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Qualified Immunity and Privacy–The Fifth Circuit Finds that Students Have no Clearly Established Right to Confidentiality in their Sexual Orientation

*Michael Sheetz**

In May of 2013, a three-judge panel of the Court of Appeals for the Fifth Circuit held that a public high school student's privacy right against unauthorized disclosure of her sexual orientation by a school official was not sufficiently well-established to defeat the official's claim of qualified immunity.[1] Noting that only one other circuit court had held that the Fourteenth Amendment shields a person's homosexuality from public disclosure by the state[2] and that no authority had ever considered the issue in a school setting, the two-judge majority found that "there was no violation of a clearly established federal right."[3] In reaching this conclusion, the Fifth Circuit rightly emphasized that the disclosure in question occurred in a public school, thereby giving due recognition to Supreme Court precedent indicating that, while students do not "shed their constitutional rights . . . at the schoolhouse gate,"[4] they do not enjoy the same level of privacy as adults in every situation.

In March of 2009, S.W., a sixteen-year-old public high school student and softball player, attended a disciplinary meeting with her coaches.[5] The coaches, Fletcher and Newell, confronted S.W. about a rumored sexual relationship between S.W. and an eighteen-year-old girl who had a reputation for drinking and drug use.[6] Following this meeting, Fletcher and Newell met with Wyatt, S.W.'s mother, to voice their concerns and to alert Wyatt to her daughter's disruptive and potentially dangerous in-

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1. Wyatt v. Fletcher, 718 F.3d 496, 499 (5th Cir. 2013).
2. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000).
3. *Wyatt*, 718 F.3d at 510.
4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
5. *Wyatt*, 718 F.3d at 500.
6. *Id.*

volvement with the older girl.[7] Based on the coaches' statements, Wyatt inferred her daughter's homosexuality.[8] The coaches did not share any information about S.W. with anyone besides her mother.[9]

Wyatt, as next friend of S.W.,[10] filed suit in federal court against Fletcher and Newell, alleging, *inter alia*, that the coaches had violated S.W.'s constitutional right to privacy under the Fourteenth Amendment.[11] The defendants moved for summary judgment on Wyatt's Fourteenth Amendment claims, relying on the defense of qualified immunity.[12] However, the trial court denied the motion, finding that "S.W.'s right to privacy was clearly established at the time of the incident" and that a genuine issue of material fact remained as to whether the coaches' actions were objectively reasonable.[13] On interlocutory appeal, a split Fifth Circuit panel reversed the denial and remanded the case back to the trial court with orders to render judgment in favor of Fletcher and Newell.[14]

The doctrine of qualified immunity shields government officials from liability for unintentionally infringing on an individual's constitutional rights in the performance of their discretionary duties.[15] When correctly applied, "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[16] When a state official accused of violating a person's constitutional rights raises the defense of qualified immunity at the summary judgment stage, the burden shifts to the plaintiff to prove "that the officer's allegedly wrongful conduct violated clearly established law."[17] To find that a right is clearly established, courts "do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate"[18] such that "*every* reasonable official would understand that what he is doing violates [the law]."[19] At minimum, a finding that a right is clearly established requires a "controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity."[20] While "officials can still be on notice that their conduct

7. *Id.* at 501.
8. *Id.*
9. *Id.*
10. FED. R. CIV. P. 17(c)(1)(A). An adult parent may assert the legal rights of her minor child as "next friend" to the minor. *Id.*
11. *Wyatt*, 718 F.3d at 501–02.
12. Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-cv-674, 2011 U.S. Dist. LEXIS 137836, 10–11 (E.D. Tex. Nov. 30, 2011).
13. Id. at 24–26.
14. *Wyatt*, 718 F.3d 496 at 510.
15. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011).
16. *Id.* at 2085.
17. Michalik v. Hermann, 422 F.3d 252, 262 (5th Cir. 2005).
18. *Ashcroft*, 131 S. Ct. at 2083.
19. Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011) (internal quotations omitted).
20. *Id.* at 371–72 (internal quotations omitted).

violates established law even in novel factual circumstances,"[21] a plaintiff asserting the existence of such a law in the absence of a case directly on point "must allege facts sufficient to demonstrate that no reasonable officer could have believed his actions were proper."[22]

The right that Wyatt sought to have the court recognize as clearly established stems, if at all, from the Supreme Court's observation in *Whalen v. Roe* that the Fourteenth Amendment privacy doctrine has developed into two distinct branches: first, autonomy in personal decision making, and second, "avoiding disclosure of personal matters."[23] The latter branch—the so-called right of confidentiality—protects citizens from having their private information divulged to third parties by the state. However, the Court has provided virtually no guidance as to what types of information trigger such protection. In fact, the Court noted in 2011 that, ever since the right was first described in the late '70s, "no other decision has squarely addressed a constitutional right to informational privacy."[24]

Nonetheless, Wyatt and the dissenting judge pointed to a number of cases, both inside and outside the Fifth Circuit, which they deemed sufficient to define the contours of the right of confidentiality to include sexual orientation.[25] The court ultimately regarded these cases as unpersuasive for a number of reasons: only one case squarely recognizes sexual orientation as protected information,[26] decisions from other circuits held that sexual orientation is not protected,[27] and none of the decisions cited by the dissent involves "the crucial question: whether a student has a privacy right under the Fourteenth Amendment that forbids school officials from discussing student sexual information during meetings with parents."[28] The dearth of Supreme Court instruction on the issue of informational privacy and the lack of any precedent applying that privacy to high school students led the court to conclude that, even if S.W. had a constitutional right to confidentiality in her sexual orientation, that right was not sufficiently well-established to defeat the defendants' qualified immunity.[29]

The dissenting judge took issue with the majority's narrowing of the Plaintiff's asserted privacy right to the specific fact situation of the case, pointing out that "the majority fail[ed] to provide any authority for its finding that the right to privacy in personal sexual matters does not ex-

21. Hope v. Pelzer, 536 U.S. 730, 742 (2002).

22. Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010).

23. Whallen v. Roe, 429 U.S. 589, 598–600 (1977).

24. NASA v. Nelson, 131 S. Ct. 746, 756 (2011).

25. *See* Wyatt v. Fletcher, 718 F.3d 496, 513–14 (5th Cir. 2013) (Graves, J., dissenting).

26. *See* Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000).

27. *See* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990). Note, however, that the *Walls* opinion drew heavily from the logic of *Bowers v. Hardwick* and should thus be critically reevaluated in light of *Lawrence v. Texas* and the subsequent development of the right of sexual autonomy. *See id.* at 193.

28. *See Wyatt*, 718 F.3d at 509–10.

29. *Id.* at 510.

tend to high school students."[30] This assertion, however, mischaracterizes the majority's opinion and misses the real issue in the case. The focus of the analysis in a qualified immunity case is on the state of the law at the time of the alleged violation and on whether the state official had fair warning that his actions were infringing on a protected right. The issue in *Wyatt* was not whether a privacy right of students in their sexual orientation exists, but whether such a right has been established clearly enough by precedent to defeat the coaches' claim of qualified immunity. Likewise, the court did not hold that students have no privacy right in their sexual orientation but, rather, that Wyatt failed to meet her burden of showing that the existence of such a right was so plainly demonstrated by existing case law that no reasonable official could have believed the coaches' actions were permissible. The dissent's insistence that the majority provide some affirmative proof that the right to confidentiality does not extend to students implies that, once a right is demonstrated to exist generally, no reasonable official could doubt that the right applies equally in a school context. However, Supreme Court precedent in the area of students' rights suggests just the opposite: that rights enjoyed by adults are regularly curtailed or circumscribed when applied to students and that, in the absence of a strong judicial consensus on the issue, a reasonable school official could easily believe that her actions, though impermissible if taken toward an adult, were permissible with respect to a student.

To be sure, the state's interests in maintaining a safe and productive learning environment in schools and inculcating good behavior and morals do not trump students' constitutional rights in every situation. As the Supreme Court recognized in the context of a First Amendment challenge to a school's restriction on students' symbolic speech, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[31] The same is true of students' freedom from unreasonable search and seizure, as well as their procedural rights under the Fourteenth Amendment's due process clause.[32] The rights of students in public schools are protected by the Constitution, and actions by school officials that unreasonably infringe upon those rights can give rise to civil liability. However, this does not mean that a rule or restriction put in place by a school official is automatically void, if it would not survive judicial scrutiny if applied to an adult. To the contrary, the Supreme Court has repeatedly emphasized that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[33]

A school official considering whether a generally recognized constitutional right of adults applies equally to her students will find plenty of examples in Supreme Court decisions suggesting a negative answer. For

30. *Id.* at 513 (Graves, J., dissenting).

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

32. *See* New Jersey v. T.L.O., 469 U.S. 325, 347–48 (1985); Goss v. Lopez, 419 U.S. 565, 584 (1975).

33. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

instance, the First Amendment freedom of expression recognized in *Tinker* does not prohibit schools from placing politically neutral restrictions on student speech for legitimate educational reasons, even when such restrictions would be unconstitutional if applied to an adult.[34] Hence, a school may take disciplinary action against a student who gives a vulgar speech to an audience of his classmates at a school function, despite the fact that the same speech given by an adult to other adults would be protected from state censorship.[35] Likewise, a school may prohibit student speech that encourages illegal drug use and may refuse to publish student-written newspaper articles for any valid educational reason.[36] The Supreme Court has recognized that when school officials determine that a given act of student expression threatens to "undermine the school's basic educational mission," the Constitution does not bar the school from restricting that expression.[37] At very least, when precedent is unclear on whether a restriction on a novel mode of student expression is prohibited, qualified immunity should shield the erroneous—yet well-intentioned—school official from liability in damages.[38]

Students' Fourteenth Amendment procedural due process rights may also be reduced in relation to those of adults. Due process demands that individuals facing a deprivation of liberty at the hands of the government receive fair notice of the grounds for the deprivation, as well as an opportunity to be heard by an impartial decision-maker.[39] This is no less true for students than for adults.[40] However, due to the special characteristics of the school environment, the form of the notice and hearing provided may differ greatly between students and adults. For adults facing criminal sanctions, notice and hearing usually take the form of a formal adversarial proceeding with the aid of counsel and certain evidentiary safeguards. However, the Supreme Court has recognized that such extensive procedural requirements would be impractical if applied to schools' routine disciplinary measures.[41] Since "[s]ome modicum of discipline and order is essential if the educational function is to be performed" and "[e]vents calling for discipline are frequent occurrences [in schools] and sometimes require immediate, effective action," the typical notice and hearing guarantees are relaxed for students facing academic suspension.[42] Such students need only be afforded an informal discussion of their punishment, often only minutes after the student's objectionable act takes place.[43] Although the privacy right Wyatt asserted is rooted in the sub-

34. *Tinker*, 393 U.S. at 506; *see Fraser*, 478 U.S. at 682–83.
35. *Fraser*, 478 U.S. at 684–86.
36. *See* Morse v. Frederick, 551 U.S. 393, 403 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).
37. *Fraser* 478 U.S. at 685–86.
38. *Morse*, 551 U.S. at 430–31 (Breyer, J., concurring).
39. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 578–79 (1975).
40. *See id.*
41. *Id.* at 579–80.
42. *Id.* at 580.
43. *Id.* at 582.

stantive rather than the procedural side of due process, the Supreme Court's approval of these reduced Fourteenth Amendment protections for students does make Fletcher and Newell's belief in the permissibility of their actions more reasonable.

In several cases, the Supreme Court has held that students enjoy less constitutional protection compared with adults in a related area of privacy: privacy in one's person and effects. The Fourth Amendment's prohibition on unreasonable searches and seizures typically requires the state to obtain a warrant supported by probable cause before searching an adult's possessions.[44] However, as with procedural due process protections, the Supreme Court has recognized that requiring strict adherence to the warrant requirement in the context of school officials' searches of students' possessions would inhibit "the substantial need of teachers and administrators for freedom to maintain order in the schools."[45] As such, schools are exempt from the warrant requirement, and the probable cause standard for a search of a student's possessions is relaxed in favor of a "reasonableness . . . under all the circumstances" standard.[46] Furthermore, students like S.W. "who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy," such that mandatory drug testing of student athletes does not constitute an unreasonable search.[47] Again, intrusions into students' privacy that would violate the Constitution if done to an adult were found permissible due to the unique needs of the school environment.

The fact that Fletcher and Newell disclosed S.W.'s homosexuality only to her mother is of special importance, given parents' interest in receiving information necessary to protect the safety and welfare of their children. In other areas of privacy law, the Supreme Court has recognized that parents' need to be informed of matters deeply impacting their minor child's well-being may sometimes outweigh the minor's interest in keeping those matters private. For instance, the Supreme Court upheld statutes requiring parental notification or consent before a doctor may perform an abortion on a minor, as long as the statutes provide a procedure allowing the minor to judicially bypass the notice or consent requirement.[48]

The numerous cases in which the Supreme Court has upheld restrictions on students' and minors' constitutional rights in a school setting establish a general principle: because of the state's interest in maintaining order, discipline, and administrative efficiency in schools, students often enjoy decreased levels of constitutional protection in relation to adults in

44. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).
45. *Id.* at 341.
46. *Id.*
47. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).
48. *See* Bellotti v. Baird, 443 U.S. 622, 651 (1979); *cf.* Planned Parenthood v. Casey, 505 U.S. 833, 897–98 (1992) (holding that a spousal notification requirement for a married adult woman to have an abortion was an impermissible restriction on the woman's sexual autonomy, though a comparable restriction would be valid for a minor).

matters of privacy and self-expression. A school official reviewing these cases could reasonably believe that a school policy necessary to preserve the school's educational mission would not be struck down so long as it served a valid educational purpose and reasonably accommodated students' rights. With this principle in mind, the validity of Wyatt's assertion of a right which no judicial authority has ever found to apply to students in a school setting is in no way "*beyond debate*."[49] The Fifth Circuit correctly found that, even if the general right of adults to confidentiality in their personal information were clearly established (despite the circuit split on the issue), Fletcher and Newell could reasonably have believed that such right did not extend to the disclosure of a high school student's sexuality to the student's mother as part of a disciplinary meeting.

Many of the arguments that led the Supreme Court, in the above-mentioned cases, to conclude that students do not enjoy the same protections as adults apply with equal force in *Wyatt*. Teachers assume responsibility for their students' well-being during school hours, and may be subject to liability if their failure to address a student's behavioral problems causes harm. Teachers concerned about their students' behavior must be able to speak candidly with the students' parents and other school officials in order to discover the root of problems and discuss possible solutions. The student's sexuality may be an important factor in these discussions, especially for high school students who are approaching sexual maturity and are more likely to make impulsive, self-destructive decisions without proper guidance from the adults responsible for their care. Anti-gay bullying is a major concern for teachers, with recent polls showing that more than 80% of LGBT students had experienced harassment over their sexual orientation.[50] Teachers are also responsible for detecting and reporting signs of sexual abuse. In fact, many states, including Texas, have mandatory sexual abuse reporting statutes for educators.[51] Teachers who suspect that a student is either the victim or perpetrator of sexual abuse or anti-gay bullying will be unable to act on their concerns if they are absolutely barred from revealing any information from which the listener might infer the student's sexual orientation. Furthermore, as the facts in *Wyatt* illustrate, a high school student's exposure to alcohol and illegal drugs, which schools no doubt have a strong interest in regulating, is often intertwined with the student's sexual activity. A myriad of concerns for a student's physical, mental, and emotional health can arise from a student's interactions with a boyfriend or girlfriend; these are concerns that a teacher would rightfully feel obligated to communicate to the stu-

49. Wyatt v. Fletcher, 718 F.3d 496, 503 (5th Cir. 2013).

50. *See* JOSEPH G. KOSCIW ET AL., THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK (2012), *available at* http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf.

51. *See* TEX. FAM. CODE ANN. § 261.101 (West 2013).

dent's parents but which would be difficult, if not impossible, to express without discussing any information related to the student's sexuality.

The Fifth Circuit in *Wyatt* correctly identified the school setting as a key factor in deciding that the confidentiality right asserted by the plaintiff was not clearly established. Drawing from the Supreme Court's precedent on students' rights, a school official who disclosed information about a student's sexuality only to the student's parent and only to the extent necessary to accomplish a legitimate disciplinary purpose could reasonably believe that her actions were permitted. No petition for a writ of certiorari has been filed in the *Wyatt* case; however, should the case eventually go before the Supreme Court, the Court should consider the effect its ruling will have on the rights of both students and educators, and the doctrine of qualified immunity as a whole. Although a holding that the right asserted by Wyatt was clearly established might be a victory for students' rights advocates, it would seriously undermine the protection that the qualified immunity defense is meant to afford public officials by requiring them to predict courts' decisions in unsettled areas of the law. When legal authorities are either silent or split on the existence of a right in general, let alone in the unique context of a public school, a school official should not be liable for honestly but erroneously deciding that the right does not apply equally to students as to adults. On the other hand, a holding affirming the Fifth Circuit's decision would not necessarily decrease students' rights. It would not suggest the nonexistence of students' right to confidentiality in their private sexual matters, but merely that the contours of the confidentiality right need more particular definition by the lower courts before qualified immunity can be defeated. Such a holding would preserve the function of the qualified immunity defense, while leaving open the possibility that the right asserted by Wyatt could eventually be vindicated and encouraging the circuit courts to further refine the scope of the right to confidentiality.