient to meet it.[45]

Neither the Tenth nor Eleventh Circuit defined "torture" in these cases. Both courts referenced the stomach pumping found unconstitutional by the Supreme Court in *Rochin v. California* as the sort of behavior that is torture. *Rochin* is a Fourteenth Amendment case in which the Supreme Court reversed a drug conviction because the police obtained drug evidence by, among other things, directing that the defendant's stomach be pumped against his will. This *Rochin* reference, however, is largely unhelpful in sussing out what amounts to torture in student substantive due process cases. First, the Supreme Court did not term the actions in *Rochin* "torture."[46] *Rochin* therefore contains no definition or explanation of torture.[47] Second, even if stomach pumping is torture,[48] the analogy is unhelpful because stomach pumping is physical in nature. Therefore, it provides little guidance as to what kind of emotional abuse or harm would amount to torture.

Equally problematic, the Tenth and Eleventh Circuits do not hold physical harm to any torture standard—defined or undefined. And both courts have found physical harm allegations sufficient to make out a substantive due process violation without mention of a torture standard. In *Garcia ex rel. Garcia v. Miera*, the Tenth Circuit first concluded that students have substantive due process rights in school.[49] It based its conclusions on a nine-year-old girl's allegations that a principal beat her on two

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[44] *T.W.*, 610 F.3d at 598.

[45] *Id.* at 601-02. Notably, T.W.'s emotional harm could arguably satisfy the definition of torture contained in the United Nations Convention Against Torture. The elements of that definition are "(1) an act; (2) severe pain or suffering; (3) physical or mental pain; (4) intent; (5) particular purposes, including punishment; (6) involvement of a public official; and (7) the absence of pain or suffering from lawful sanctions." GAIL MILLER, DEFINING TORTURE 6 (2005). Garrett engaged in not one but multiple acts that resulted in T.W. suffering severe mental pain, including the development of symptoms of Post Traumatic Stress Disorder. *T.W.*, 610 F.3d at 608 n.6. Garrett intended and had the purpose to cause this pain and suffering as evidenced both by the fact that she knew from psychological assessments of T.W. that it likely would cause it, and she her stated purpose was punishment. *Id.* at 596, 599. Finally, as a public school teacher, Garrett was a public official, and no evidence in the record suggested that any law sanctioned the pain and suffering. To the contrary, Garrett was convicted of one count of criminal child abuse for her actions. *Id.* at 597.

[46] Rochin v. California, 342 U.S. 165 (1952) (petitioner was arrested on suspicion of drug possession and sale, taken to the hospital, and while at the hospital doctors pumped his stomach at the direction of police in order to determine if he had swallowed illegal drugs).

[47] Merriam Webster's Dictionary defines "torture" in two ways: "1 a: anguish of body or mind; agony; b: something that causes agony or pain; 2: the infliction of intense pain (as from burning, crushing, or wounding) to punish, coerce, or afford sadistic pleasure." *Torture Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/torture?show=0&t=1372823523 (last visited July 2, 2013). Whether the courts meant to incorporate some or all of these dictionary definitions is unclear.

[48] And certainly there is an argument that it does constitute torture. *See supra* note 45.

[49] Garcia by Garcia v. Miera, 817 F.2d 650 (10th Cir. 1987).

occasions with a split wood paddle.[50] The Court followed *Hall* in finding that students have substantive due process rights in school and the school official's actions in violation of those rights in *Garcia*.[51] In doing so, it made no mention of torture.[52]

Similarly, in cases such as *Neal v. Fulton County Board of Education*, *Kirkland v. Greene County Board of Education*, and *Hatfield v. O'Neill*, the Eleventh Circuit has found allegations of physical harm imposed on students by school officials sufficient to make out substantive due process violations.[53] In all of those cases, the students alleged physical abuse as the bases for their substantive due process claims.[54] In those cases, the Court never identified torture as a requirement for finding, as it did, that the students' harm was unconstitutional.

2. Summary Analyses

Even more frequently than the courts hold students' emotional harm to an undefined torture standard, they fail to do anything more than summarily analyze it. Of the nine federal courts of appeals that have heard students' substantive due process cases, seven have considered cases alleging some sort of emotional harm.[55] All have summarily analyzed these allegations. Many of the courts reference the allegations of emotional harm somewhere in their opinions. Some courts reference the alleged emotional harm in the facts.[56] Others reference it in their analyses.[57]

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[50] The Court based its conclusion on allegations that two beatings of the plaintiff by a school official left a permanent scar in one instance and serious bruises and long-lasting pain in the second. *Id.* at 653.

[51] *Id.* at 655.

[52] *Id.*

[53] Neal v. Fulton Cty. Bd. of Ed., 229 F.3d 1069 (11th Cir. 2000); Kirkland v. Greene Cty. Bd. of Ed., 347 F.3d 903 (11th Cir. 2003); Hatfield v. O'Neill, 534 F. App'x 838 (11th Cir. 2013) (per curiam).

[54] The student in *Neal* lost his eye when a coach hit him with a weight lock. *Neal,* 229 F.3d at 1071. The student in *Kirkland* suffered migraines when the principal hit him repeatedly with a metal cane. *Kirkland,* 347 F.3d at 904. The student in *Hatfield* was hit on multiple occasions on her head in the place where she had had a portion of her brain removed, causing extreme physical pain. *Hatfield,* 534 F. App'x 838, 840-41. The student was also subjected to emotional abuse by the teacher, who called her "fat ass" and said she was just "sucking up oxygen." *Id.* at 842. As a result, the student suffered some bruising, vomiting, and emotional harm in the form of depression. *Id.* However, the Court focused on the student's physical harm and injuries to find a substantive due process violation and only considered the emotional abuse in concluding the teacher acted with malice. *Id.* at 847.

[55] *See supra* note 15.

[56] Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 170 (2d Cir. 2002) (noting the plaintiff suffered "severe emotional pain for which he underwent psychotherapy"); H.H. v. Moffett, 335 Fed. Appx. 306, 307 (4th Cir. 2009) (stating the student became "increasingly distressed, anxious, and angry about her experiences [at school]" and "would cry or scream" as she approached school because she was inappropriately restrained in her wheelchair for hours a day); Costello v. Mitchell Pub. Sch. Dist., 266 F.3d 916, 920-21 (8th Cir. 2001) (stating the teacher in question called the student "retarded," stupid," and "dumb' in front of her classmates, threw a book, and as a result the student suffered depression and suicidal ideation).

Irrespective of where the courts reference the alleged emotional ham, these mere references do not rise to the level of analysis.

Although the Tenth and Eleventh Circuits do something more than reference the allegations of emotional harm in the cases in which they have considered it, both have come short of a meaningful analysis of the allegations. As already noted, the Tenth and Eleventh Circuits have assessed allegations of emotional harm in light of an undefined torture standard.[58] However, neither engaged in a full analysis of the emotional harm alleged. Because the courts both failed to define torture,[59] they could not and therefore did not explain why the emotional harm in those cases did not meet that standard.[60] In all other respects, the courts simply ignored the students' allegations of emotional abuse and harm.[61]

All of the courts that have barely or summarily analyzed students' emotional harm have engaged in at least a relatively more thorough analysis of students' allegations of physical harm.[62] Even when emotional and physical harm allegations

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[57] Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 252 (2d Cir. 2001) (stating in the analysis only that "various emotional injuries were inflicted" and nothing more anywhere else in the opinion); P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996) (noting a number of the ways physical harm was inflicted and suffered but only making one reference in the analysis to the "emotional injury" alleged).

[58] *See supra* Part I(B)(1).

[59] *See supra* Part I(B)(1).

[60] In *T.W.*, the court's analysis consisted of one conclusory statement: "after considering the totality of the circumstances, including T.W.'s psychological injuries, we conclude that Garrett's conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process." T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588, 602 (11th Cir. 2010).

[61] The courts totally failed to apply the emotional abuse and harm to the elements of the *Hall* test. The Tenth Circuit did not assess the alleged emotional abuse of the student in light of its proportionality, as required by the *Hall* test it cited as its standard. Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 19, 77 F.3d 1253, 1256-58 (10th Cir. 1996).

Although the Eleventh Circuit assessed the need for physical force and the proportionality of the physical force used in *T.W.*, it completely ignored emotional abuse inflicted on T.W. in analyzing these factors. *T.W.,* 610 F.3d at 599-602.

[62] In cases where students allege both physical and emotional harm and ultimately prevail, the courts rely on the physical harm to find in favor of the students. *Johnson*, 239 F.3d at 252 (2d Cir. 2001) (relying almost entirely on the "extremely violent" conduct of the school official and detailing the physical harm of "head trauma, lacerations, and bruising . . . requiring hospital treatment" but noting no more than "various emotional injuries were inflicted"); *H.H.*, 335 Fed. App'x. at 314 (relying entirely on the fact that a child was restrained in a chair for long periods of time to find a constitutional violation even though the facts set forth emotional injury, including that the student became "increasingly distressed, anxious, and angry" and would "cry or scream" when approaching school); P.B. v. Koch, 96 F.3d 1298, 1304 (9th Cir. 1996) (noting that the principal's behavior caused "emotional injury" but emphasizing the "slapping, punching, and choking" in finding a substantive due process claim was sufficiently alleged).

In cases where students allege physical and emotional harm and do not succeed in making out a substantive due process violation, the courts also rely on physical harm and summarily analyze or ignore the emotional harm. *See, e.g.*, *Smith*, 298 F.3d at 173 (noting the lack of any

are brought in the same case, courts still analyze and rely virtually exclusively on physical harm allegations to decide the cases.[63] Relying on allegations of physical harm and largely or totally ignoring emotional harm means the constitutionality of government actions against students in school will be measured by the physical harm alone.

### *C. The Resulting Problematic Jurisprudential Landscape*

Treating emotional harm differently than physical harm, the Circuit Courts have yet to find any student's stand-alone emotional harm sufficient to make out a substantive due process violation. They have therefore denied students who suffer severe emotional harm in school the unique protections offered by the Constitution. If the courts are going to recognize that severe harm of students by the State can violate the Constitution no matter its emotional or physical form, which they do, then the distinction in treatment of emotional harm is not sustainable or fair. It denies students suffering severe emotional harm the protections of the Constitution and effectively allows severe emotional harm of students to go unchecked by the very constitutional rules that are designed to protect against such abuse of state authority.[64]

#### 1. Leaving Students' Emotional Harm Categorically Lacking in Constitutional Significance

The Constitution and, in particular, substantive due process, protects individuals from abuses of government authority.[65] Unlike mere torts that protect individuals from harms wrought by other individuals in their own capacity,[66] the Constitution "asks whether the government has treated someone fairly."[67] When the State—either

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justification for the physical harm—a slap—and thereby analyzing its need and severity but not assessing the alleged "severe emotional pain for which [the student] underwent psychotherapy" at all before concluding the student had not made out a substantive due process violation); *Costello,* 266 F.3d at 921 (analyzing none of the harm specifically but simply stating the teacher's behavior in calling the student "retarded," stupid," and "dumb' in front of her classmates and throwing a book at her was not "sufficiently shocking to the conscience" without explaining why the student's consequent depression and suicidal ideation did not support her substantive due process claim).

[63] *Id*. *T.W.* provides a clear example of this distinct treatment. In contrast to its evaluation of T.W.'s emotional harm, which the Court did not analyze in terms of need or proportionality, the Court analyzed each of the five instances of physical restraint imposed on T.W. in detail, identifying needs for the physical restraints and assessing their proportionality and harm. *Supra* note 36. The Court found the physical force and harm alleged insufficient to establish a constitutional violation because it found a need for, a proportionality to, and minimal harm from it. *Id.*

[64] Although tort can remedy the abuse as between two individuals, the abuse of government authority vis-à-vis the individual cannot be remedied in tort. *See infra* note 66.

[65] Brennan, *supra* note 20, at 15-15.

[66] DANIEL B. DOBBS, THE LAW OF TORTS § 1 (West Pub., Minnesota 2002). Dobbs emphasizes the "essence of tort is the defendant's potential for civil liability to the victim for harmful wrongdoing and correspondingly the victim's potential for compensation or other relief." *Id.*

[67] Brennan, *supra* note 20, at 16.

through the action of an individual state actor or otherwise—treats someone in a significantly unfair way, the Constitution serves "as a last line of defense against those literally outrageous abuses of official power."[68] Moreover, the possibility of a lawsuit under the auspices of the Constitution provides "an incentive for government agents to operate within the confines of their prescribed authority and as a remedy for vindicating federal civil rights."[69]

The collective failure by the federal courts of appeals to find that students' stand-alone emotional harm violates the Constitution essentially means almost no or no amount of emotional harm imposed on students by school officials will rise to the level of an unconstitutional abuse of government power. Students' severe emotional harm, therefore, is just a matter between two individuals. In addition, for practical purposes, students who suffer only emotional harm at the hands school officials lack the "last line" of defense provided by the Constitution. School officials consequently lack the constitutional incentive to "operate within the confines of their prescribed authority" if the harm they inflict is only severe emotional harm.[70]

This ineffective treatment of students' emotional harm also means that when school officials impose severe emotional harm on students, state interests consistently trump students' interests. The assessment of substantive due process claims involves a weighing of state interests against the individual's interests.[71] State interests are framed in terms of schools' need to maintain discipline and order.[72] Student interests are their right to personal privacy and bodily integrity.[73] The courts' treatment of emotional harm, therefore, consistently orders discipline in schools as more important than students' interests in their own emotional integrity, no matter how severely it is infringed.

The result of leaving an entire category of harm by the constitutional wayside is that the only meaningful harmful contact in a constitutional sense between a public school official and a student is physical.[74] The Constitution recognizes students' severe physical harm, but it does not recognize their severe emotional harm. This dichotomy devalues emotional harm and the students who suffer it.

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[68] Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[69] Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001).

[70] Of course the officials may be liable in tort, but again tort does not hold government officials in their capacity as representatives of the state to the limits of their authority. It proscribes unlawful conduct between two individuals. *See supra* note 66.

[71] *Hall* called for an assessment of the need for force, which involves identifying the government interest in the action, and the harm, which involves identifying the degree to which a student interest in bodily integrity was transgressed. *Hall*, 621 F.2d at 613.

[72] *Hall* made clear the state's interest in "maintaining order in the schools" when concluding the parents of the student in question had no right to exempt their child from disciplinary corporal punishment in school. *Id.* at 610.

[73] *Id.* at 613.

[74] Nancy Levitt, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136 (1992). As Nancy Levitt has pointed out in discussing emotional and mental distress torts, this outcome creates a "mythology about what qualifies as valid injuries. Injuries—to be considered "real"—must be physical, visible, or discernible." *Id.* at 174.

2. Unavoidability

These constitutional protections from abuses of government authority are particularly necessary because when school officials inflict emotional harm on students, the students cannot avoid it. Every state has a compulsory public school attendance law. [75] The vast majority of students attend public schools in order to comply with these laws.[76] For those students, then, the infliction of emotional harm in school is virtually unavoidable.[77] Public school students are at the mercy of state

[75] Compulsory attendance laws are codified in each of the fifty states. ALA. CODE § 16-28-3 (2012); ALASKA STAT. § 14.30.010 (2002); ARIZ. REV. STAT. § 15-802 (LexisNexis 2012); ARK. CODE ANN. § 6-18-201 (2009); CAL. EDUC. CODE § 48200 (West 2006); COLO. REV. STAT. § 22-33-104 (2012); CON. GEN. STAT. § 10-184 (2009); DEL. CODE ANN. tit. 14, § 2702 (2007); FLA. STAT. § 1003.21 (2009); GA. CODE ANN. § 20-2-690.1 (2012); HAW. REV. STAT. § 302A-1132 (1996); IDAHO CODE ANN. § 33-202 (2009); 105 ILL. COMP. STAT. ANN. 5/26-1 (2009); IND. CODE § 20-33-2-6 (2005); IOWA CODE § 299.1A (2012); KAN. STAT. ANN. § 72-1111 (2012); KY. REV. STAT. ANN. § 159.010 (West 2000); LA. REV. STAT. ANN. § 17:221 (2011); ME. REV. STAT. ANN. tit. 20-A, § 5001-A (2009); MD. CODE ANN., EDUC. § 7-301 (West 2012); MASS. GEN. LAWS ch. 76, § 1 (2012); MICH. COMP. LAWS § 380.1561 (2009); MINN. STAT. § 120A.22 (2012); MISS. CODE ANN. § 37-13-91 (2009); MO. REV. STAT. § 167.031 (2012); MONT. CODE ANN. § 20-5-102 (2009); NEB. REV. STAT. ANN. § 79-201 (West 2012); NEV. REV. STAT. ANN. § 392.040 (West 2011); N.H. REV. STAT. ANN. § 193.1 (2009); N.J. STAT. ANN. § 18A:38-25 (West 1999); N.M. STAT. ANN. § 22-12-2 (2007); N.Y. EDUC. LAW § 3205 (McKinney 2012); N.C. GEN. STAT. § 115C-378 (2009); N.D. CENT. CODE § 15.1-20-01 (2001); OHIO REV. CODE ANN. § 3321.01 (West 2012); OKLA. STAT. tit. 70, § 10-105 (2010); OR. REV. STAT. § 339.010 (2012); 22 PA. CONS. STAT. § 11-13 (2012); R.I. GEN. LAWS § 16-19-1 (2012); S.C. CODE ANN. § 59-65-10 (2012); S.D. CODIFIED LAWS § 13-27-1 (2010); TENN. CODE ANN. § 49-6-3001 (2003); TEX. EDUC. CODE ANN. § 25.085 (West 2007); UTAH CODE ANN. § 53A-11-101 (West 2012); VT. STAT. ANN. tit. 16, § 1121 (2009); VA. CODE ANN. § 22.1-254 (2012); WASH. REV. CODE § 28A.225.010 (1998); W. VA. CODE § 18-8-1(a) (2010); WIS. STAT. § 118.15 (2011); WYO. STAT. ANN. § 21-4-102 (2010). Students can avoid attendance at traditional public schools if their parents opt to send them to alternatives such as charter schools or homeschools. *See, e.g.*, D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc). Significantly, these options do not exist for every student. Parents who have work obligations cannot homeschool their children, and charter schools have limited enrollment.

[76] Of course some students attend home schools or private schools. However, the number of students attending home schools or private schools remains relatively very low compared to the number of students in public schools. According to the most recent data available, in the 2010-2011 academic year 49,177,617 students attended public school in the United States. *Digest of Education Statistics*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/pubs2012/pesschools10/tables/table_03.asp. In 2007, the most recent year for which information is available, approximately 1.5 million students attended home schools. *Digest of Education Statistics*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/programs/digest/d11/tables/dt11_040.asp. In the 2009-2010 academic year, also the most recent year for which data is available, 4,700,119 children attended private schools.

[77] Students could skip school to avoid the harm, but then they or their parents face potential punishment through truancy laws. ALA. CODE §§ 16-28-1 to -24; ALASKA STAT. §§ 14.30.010 to .047; ARIZ. REV. STAT. ANN. § 15-802; ARK. CODE ANN. § 6-18-201; CAL. EDUC. CODE §§ 48200 to 48361; COLO. REV. STAT. §§ 22-33-104, -107, -107.5, -108; CONN. GEN. STAT. §§ 10-184 to -202f; DEL. CODE ANN. tit. 14, §§ 2702 to 2706; D.C. CODE §§ 38-201 to -209; FLA. STAT. §§ 1003.21 to .29; GA. CODE ANN. §§ 20-2-690.1; HAW. REV. STAT. § 302A-1132; IDAHO CODE ANN. §§ 33-201 to -212; 105 ILL. COMP. STAT. 5/26-1 to -16; IND.

officials for their psychological well being in school. Yet as the jurisprudence now stands, when officials abuse that authority the Constitution is not offended.

Given the degree of emotional harm that can occur when students are abused in school by school officials, these results are untenable. Students' emotional harm can take the form of debilitating psychological disabilities as it did in *T.W.* As a result of months of repeated verbal and emotional abuse by his teacher,[78] T.W. "had trouble sleeping, became stressed, developed trust issues and panic attacks."[79] Eventually, T.W. dropped out of school as a result of the emotional harm he suffered in Garrett's classroom, resulting in loss of educational attainment.[80] This kind of harm can last years, far longer than many forms of physical harm, as students relive the emotional harm in their memories.[81] In addition, if a student drops out of school as a result of emotional harm suffered in school, the economic harm can be substantial.[82] If a

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CODE ANN. §§ 20-33-2-5 to -47; IOWA CODE ANN. §§ 299.1 to .24; KAN. STAT. ANN. § 72-1111; KY. REV. STAT. ANN. §§ 159.010 to .270; LA. REV. STAT. ANN. §§ 17.221 to .226; ME. REV. STAT. tit. 20(A), § 5001(A); MD. CODE ANN., EDUC. § 7-301; MASS. ANN. LAWS ch. 76, §§ 1 to 4; MICH. COMP. LAWS §§ 380.1561 to .1599; MINN. STAT. ANN. §§ 120a.22 to 120a.36; MISS. CODE ANN. § 37-13-91 (amended 2013); MO. REV. STAT. §§ 167.031 to .111; MONT. CODE ANN. §§ 20-5-101 to -111; NEB. REV. STAT. §§ 79-201 to -210; NEV. REV. STAT. §§ 392.040 to .125; N.H. REV. STAT. ANN. §§ 193:1, :7, :16 to :18; N.J. STAT. ANN. §§ 18a: 38-25 to -36; N.M. STAT. ANN. §§ 22-12-2, -7 to -9; N.Y. EDUC. LAW §§ 3201 to 3234; N.C. GEN. STAT. §§ 115c-378 to -383; N.D. CENT. CODE §§ 15.1-20-01 to -04; OHIO REV. CODE ANN. §§ 3321.01 to .13; OKLA. STAT. tit. 70, § 10-105; OR. REV. STAT. §§ 339.010 to .110; 24 PA. STAT. ANN. §§ 13-1326 to -1339; R.I. GEN. LAWS §§ 16-19-1 to -10; S.C. CODE ANN. §§ 59-65-10 to -90; S.D. CODIFIED LAWS §§ 13-27-1 to -29; TENN. CODE ANN. §§ 49-6-3005 to -3019; TEX. EDUC. CODE ANN. §§ 25.085 to .0952; UTAH CODE ANN. §§ 53A-11-101 to -106; VT. STAT. ANN. tit. 16, §§ 1121 to 1130; VA. CODE ANN. §§ 22.1-254 to -269.1; WASH. REV. CODE ANN. § 28A.225.010; W. VA. CODE § 18-8-1; WIS. STAT. §§ 118.15 to .163; WYO. STAT. ANN. §§ 21-4-101 to -107. So their choice, then, is to either suffer severe emotional harm or the consequences of violating compulsory education laws.

[78] Although the use of the term "abuse" has specific legal meaning, and in fact Garrett was found guilty by a jury of one count of child abuse because of her actions in T.W.'s classroom, here the term is used because the Court termed Garrett's behaviors "abusive." T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588, 594 (11th Cir. 2010).

[79] *Id.* at 596. T.W. also suffered some minor physical harm in the form of bruising. *Id.* at 601. Psychologists who evaluated T.W. concluded that "Garrett's actions 'aggravated [T.W.'s] developmental disability, increasing his anger, and decreasing his adaptive functioning.'" *Id*. T.W. also developed symptoms of Post-Traumatic Stress Disorder. *Id.*

[80] Two psychologists concluded that T.W. dropped out of school as a direct result of the abuse and harm he suffered in Garrett's classroom. *Id.*

[81] Naomi I. Eisenberger, *Broken Hearts and Broken Bones: A Neural Perspective on the Similarities Between Social and Physical Pain*, 21 CURRENT DIRECTIONS IN PSYCHOL. SCIENCE 42 (2012) [hereinafter Eisenberger, *Broken Hearts*]. Neuropsychological evidence shows that emotional harm can be longer lasting than physical harm because a person can relive the experience of the emotional pain and feel it again. *Id.* at 45.

[82] Students who drop out of school in their teens and 20s are "less likely to be active labor force participants than their better educated peers, and they frequently experience considerably higher unemployment rates when they do seek work. As a consequence, they are much less likely to be employed than their better educated peers across the nation." Andrew Sum et al., *The Consequences of Dropping Out of High School*, Center for Labor Market Studies, Northeastern University, at 2 (Oct. 2009), *available at* http://www.northeastern.edu/

student suffering suicidal ideation, as in cases such as *Costello v. Mitchell Public School District,* and follows through on those thoughts, the harm can be total and irreparable.[83] When the government infringement on students' personal privacy and bodily integrity results in such severe and unavoidable harm, the Constitution should protect them. Yet effectively it does not. These results of the courts' distinction in treatment of students' emotional harm beg the question: Why do the courts treat emotional harm differently than physical harm in these cases?

## II. WHY PUBLIC SCHOOL STUDENTS' CLAIMS BASED ON EMOTIONAL HARM "HAVE NOT FARED WELL"[84]

The courts have been explicit that students have a very difficult time succeeding in substantive due process claims that are based on emotional harm.[85] They have pointedly observed that the claims "have not fared well."[86] The courts have been less explicit, though, about why the claims have not fared well. Possible explanations include: that in some cases the courts can rely on physical harm to decide outcomes without reaching the emotional harm; a need to protect the Constitution from becoming a source for relatively insignificant tort claims; and supporting a policy of deference to school officials' disciplinary authority. Each of these explanations, though, is unsatisfactory; therefore, another explanation is necessary. This Part concludes by offering emotions stigma as that alternative explanation.

### *A. Possible, But Unsatisfactory, Explanations*

#### 1. The Ease and Efficiency of Relying on Sufficiently Severe and Objectively Verifiable Physical Harm

Both the causes and effects of physical harm seem more objectively verifiable and therefore easier to assess than those of emotional harm. This ease of assessment may explain why courts, when they can, rely on physical harm to decide substantive due process claims in favor of students. When a student's unbroken arm is broken immediately following a beating, the cause is apparent. The effects of that beating can be objectively verified by looking at an x-ray.

In contrast, the causes and effects of emotional harm can be less clear. These causation problems involve questions about how much psychological distress

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clms/wp-content/uploads/The_Consequences_of_Dropping_Out_of_High_School.pdf; *see also* Alliance for Excellent Education, *The High Cost of School Dropouts: What the Nation Pays for Inadequate High Schools*, at 1 (Nov. 2011), *available at* http://all4ed.org/wp-content/uploads/2013/06/HighCost.pdf (noting the difference in annual pay for a high school graduate as compared to a high school dropout: $27,380 versus $19,540 in 2009). In addition, "the incidence of institutionalization problems among young high school dropouts was more than 63 times higher than among young four year college graduates." Sum et al., *supra* at 9. These statistics are not limited to students without disabilities; they include students with disabilities and apply regardless of ability level. For T.W., then, the loss of a high school diploma likely will mean more difficulty with employment and earning an income than if he had not dropped out of school.

[83] Costello v. Mitchell Pub. Sch. Dist., 266 F.3d 916, 920-21 (8th Cir. 2001).

[84] Dockery v. Barnett, 167 F. Supp. 2d 597, 603 (S.D.N.Y. 2001).

[85] *See, e.g.*, *id.*

[86] *Id.* at 603.

students may have had prior to their abuse by school officials.[87] In cases where students had some psychological distress prior to their abuse by school officials, precisely what amount school officials caused can be difficult to determine. In addition, individuals, including students, could conceivably fake the effects of emotional harm. Malingering, therefore, is a concern.[88]

Deciding cases on the basis of objectively verifiable physical harm seems not only easier but also more efficient. When the objective evidence of physical harm's causes and effects are simply more obvious and available (x-rays, for example, are common), the courts have adequate bases to decide cases. The appellate courts need not spend time and resources evaluating emotional harm when the physical harm will suffice.

This line of reasoning, however, provides at best a partial and therefore unsatisfactory explanation for the courts' distinct treatment of emotional harm in students' substantive due process claims. First, although the causes and effects of physical harm may be easier to objectively verify than those of emotional harm, the causes and effects of emotional harm can be objectively verified. Evidence of emotional harm and its severity exists in the form of independent psychological examinations and reports.[89] In addition, neuroscience has also shown that emotional harm can be physically and objectively verified.[90] Functional magnetic resonance imaging (fMRI) scans show where emotional pain physically affects the brain.[91]

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[87] DOBBS, *supra* note 66, at § 302. Dobbs notes that emotional distress cases in torts raise questions "about how deep-seated it is" and given that "some persons cope with distress better than others." *Id.* Indeed, for these reasons emotional distress claims were not even recognized in the Restatement of Torts until 1965. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § Scope (1965). Courts were "wary of opening the floodgates to fraudulent, frivolous, and perhaps even marginal lawsuits" based on emotional harm in tort. Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 Ariz. St. L.J. 805, 808 (2004).

[88] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM, Ch. 8 Scope Note (1965).

[89] Certainly this was the case in *T.W.*, where two psychological evaluations identified T.W.'s post-traumatic stress symptoms, his decreased adaptive behavior, and his school drop out to be the result of his treatment in school by his teacher, Kathleen Garrett. T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cty., 610 F.3d 588, 596 (11th Cir. 2010). Even tort law, historically so reticent to recognize emotional distress harms, now acknowledges "the reality and existence of [emotional] distress is not in doubt . . . if your child is crushed by a car, we can believe you suffered anguish." DOBBS, *supra* note 66, at § 302.

[90] Betsy Grey, *Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims*, 13 L. & NEUROSCIENCE: CURRENT LEGAL ISSUES 12 (2010). It also shows, therefore, that emotional pain is very much as real as physical harm. *Id.*

[91] *Id.* Grey has argued that distinction between emotional and physical pain is false because of the changes in the brain that result from emotional pain. *Id.*; *see also* Eisenberger, *Broken Hearts*, *supra* note 81; Naomi I. Eisenberger, *Does Rejection Hurt? An fMRI Study of Social Exclusion*, 302 SCI. 290 (2003) [hereinafter Eisenberger, *Rejection*].

Neuroscientific evidence has also shown that emotional harm can be at least as painful as physical harm.[92] Through fMRIs, scientists have found that the brain processes both types of harm in the same area.[93] As one study noted, it "seems difficult to imagine these social experiences that do not physically wound us could truly lead to the same kind of pain as a broken bone or an aching stomach . . . accumulating [neuroscientific] evidence demonstrates that experiences of social and physical pain actually rely on some of the same neurobiological and neural substrates."[94] Emotional pain can also be more prolonged than physical pain. "While individuals can relive the pain of social rejection or betrayal, they are less capable of reliving the pain of physical assault or injury."[95]

Courts could, then, achieve efficiency objectives by evaluating emotional harm instead of physical harm. When presented with objective evidence of the cause, existence, and severity of the emotional harm, the courts save nothing by evaluating the physical harm instead of emotional harm.[96] In such cases, the evaluation of physical harm instead of emotional harm is pure choice.

Moreover, nothing requires the courts to stop assessing students' allegations at the point of physical harm. To the contrary, the appellate courts arguably should evaluate all allegations before them as part of their responsibility to provide guidance to lower courts.[97] Failing to provide that guidance means that the appellate courts will likely have to evaluate allegations of emotional harm later in other cases. Evaluating these allegations seriatim is decidedly inefficient.

2. Protecting the Constitution and the Courts

The courts may also be wary of finding emotional harm unconstitutional because they have an obligation to protect the Constitution and the federal courts from becoming a basis for litigating relatively insignificant tort claims. Starting with *Hall v. Tawney*, when courts have evaluated students' substantive due process claims, they have repeatedly emphasized that a violation of substantive due process is

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[92] Eisenberger, *Broken Hearts*, *supra* note 81, at 45 (finding emotional pain in the form of social rejection and social loss as severe or more severe in the brain than physical harm).

[93] *Id.* Functional magnetic resonance imaging (fMRI) has shown " a pattern of activation very similar to those found in studies of physical pain . . . evidenc[ing] that the experience and regulation of social and physical pain share a common neuroanatomical basis." Eisenberger, *Rejection*, *supra* note 92, at 291; *see also* Michael J. Bernstein & Heather M. Claypool, *Social Exclusion and Pain Sensitivity: Why Exclusion Sometimes Hurts and Sometimes Numbs*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 185 (2012); Ethan Kross et al., *Social Rejection Shares Somatosensory Representations with Physical Pain*, 108 PNAS 6270 (2011).

[94] Eisenberger, *Broken Hearts*, *supra* note 81, at 45.

[95] *Id.*

[96] For example, in *T.W.* and *Meeker*, both students developed symptoms of Post-Traumatic Stress Disorder, among other emotional harm, as a result of their treatment by school officials. T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cty., 610 F.3d 588, 596 (11th Cir. 2010); Meeker v. Edmunson, 415 F.3d 317, 319 (4th Cir. 2005).

[97] The Circuits' decisions are binding on lower courts within their individual boundaries, creating a "law of the circuits" that inevitably provides guidance to the lower courts on what the law is and how it applies in certain circumstances. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 855 (1994).

different than a tort.[98] Since *Hall*, courts have continued to stress that not just any violation of bodily integrity will constitute a substantive due process violation.[99] They underscore that "the Fourteenth Amendment is not a 'font of tort law' that can be used, through section 1983, to convert state tort law claims into federal causes of action."[100] Indeed, when the Eleventh Circuit adopted a version of the *Hall* test for students' substantive due process claims, it was compelled to assure that "we do not open the door to a flood of complaints by objecting to traditional and reasonable corporal punishment."[101] It has also stated its responsibility to "remain vigilant in policing the boundaries separating tort law from Constitutional law."[102]

The courts' need to protect the Constitution from misuse and misunderstanding arguably serves to explain why emotional harm on its own has yet to successfully support a substantive due process claim. Emotional harm is notoriously difficult to successfully bring in tort law.[103] Although intentional infliction of emotional distress claims are recognized, they require proof of more than just some emotional harm. To succeed, a plaintiff must show "outrageousness."[104] A showing of outrageousness requires proof of actions that are "utterly intolerable and beyond all bounds of civilized society."[105] If a showing of this level of conduct is required in tort, then it would seem that something more must be required for emotional harm that offends the Constitution, making such claims harder to establish successfully.

The rationale that students' emotional abuse and harm allegations have not succeeded in making out a substantive due process claim because the Constitution is not a "font of tort law," however, also fails to explain the treatment by the federal courts of appeals of emotional abuse and harm claims. First, while this principle limits overlapping tort and constitutional claims to only the egregious, it does not preclude any overlap of tort and substantive due process claims. Tort and substantive due process claims are not mutually exclusive.[106] While the Supreme Court has

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[98] Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[99] Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 19, 77 F.3d 1253, 1258 (10th Cir. 1996).

[100] Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074 (11th Cir. 2000).

[101] *Id.* at 1076.

[102] T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cty., 610 F.3d 588, 602 (11th Cir. 2010).

[103] As previously discussed, the tort of intentional infliction of emotional distress only entered the RESTATEMENT (SECOND) OF TORTS in 1965, and even then the American Law Institute "declined to extend the infliction of emotional distress to negligent conduct." Levitt, *supra* note 74, at 144. However, the RESTATEMENT (THIRD) OF TORTS recognizes both intentionally and negligently inflicted stand-alone emotional distress, irrespective of any physical injury or component. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, §§ 46-47 (1965).

[104] DOBBS, *supra* note 66, at § 304.

[105] *Id.* (noting a dean speaking to a faculty member in a "sexist and condescending manner" did not constitute "outrageous" behavior).

[106] As already noted, the Fourth Circuit made the point in *Hall* that "not every violation of state tort and criminal assault laws will be a violation of a constitutional right . . . some of course may be." Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

"rejected the lowest common denominator of customary tort liability" as insufficient to make out a substantive due process claim,[107] stating that the Fourteenth Amendment does not "regulate liability for injuries that attend living together in society," it does protect against some injuries that could be brought as either tort or substantive due process claims or both.[108] When a state actor in his or her official capacity causes severe harm, the matter is not one that is just attendant to living together in daily society and that tort can redress. The matter has constitutional implications because the State is imposing the harm and the harm is severe.[109] So while tort actions can redress matters of individual harm,[110] when the individual causing the harm is also a state actor and the harm is severe, constitutional claims are warranted as well.

Second, this principle has not prevented students' substantive due process claims based on allegations of physical abuse and harm from going forward.[111] The courts find physical harm unconstitutional while operating within the confines of their obligation to protect the Constitution from becoming a "font of tort law." They should then be able to find severe emotional harm unconstitutional and still uphold these obligations.

The rationale that the Constitution must be preserved from becoming a "font of tort law" therefore only suffices to explain why emotional harm of the kind associated day-to-day living in society does not receive constitutional scrutiny.[112] It does not explain why severe emotional harm, such as that in *T.W.*, has also not survived constitutional scrutiny.[113] In addition, the need to protect the Constitution also does not explain why courts largely fail to analyze emotional abuse and harm in general or hold them to an undefined torture standard not applied to physical harm. The courts could still protect the Constitution while also fully analyzing emotional abuse and harm and holding them to the same standard as physical harm.

3. Deference to Schools' Disciplinary Authority

Another possible explanation for courts' distinct treatment of students' emotional harm is that they feel obliged to defer to schools when it comes to matters of discipline. The Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the

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[107] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

[108] Daniels v. Williams, 474 U.S. 327, 332 (1986).

[109] *See supra* note 13.

[110] This protection is based on the assumption that the state actors are not protected by immunities in state tort law. Although some states have eliminated such immunities, not all have. *See* Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1145 (2002).

[111] *See supra* Part I.A-B.

[112] As the Eleventh Circuit stated in *Neal,* "'not every push or shove . . . violates [a person's] constitutional rights.'" Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1076 (11th Cir. 2000) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[113] *See supra* Part I.

schools."[114] Moreover, the Supreme Court has underscored its deference to schools officials' decisions with respect to disciplinary methods in particular, stating, "the appropriate means of maintaining school discipline is committed generally to the discretion of school authorities subject to state law."[115] Thus, the courts "refrain from second-guessing the disciplinary decisions made by school administrators."[116]

When disciplinary actions of public school officials include verbal or other reprimands that cause emotional discomfort, then, the courts are reluctant to intervene. They do not want to be in the business of parsing verbal reprimands that may have caused more than a little emotional discomfort. Any reprimand could cause some degree of emotional harm. Indeed, the intent of a reprimand can be, and often is, to cause emotional harm and thereby deter further misconduct on the part of students.

The courts' inclination to defer to schools' disciplinary authority also, though, does not explain their distinct treatment of emotional harm. The courts have been willing to intervene in matters of student discipline when they have involved egregious physical force or physical harm.[117] They do, therefore, sometimes step into matters involving schools' disciplinary authority. That they do intervene at times, then, does not explain why they have never intervened when students suffer severe stand-alone emotional harm or why they do not fully assess emotional abuse and harm. It also does not explain why the courts have held emotional harm to an undefined torture standard in order to justify such intervention.

### *B. An Alternative Explanation: Emotions Stigma*

The inadequacy of these rationales to explain the courts' collective treatment of students' emotional harm leaves a gap in understanding regarding why the courts treat students emotional harm differently than physical harm. The concept identified here as "emotions stigma" helps to fill this gap. Emotions stigma is drawn from the phenomenon of mental illness stigma but is broader because it encompasses skeptical or negative reactions to emotional harm generally even if it does not rise to the level of a diagnosable mental illness.[118] Its operation is apparent in the federal

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[114] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

[115] Ingraham v. Wright, 430 U.S. 651, 682 (1977). This authority even limits parents' ability "unilaterally to except their children from the [discipline] regime to which other children are subject." Hall v. Tawney, 621 F.2d 607, 610 (4th Cir. 1980).

[116] Yap v. Oceanside Union Free Sch. Dist., 303 F. Supp. 2d 284, 294 (E.D.N.Y. 2004) (quoting Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

[117] *See supra* note 61.

[118] In some cases, including cases involving substantive due process claims, emotions stigma may overlap almost entirely or entirely with mental illness stigma because the degree of severity required for emotional harm in the legal claim is so high. However, in other contexts the required amount of emotional harm may be much lower than the threshold for a diagnosable mental illness. For example, some child abuse laws address emotional harm that does not rise to the level of a diagnosable mental illness. In that and other similar contexts, emotions stigma could potentially still operate but not overlap very much, if at all, with mental illness stigma. *See, e.g.*, KAN. STAT. ANN. § 38-2202 (2012) (allowing a child to be taken into state care upon a showing of emotional harm with a showing of any particular level of emotional harm); LA. CHILD. CODE. ANN. art. 603 (2012) (defining "child abuse" as endangering the emotional health of the child without any level of severity required); MISS.

courts of appeals' collectively distinct treatment of emotional harm in students' substantive due process cases.

1. Mental Illness Stigma and its Causes

The field of psychology has long recognized and studied the causes and effects of mental illness stigma.[119] In general, stigmas implicate "normative derivations in physical attributes, behavior, character."[120] They are "mark[s] of shame or discredit."[121] They represent "unwanted effects."[122] Mental illness stigma, then, represents the negative attributions and unwanted effects associated with people with mental illness.[123] It consists of both the perceptions about and reactions to individuals with mental illness.[124]

Research has shown the most common cause of mental illness stigma is attributions about its controllability.[125] Lay individuals perceive that persons with mental illness can control their mental illnesses.[126] Persons with mental illness are therefore perceived to be personally responsible for their mental illnesses because they have failed to exercise their own ability to control them.[127]

A second component of mental illness stigma is social rejection or avoidance of individuals with mental illness. When individuals perceive that the mental illness is controllable, they exhibit little or no sympathy for the mentally ill individual and little or no desire to help the individual.[128] They socially reject and want to avoid people with mental illness.[129] This avoidance exists independently of perceptions

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CODE ANN. § 43-21-105 (2010) (defining an "abused" child as one who has suffered emotional abuse without any specific level of severity).

[119] *See, e.g.*, Feldman, *supra* note 20; P. Hayward & J.A. Bright, *Stigma and Mental Illness: A Review and Critique*, 6 J. MENTAL HEALTH 345 (1997); Ross M. G. Norman et al., *The Role of Perceived Norms in the Stigmatization of Mental Illness*, 43 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 851 (2008); Daniel W. Socall & Thomas Holtgraves, *The Effects of Label and Beliefs*, 33 SOC. Q. 435 (2005); Weiner, Perry & Magnusson, *supra* note 20.

[120] Weiner, Perry & Magnusson, *supra* note 20, at 738.

[121] *Stigma Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/stigma (last visited July 2, 2013).

[122] Weiner, Perry & Magnusson, *supra* note 20, at 738.

[123] Mental illness causes numerous unwanted effects, including "strained familial relationships, employment discrimination, and general social rejection." Feldman, *supra* note 20, at 138.

[124] *See* Weiner, Perry & Magnusson, *supra* note 20.

[125] *See id.*; Feldman, *supra* note 20.

[126] *See* Feldman, *supra* note 20; Weiner, Perry & Magnusson, *supra* note 20.

[127] *See* Feldman, *supra* note 20; Weiner, Perry & Magnusson, *supra* note 20.

[128] Weiner, Perry & Magnusson, *supra* note 20, at 740

[129] Feldman, *supra* note 20, at 138. The most common reason individuals with mental illness experience social distancing, social rejection, and punishment is that they are perceived to be personally responsible for their mental illness. *Id.* at 147. The opposite attribution and effect occur when injury or illness is physical in nature. When illnesses or injuries are perceived to be purely physical, individuals perceive they are not controllable. Weiner, Perry

regarding volatility or dangerousness of the individuals. The perception of dangerousness is a separate cause of mental illness stigma.[130]

2. Emotions Stigma and its Dimensions

An emotions stigma operates in the evaluation of public school students' emotional harm in ways parallel to how mental illness stigma operates in society. Emotions stigma is the skeptical, sometimes negative, view of the operations of emotions and emotional harm that discredits emotions-based legal claims. Emotions stigma is reflected in one of two ways: a perception about or a reaction to an emotional harm or other emotions-based claims. More specifically, the perception is, as with mental illness stigma, that emotional harm is controllable by reason. The reaction, also as with mental illness stigma, is avoidance. The components do not need to work together to create the stigma. Either can discredit an emotional harm claim.

Both the perception and reaction pieces of emotions stigma have historic roots and are evident in the evaluation of legal claims generally, perhaps most notably in torts. Historically, emotions and therefore emotional harm have been perceived as controllable by reason. In this component lies the skeptical view of the operation of emotions and emotional harm. If emotions are controllable, then they need not manifest in harm if the individual chooses otherwise. The avoidance reaction of emotions stigma is also rooted in history. Courts have a long history of reacting to emotions claims by avoiding their assessment. Together or on their own, these component parts of emotions stigma discredit emotions-based claims because they result in the claims not being heard on their own merits.

*a. The Perceived Controllability Component of Emotions Stigma*

The perception that individuals can control their own emotions has deep historical roots. It has affected understandings about the role of government, judges, and individual with respect to their own emotional harm. Summarizing the view of emotions, or passions, in the Federalist Papers, Doni Gewirtzman states, "Publius envisioned 'passions' as diametrically opposed to reason."[131] Publius saw reason as a mediating force on emotions, noting that "[w]hen men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them."[132] Publius also went further to argue that government was responsible for controlling emotions, or passions, through reason. He asserted, "[b]ut it is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."[133]

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& Magnusson, *supra* note 20, at 741. The response based on this attribution, or perception, of uncontrollability tends to be sadness and pity for the ill or injured person. *Id.* Persons perceiving the illness or injury as physical and therefore uncontrollable will want to help those with the perceived physical illnesses or injuries. *Id.*

[130] Weiner, Perry & Magnusson, *supra* note 20, at 740-41.

[131] Gewirtzman, *supra* note 20, at 637.

[132] THE FEDERALIST NO. 50.

[133] THE FEDERALIST NO. 49.

By the Twentieth Century some voices argued against this vilification of emotions in favor of reason, particularly with respect to how judges evaluate cases.[134] Justice Cardozo described the dominant view of reason as capable of "lift[ing judges] . . . above and beyond the sweep of perturbing and deflecting forces" such as "instincts and emotions and habits and convictions" in order to argue against it.[135] Although Cardozo stated, "the great tides and currents which engulf the rest of men do not turn aside their course and pass the judges by," he was himself fighting the tides of perception that reason could control emotions and therefore should serve as the sole guiding force in judicial decision making.[136] Those perceptions persist into the present. No less a judicial figure than the current Chief Justice of the United States has asserted that his role in evaluating cases involves no emotion or other similar influences.[137]

Reason has been seen as being capable of controlling the emotions not only of judges but also the individuals alleging emotional harm. This perceived controllability on the part of the individual is perhaps most obvious in the evaluation of emotional harm torts. The recognition of emotional harm as a tort occurred relatively recently in no small part because of a belief that it could be mitigated by the individual.[138] Even as the law evolved in an ad hoc way to recognize at least some violations of emotional and mental distress in torts, though, the concept that reason could control that harm has persisted.[139] As Nancy Levitt has noted, "mental

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[134] For a more comprehensive analysis of this understanding of reason as capable of controlling emotion in both government and the work of judges historically and into the present, see Maroney, *Judicial Dispassion*, *supra* note 20, at 634-40.

[135] Brennan, *supra* note 20, at 5.

[136] *Id.* (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 167-68 (1921)).

[137] Posner, *supra* note 20, at 1051. Justice John Roberts has likened his job to that of an umpire calling balls and strikes in a baseball game. *Id.*

[138] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § SCOPE (2012). The policy concerns leading courts to refuse to allow recovery for emotional harms on their own, and therefore to not analyze those claims, included:

> (1) emotional harm is less objectively verifiable than physical harm and therefore easier for an individual to feign, to exaggerate, or to imagine; (2) emotional harm can be widespread—a single act can affect a substantial population; (3) some degree of emotional harm is endemic to living in society, and individuals must learn to accept and cope with such harm; (4) giving legal credence to and permitting recovery for emotional harm may increase its severity; and (5) related to the prior concern, while mitigation may be important in minimizing this harm, there is little a legal system can do to encourage or enforce mitigation.

*Id.*

[139] Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936) ("Quite apart from the question how far peace of mind is a good thing in itself, it would be quixotic indeed for the law to attempt a general securing of it. Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be.").

harms are treated [by courts] as individually manufactured illnesses."[140] They are, therefore, discredited.

*b. The Avoidance Component of Emotions Stigma*

The second component of emotions stigma is, as with mental illness stigma, avoidance. More specifically, this component of emotions stigma is the judicial avoidance of or failure to engage with emotional harm.[141] In the legal analysis of emotional harm, the avoidance is evidenced in the reluctance of courts to engage in a full, or at times any, analysis of emotional harm. Instead, courts have often relied on analyses of physical harm to draw conclusions about cases in which emotional harm is alleged.[142] When faced with allegations of emotional harm, therefore, the courts' reaction is to avoid them.

As with the perception that reason can control emotions, this avoidance of assessing emotional harm also has historic roots and is apparent in tort. The *Restatement (Third) of Torts* acknowledges that courts have historically been reluctant to remedy emotional harm on its own without a physical harm element.[143] Courts have viewed stand-alone emotional harm so skeptically that it did not have legal value without a concomitant physical harm.[144] The emotional harm could not be believed unless a physical harm verified it.[145] Courts avoided the assessment of emotional harm on its own, then, by simply rejecting it.[146] This rejection of course completely discredited the claims.

*c. Substantive Due Process Claims: Ripe for the Influence of Emotions Stigma*

Significantly, the evaluation of substantive due process claims is ripe for the influence of bias or emotionally imbued perspectives, including emotions stigma. Substantive due process represents one of the most nebulous areas for judicial evaluation. Scholars and jurists have written about the inevitability of,[147] and the need for,[148] the use of faculties such as intuition and emotion in the evaluation of these grey areas of law, or "zones of reasonableness."[149] In these areas intuition,

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[140] Levitt, *supra* note 74, at 175-76.

[141] Avoidance here is, as with mental illness stigma, not tied to volatility or dangerousness.

[142] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM, § Scope (1965).

[143] *Id.* The Restatement notes that "policy concerns often led courts to declare that actors had 'no duty' to prevent pure emotional harm, except in some narrowly defined areas."

[144] *Id.*; *see also* DOBBS, *supra* note 66, at §§ 302-03 (generally and with respect to intentional infliction of emotional distress torts); *id.* at § 308 (regarding negligent infliction of emotional distress claims).

[145] *See id.*

[146] *Id.*

[147] Posner, *supra* note 20, at 1065-66.

[148] Brennan, *supra* note 20, at 13.

[149] Interestingly Posner, identifying emotions as a "form of thought," declines to adopt the binary of reason versus emotions. Posner, *supra* note 20, at 1063.

emotions,[150] and other not-purely rational forms of evaluation play a role because clear legal rules or precedent generally do not dictate outcomes.[151] In the zone of reasonableness, the judge can make "a decision either way that can be defended persuasively, or at least plausibly, using the resources of judicial rhetoric."[152]

Nowhere is the zone of reasonableness wider than in constitutional decision-making "because constitutional text provides little guidance and emotion opposes dispassionate consideration of the systemic factors that induce judges to rein in their discretion."[153] Taking the matter further, Justice Brennan even postulated that the due process clause in particular requires the injection of emotion, or "passion" as he called it, because the substantive due process clause's very existence serves to "balance . . . the everyday exchanges between government and citizen."[154] That balance, he said, requires "draw[ing] on our own experience," including our passions.[155]

*d. Emotions Stigma and Students' Substantive Due Process Claims*

Emotions and faculties other than reason, then, have an impact on the judicial evaluation of matters falling into the zone of reasonableness in general and substantive due process in particular. In the context of students' substantive due process claims, emotions stigma is one particular faculty at work. Both of the components of emotions stigma are reflected in the courts' evaluations of students' emotional harm. The first component, the perception that the individual can control emotions, is reflected in the courts' use of the undefined torture standard. The second component, avoidance, is evidenced in the courts' shallow analyses of students' emotional harm.

i. "Torture:" Code for Controllability

The perceived controllability component of emotions stigma explains the undefined torture standard to which two Circuits have held students' emotional harm in substantive due process cases. These courts have acknowledged that emotional harm on its own could potentially make out a Fourteenth Amendment violation, but only if it is tantamount to torture. Although the courts do not define their use of the term "torture" in the context of students' substantive due process claims and no one definitive definition of torture exists,[156] the definitions of "torture" generally involve a context where the victims do not have control over their treatment, such as during interrogations or imprisonment.[157] This unifying characteristic suggests that when

[150] Maroney, *Common Sense*, *supra* note 20, at 902. The interplay of emotion and reason in legal evaluation has also been described as "emotional common sense," and it too comes into play in the zone of reasonableness. *Id.*

[151] Posner, *supra* note 20, at 1053.

[152] *Id.*

[153] *Id.* at 1066.

[154] Brennan, *supra* note 20, at 16.

[155] *Id.*

[156] MILLER, *supra* note 45, at 1.

[157] *Id.* at 6, 15, 32. The United Nations Convention Against Torture defines torture within the context of interrogation and also discusses the definition of torture in the context in which

the courts "imagine" cases of emotional harm that amount to torture, they are reaching for scenarios where students are without control and cannot control their own harm. They are imagining potential cases where nothing—not even the students' own reason—can overcome, or at least mitigate, their emotional harm.

The Tenth and Eleventh Circuits' reliance on *Rochin v. California* in *Abeyta* and *T.W.* further supports this idea that the perceived controllability component of emotions stigma is at work in the undefined torture standard. Those courts both state that if some hypothetical students suffered emotional harm reaching the level of "torture" found in *Rochin*, then that kind of emotional abuse and harm might be unconstitutional. Although the Supreme Court never called the unconstitutional police actions in *Rochin* "torture," and the police actions were physical in nature, the claimant in *Rochin*, significantly, had no control over his treatment.[158] That the Tenth and Eleventh Circuits deem behavior that at its core involves a lack of control "torture" evidences the lack of control inherent in the conception of torture they applied to the students' emotional harm in *Abeyta* and *T.W.*[159] By seeking to find a lack of control and not defining how they will find it, courts discredit emotional harm claims. They heighten the proof required for emotional harm and thus mark the claims as less credible.[160]

ii. Cursory Analyses of Emotional Harm and the Avoidance Component of Emotions Stigma

The avoidance component of emotions stigma leaves students' emotional harm in substantive due process cases barely assessed or not assessed at all. When presented with students' emotional harm, the courts react by avoiding their assessment. They avoid assessing emotional harm by relying on the concomitantly alleged physical harm to determine the outcome of students' substantive due process claims.[161] The courts also avoid assessing students' emotional harm by engaging in shallow analyses of it.[162] In both situations, the courts do not justify their failure to fully address the emotional harm by explaining that they need not be reached or why.[163] They simply react by avoiding the students' claims.

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an individual is taken hostage under the U.S. Foreign Sovereign Immunities Act. Most, or all, of the definitions of torture assume some lack of control on the part of the person being tortured because of circumstances such as imprisonment or interrogation. *See id.*

[158] Rochin v. California, 342 U.S. 165, 166 (1952). In *Rochin*, the petitioner was suspected of selling narcotics. He was handcuffed and taken to the hospital where, at the direction of police, doctors pumped his stomach against his will. *Id.*

[159] Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist. No. 1, 77 F.3d 1253, 1257-58 (10th Cir. 1996); T.W. v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588, 601-02 (11th Cir. 2010).

[160] Therefore, the emotional harm allegations are also harder to prove than physical harm allegations that do not require proof of this undefined standard. That said, arguably some emotional harm claims could meet torture standards outlined in other contexts. *See* MILLER, *supra* note 45.

[161] *See supra* note 63.

[162] *See supra* Part I.B.

[163] *See supra* Part I.B.

If only one or two courts avoided analyzing students' emotional harm, then emotions stigma would be a less plausible way of describing the courts' avoidance reaction to it. The avoidance might be as easily described as an instance or two of shoddy opinion drafting.[164] *All* the federal courts of appeals, however, have avoided the assessment of students' emotional harm without a fully plausible basis.[165] The consistency with which the federal courts of appeals avoid students' emotional harm reflects that the avoidance is not about a particular court or case. The avoidance reaction is one that goes hand-in-hand with students' emotional harm and is about the emotional harm itself.

This unjustified avoidance across the federal courts of appeals discredits the claims as insignificant or otherwise unworthy of attention. It leaves little hope that students will prevail in substantive due process cases on the basis of emotional harm.[166] If courts do not engage in any analysis of emotional harm, they will have difficulty concluding the harm is unconstitutional, particularly if the harm is held to an undefined torture standard.

## III. OVERCOMING EMOTIONS STIGMA AND ADDRESSING CONSTITUTIONAL EMOTIONAL HARM

Naming emotions stigma and understanding that it can be at work in the evaluation of public schools students' substantive due process claims only takes the matter so far. Overcoming its effects on the jurisprudential landscape also requires attention. For the courts to acknowledge that emotional as well as physical harm of students can violate the Constitution but to then never find it actually does is unfair, devalues the significance of students' severe emotional harm, and is therefore untenable. When the State, through a school official, causes severe emotional harm to a student, it raises a constitutional matter. To begin to overcome emotions stigma, this Part proposes a paradigm for evaluating students' emotional harm that works within the existing *Hall* analytic framework. Then, applying these factors, it explains how two cases of emotional harm, *T.W.* and *Costello*, should have come out differently. It also advocates for raising emotions stigma in the litigation of these cases.

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[164] Although only two Circuits have used the undefined torture standard with respect to students' emotional harm, the relatively small number of courts using it does not indicate shoddy drafting. Because the courts affirmatively identify the undefined torture standard, their use of it is intentional, not inadvertent.

[165] *See supra* Part II.A.

[166] This veritable lack of a realistic chance of redress in the Constitution when school officials cause students severe emotional harm contrasts sharply with the great expansion of schools' authority to punish students when the inflict emotional harm on other students. This expansion of authority has come in the form of electronic harassment or cyberbullying laws. All states, save one, have bullying laws, and the vast majority includes electronic harassment provisions, cyberbullying provisions, or both. Sameer Hinduja & Justin W. Patchin, *State CyberBullying Laws: A Brief Review of State Cyberbulling Laws and Policy*, CYBERBULLYING RESEARCH CENTER, *available at* http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf (last visited Nov. 1, 2013). A fuller analysis of this contrast, however, is the work of another article.

### *A. A New Paradigm for Evaluating Students' Emotional Harm in Substantive Due Process Cases*

Counteracting the effects of emotions stigma in students' substantive due process cases can begin to be accomplished in two ways. First, the language of the *Hall* analytic framework needs to change so the emphasis is not placed on "force."[167] Second, the courts need to consider specific factors within each prong of that analytical framework when faced with allegations of emotional harm.

#### 1. Adjusting the Language of the *Hall* Framework

The language of the *Hall* framework focuses on "force." This language is significant because all but one of the federal courts of appeals that have found that students have a substantive due process right in school have taken their cues from *Hall*.[168] The *Hall* standard calls for courts to evaluate "the force applied" in students' substantive due process claims.[169] The term "force" suggests something physical. It therefore encourages courts to focus on the physicality of the school official's actions and physicality of the harm, potentially to the exclusion of any other kind of harm. It thus facilitates the avoidance component of emotions stigma by allowing courts to neglect allegations of emotional harm. The language of the test must be adjusted to ensure it does not facilitate emotions stigma.

The Ninth Circuit provides a helpful example of such modification. Instead of assessing the state official's "force," the Ninth Circuit assesses "the governmental action in question."[170] Substituting the words "government action" for "force" is physicality-neutral and therefore better allows for consideration of forms of abuse other than physical. It better allows for consideration of emotional, verbal, psychological, and other non-physical abuse.

#### 2. Specific Factors for the Analysis

The courts need to go further, though, and consider specific factors when analyzing students' substantive due process claims based on allegations of emotional harm. When the *Hall* test first called for an assessment of "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was inspired by malice or sadism rather than a merely unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience," it did not identify specifically what kinds of needs could be considered legitimate, ways to assess proportionality, what kinds of injuries could be considered severe, and ways to identify maliciously or sadistically inspired behavior.[171] The

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[167] The language of the test could be perceived as part of the root of the distinction in treatment of emotional abuse and harm and physical abuse and harm claims if it were not for the case of *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996). There the court analyzed physical and emotional harm claims using a test that did not include language that connotes physicality. *Id.* In spite of that, the court still summarily analyzed the students' emotional harm. Thus, the language of the test facilitates the problem but does not cause it, and changing the language alone will not completely solve the emotions stigma problem.

[168] Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).

[169] *Id.*

[170] *P.B.*, 96 F.3d at 1304.

[171] *Hall*, 621 F.2d at 613.

cases that have followed *Hall* have also failed to provide much specific guidance. Identifying factors for evaluating verbal and other non-physical government actions and harm and requiring courts to evaluate those factors would help overcome the avoidance component of emotions stigma. Leaving torture out of that mix would prevent it from being used by courts and would therefore counteract the perceived controllability component of emotions stigma.

*a. Factors Relevant in Considering the Need for Non-Physical Government Action*

To assess the need for verbal or other emotional abuse, the courts have to first identify whether there is any verbal or emotional abuse included in the government actions in question. The change in the language from "force" to "government action" will encourage, if not require, courts to consider verbal and other non-physical acts in their assessments of need. In addition, the courts need guidelines for determining the kinds of verbal and other non-physical acts that constitute emotional abuse. These guidelines must recognize that any school official who uses vulgar names, taunts, swears, or incites others to engage in any of those behaviors has verbally abused a student. In addition, a teacher's taunts that incite the student to do harm to him- or herself, whether because it provoked the student to act out and be disciplined or to consider harming him- or herself, constitutes verbal abuse. These acts are verbal abuse because they constitute an abuse of power by an authority figure, are unnecessary, and are potentially or likely harmful words.[172] The verbal abuse is only exacerbated if it occurs in front of other students because the harmful effects of the abuse are likely compounded by the embarrassment and shame that results from being abused in front of peers.

When assessing need, the courts should also start with the rebuttable presumption that there is not a need for emotional abuse. This rebuttable presumption is justifiable because rarely, if ever, will the State be able to establish a legitimate need for emotional abuse of a child. Discipline does not require verbal or other forms of emotional abuse.[173]

Instituting this rebuttable presumption does not mean that every instance of a teacher calling a student a vulgar name will constitute a substantive due process violation. One instance of calling a student a vulgar name will likely fail on the other prongs of the analytic framework, including proportionality and harm. A school official's emotional abuse of students must nevertheless be assessed in light of its presumed lack of need because there is so little, if any, need for it. It will also ensure that when the emotional abuse does not fail the other prongs of the analysis, it is protected by the Constitution.

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[172] Harsh verbal discipline has been shown to be counterproductive in that it increases conduct problems and is associated with inducing depressive symptoms in adolescents. Ming-Te Wang & Sarah Kenny, *Longitudinal Links Between Fathers' and Mothers' Harsh Verbal Discipline and Adolescents' Conduct Problems and Depressive Symptoms*, CHILD DEVELOPMENT 10 (2013). In addition, the American Academy of Pediatrics recommends against using yelling or other strong verbal discipline because it is not necessary. *Disciplining Your Child*, AMERICAN ACADEMY OF PEDIATRICS ONLINE, http://www.healthychildren.org/English/family-life/family-dynamics/communication-discipline/pages/Disciplining-Your-Child.aspx?nfstatus=401&nftoken=00000000-0000-0000-0000-000000000000&nfstatusdescription=ERROR%3a+No+local+ token (last visited Aug. 13, 2013).

[173] *Id.*

*b. Factors Relevant in Assessing the Proportionality of the Non-Physical Government Action*

In assessing the proportionality of verbal and other non-physical abuse, the courts need to consider both the severity and quantity of the verbal or non-physical abuse. The severity of the verbal or non-physical abuse should be determined by considering the general offensiveness of the words used. The more offensive and vulgar the words, the more severe they are. The word "jerk" is generally considered less severe an epithet than "asshole" because "asshole" is more vulgar.[174]

In addition, the more precisely drawn the words are to the particularities of a student, the more severe they are. Calling an accomplished athlete a bad athlete is not particularly severe because so much evidence likely contradicts the term that it cannot be said to be precisely drawn to the particularities of the student. In contrast, calling a student with dyslexia "stupid" is more precisely drawn because it targets the student's difficulties with academics and reading; therefore, it is more severe. Similarly, if a student has sensitivities known to the school official, exploiting those sensitivities should also constitute emotional abuse.

Quantity must also be considered in assessing disproportionality. When there is no need for emotional abuse, the courts should again start with a presumption that the abuse was disproportionate.[175] However, that presumption can be rebutted by evidence that the abuse happened in one isolated incident and was not very severe in kind. Repeated verbal or other emotional abuse increases its disproportionality.[176]

*c. Factors Relevant in Assessing the Severity of the Emotional Harm and Malice*

When looking at the severity of the emotional injury, courts first need to consider the harm from both emotional and physical abuse. As *T.W.* shows, both emotional and physical abuse can cause emotional harm.[177] So if, in a case like *T.W.*, the

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[174] In considering the vulgarity of a teacher's student-directed speech, there surely is a level of intersection with First Amendment jurisprudence. In concluding the First Amendment did not protect a student who made a speech laced with sexual innuendo at a school assembly, the Supreme Court stated in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), stated, "it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. The intersectionality, then, involves not only the consideration of what constitutes vulgar speech (and if sexual innuendo is vulgar, then surely curse words are also vulgar), but also the juxtaposition of a school being able to punish for vulgar speech quite freely but not being liable when school official use vulgar speech and it causes severe emotional harm to students. This juxtaposition reflects another instance of schools' legal authority being expanded and given deference while legal protections for students gets limited. *See also* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527 (2000).

[175] On the basis of this kind of disproportionality alone, the Sixth Circuit in *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987), found physical blows to a student to violate the Constitution. *Id.* at 1159. The Court stated, "[the] need . . . was so minimal or non-existent that the alleged blows were a brutal and inhumane abuse of McCullough's official power, literally shocking to the conscience." *Id.*

[176] While this point may seem obvious, it eluded the *T.W.* court. T.W. *ex rel.* Wilson v. Sch. Bd. of S. Seminole Cnty., 610 F.3d 588 (11th Cir. 2010).

[177] *Id.*

physical abuse caused minimal physical harm, it should still be considered insofar as it may have caused emotional harm.

Factors that tend to establish severity of emotional harm are those that show long-term, intractable, or irreparable harm or psychological regression. These kinds of harms include: new symptoms of psychological diagnoses; the exacerbation of any existing psychological disorder; any new (since the onset of abuse) and unusual emotional reactions to school, including crying and screaming; and any developmentally inappropriate behaviors.

Finally, when determining whether the school official's actions were inspired by malice or sadism, the courts should look into the subjective understandings of the school official as well as the objective facts. If the school official had reason to know that the treatment of the student would harm the student emotionally and did it anyway, then the school official has acted maliciously. Even if the school official did not know the actions would emotionally harm the student, though, severe actions (as determined by the proportionality prong of the analytic framework) can establish malice or sadism by their very severity.[178]

### *B. The New Paradigm Applied:* T.W. *and* Costello

Applying these factors to two stand-alone emotional harm cases, *T.W.* and *Costello*, shows that they could and should have come out differently. *T.W.* is the case identified in this Article's Introduction and discussed in Part I.[179] *Costello v. Mitchell Public School District 79* is an Eighth Circuit case in which the Court found that when a student, Sadonya Costello, suffered suicidal ideation and depression as a result of her teacher calling her "retarded," "stupid," and "dumb" repeatedly during her semester in his class, it did not violate the Constitution.[180]

Including verbal taunts, vulgarity, swear words, and words that incite others to act against a student in the consideration of the "government action" would have started the courts in *T.W.* and *Costello* down different analytic paths than the ones they actually took. Considering these kinds of verbal abuse would have required the Court in *T.W.* to consider the teacher's taunts and acts of calling T.W. "lazy," "asshole," "pig," and telling him he stinks in its assessment of need.[181] It would have required the Court in *Costello* to consider both the teacher's actions in calling Sadonya "stupid," "retarded," and "dumb," and the fact that he did it in front of her classmates.[182]

After these considerations, the courts would then have to consider the need for this government action. Applying the rebuttable presumption that there is no need for verbal or non-physical abuse of students, the courts would have been unable to find the presumption overcome. In *T.W.* no evidence suggested any need—

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[178] As the Fourth Circuit found in *Meeker*, a "fact-finder could certainly determine that such beatings . . . causing [the student] to suffer 'excruciating physical pain, inflammation of the body,' and 'traumatic stress disorders,'" were "inspired by malice." Meeker v. Edmunson, 415 F.3d 317, 321 (4th Cir. 2005).

[179] *T.W.*, 610 F.3d 588.

[180] Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001).

[181] *T.W.*, 610 F.3d at 594.

[182] *Costello*, 266 F.3d at 919.

disciplinary, pedagogical, or otherwise—for the teacher's verbal abuse.[183] In *Costello*, the teacher called Sadonya "dumb" and "retarded" for no apparent reason other than because she was struggling in school.[184] Struggling in school merits attention and help from teachers; it does not create a need for verbal abuse.

Without a need for the verbal abuse in *T.W.* and *Costello*, the courts could not have found proportionality between the need for the government action and the amount of it. When there is no need, there cannot be proportionality. Further, the State-imposed verbal abuse in both cases went on repeatedly for months, showing disproportionality based on quantity. The disproportionality was also exacerbated because the words were drawn to the particularities of the student. Calling T.W., who had intellectual and developmental disabilities, "stupid" targeted his disabilities.[185] Calling Sandoya Costello "stupid" and "retarded" exploited both her academic difficulties and her status as a student who needed or had needed special education services.[186]

If the courts considered the factors for assessing severity of harm called for in Part III(A)(2)(c) above, they could have found the harm suffered in *T.W.* and *Costello* severe. T.W. developed a new, long-term disability: PTSD.[187] He regressed developmentally, including by starting to urinate in multiple places.[188] Sadonya Costello also developed symptoms of new disabilities: depression and suicidal ideation.[189]

The courts could have also found malice on the part of the school officials in both *T.W.* and *Costello*. In *T.W.* the malice could have been found because the teacher abusing T.W. knew from psychological evaluations that she could likely exacerbate his disabilities by her abuse, but she nonetheless engaged in it.[190] Although no evidence in *Costello* suggested that the teacher knew his actions were likely to cause depression and suicidal ideation in this particular student, the disproportionality between the need for his verbal abuse (none) and the severe abuse shows malice.

In application, then, the factors making up the new paradigm for evaluating emotional harm in students' substantive due process cases can work. They work by requiring courts to not only consider emotional harm, but also consider it effectively and without reference to unhelpful and vague standards. They work, therefore, by overcoming emotions stigma.

### *C. Recognizing the Role of Emotions Stigma in Litigation*

In order to overcome emotions stigma, it must be recognized as it occurs. In the process of litigating cases, the work of alerting judges to issues that need to be

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[183] *T.W.*, 610 F.3d at 594-96.

[184] *Costello*, 266 F.3d at 919.

[185] *T.W.*, 610 F.3d at 594.

[186] *Costello*, 266 F.3d at 919.

[187] *T.W.*, 610 F.3d at 596.

[188] *Id.*

[189] *Costello*, 266 F.3d at 920.

[190] *T.W.*, 610 F.3d at 608 n.6.

addressed falls to the lawyers and litigants. While judges surely should be alert to their own biases and analytic missteps, they may also miss them.[191] The role of the lawyer is to ensure that judges do not miss points relevant to their analyses. Attorneys then should alert judges that emotions stigma can play a role in the evaluation of students' emotional harm allegations in substantive due process cases. Indeed, attorneys have an obligation to point out emotions stigma on behalf of their clients in order to ensure that it does not play a role in harming the evaluation of their claims.

Suggesting to a judge that he or she may apply a stigma about emotions in a case, however, could be a tricky business. Lawyers understandably may not want to offend courts by appearing to presumptuously assert that judges may apply a bias or stigma to the analysis of the case. If Chief Justice John Roberts serves as any example, such a suggestion may offend judges' most basic sense of their role and how they act in that role.[192]

One way to alert courts to the potential role of emotions stigma is to point out that it has played a role in other courts' evaluations of students' emotional abuse and harm claims. In this way, the lawyer can make the argument without directly suggesting that emotions stigma might play a role in evaluations by the particular courts before which they are appearing. In addition, attorneys should argue that the result of emotions stigma has been to contribute to, or cause the failure of, any court to recognize that emotional harm, no matter its severity, can on its own violate students' substantive due process rights. Attorneys can thereby allow the courts to understand the problematic jurisprudential landscape that has been created by emotions stigma so other courts can avoid contributing to it.

## IV. CONCLUSION

This paradigm and related steps are envisioned as a starting point for addressing and overcoming emotions stigma in the evaluation of students' substantive due process claims. Addressing emotions stigma involves addressing deeply historic perceptions about the interaction of emotions and reason. It requires courts to begin to meaningfully evaluate students' allegations of emotional harm absent any physical harm component. It also requires them to abandon meaningless torture standards applied only to emotional, but not physical, harm. Yet, a start needs to be made. Failing to address the operation of emotions stigma will leave the jurisprudential landscape as is. Students like T.W., who must go to school in order to comply with compulsory attendance laws, will continue to suffer severe, State-imposed emotional harms, and the Constitution will not be offended. The Constitution will simply

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[191] Assumptions, a category similar to emotions stigma and stigmas generally, are notoriously easy to miss because they are "taken for granted." *Assumption Definition*, WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/assumptions (last visited July 2, 2013). They therefore get applied entirely or almost entirely without thought. So too emotions stigmas can lie below the intellectual surface and be missed.

[192] In his Senate confirmation hearings, the Chief Justice described his role as a judge as analogous to that of an umpire calling strikes and balls in baseball. Posner, *supra* note 20, at 1051. While other judges and scholars have pointed out the fallacy of that analogy, because Justice Roberts used it in reference to himself in no more serious a forum than his own confirmation hearings, it is reasonable to conclude he believes it or at least wants it to be true about himself.

continue to fail to protect public school students from even very severe emotional harm in school.