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THE FOURTH AMENDMENT—ARE MOBILE PHONES NOW GOVERNMENTAL TRACKING DEVICES?

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THE Fourth Amendment has played a crucial role throughout the history of the United States by protecting "'the sanctity of a man's home and the privacies of life'" from unauthorized governmental intrusion.[1] However, a recent decision by the U.S. Fifth Circuit Court of Appeals tested this issue with respect to governmental tracking of mobile phones.[2] Although wiretapping historically required a warrant, the Fifth Circuit now allows the government to obtain the location of mobile phone users through mobile phone tower data pursuant to the Electronic Communications Privacy Act of 1986 (ECPA).[3] The court's opinion created a circuit split with the Third Circuit, the only other circuit to address the issue.[4] This Note argues that the court's holding in *In re Application of the United States of America for Historical Cell Site Data* is incorrect because it does not accurately interpret the language of the ECPA and is impractical when applied in practice.

The case at issue arose in the Southern District of Texas when the government, in three different cases, requested records regarding cell tower location and call details for the previous sixty days.[5] These requests were directed under the ECPA,[6] which states:

> A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall

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1. Lewis v. United States, 385 U.S. 206, 213 (1966) (Brennan, J., concurring).

2. *In re* Application of the U.S. for Historical Cell Site Data (*Application II*), 724 F.3d 600, 603 (5th Cir. 2013).

3. *Id.* at 621–22; *see generally* Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

4. *Application II*, 724 F.3d at 616 (Dennis, J., dissenting).

5. *In re* Application of the U.S. for Historical Cell Site Data (Application I), 747 F. Supp. 2d 827, 827–28 (S.D.T.X. 2013).

6. *Id.* at 845–46; *see* ECPA § 201(a).

> issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.[7]

However, a magistrate judge denied the requests based on the Fourth Amendment protection from unreasonable search and seizure.[8] Specifically, the judge found that the devices would track individual's phones twenty-four hours each day, to within several hundred feet of the individuals, and would occur whether or not a call was actually placed on the mobile phone.[9] These conditions, presented without probable cause, violate the Fourth Amendment.[10]

The government then appealed to the Fifth Circuit Court of Appeals, which reversed the magistrate judge's ruling, found the requests constitutional, and granted the requests.[11] In reaching this decision, the court considered the ripeness of the issue, the statutory language of the ECPA, and the constitutionality of the record request portion of the ECPA.[12]

The Fifth Circuit quickly dispensed with the ripeness and statutory language issues. Specifically, the court found that the issue was ripe because "the §2703 (d) order provision was categorically unconstitutional with respect to an entire class of records"[13] and "we are presented with the unusual circumstance of 'an abstract question of [Fourth Amendment] law with no connection to a genuine factual record.'"[14] The court found that the case met the Fifth Circuit criteria for ripeness, in that it "'raise[d] pure questions of law'" and "'[the plaintiff] would suffer hardship if review were delayed.'"[15] The court held that under the language of the EPCA, a court must grant a court order if the provisions in the Act are met, without any judicial discretion.[16]

The court then held that the court order portion of the ECPA was constitutional because the individual mobile phone user has no reasonable expectation of privacy.[17] This lack of a reasonable expectation of privacy stems from the mobile phone user's general knowledge and his contractual agreement that data from mobile phones must bounce off towers and be stored by the mobile phone company for its own uses.[18] Because the information is willingly given to the company for use in its business, the

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7. ECPA 201(a).
8. *Application I*, 747 F. Supp. 2d at 827–28.
9. *Id.* at 845–46.
10. *Id.*
11. *Application II*, 724 F.3d at 615.
12. *Id.* at 603.
13. *Id.* at 604.
14. *Id.* at 603.
15. *Id.* at 604 (citing Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279, 287–88 (5th Cir. 2012)).
16. *Id.* at 607.
17. *Id.* at 612–13.
18. *Id.* at 613–14.

court reasoned that the phone user lacks the typical expectation of privacy under the Fourth Amendment.[19] It should be noted that this opinion is limited to historical data points from mobile phone towers, and does not address requests to obtain actual conversations from a phone.[20]

The court's holding appears legally sound, considering Supreme Court precedent. The court largely follows *Smith v. Maryland*, in which search records of a pen register were held constitutional.[21] The Supreme Court found that the registers, installed on property owned by the phone company,[22] simply recorded calls to the phone company in its ordinary course of business.[23] Therefore, callers had no reasonable expectation of privacy because they freely conveyed information to the third-party phone company that might eventually be given to police.[24] This case, when compared with the Supreme Court's holding in *Smith*, is factually similar and legally correct.[25] Thus, it can be said the "analysis and ultimate determination in the case are controlled and informed by the central importance of *stare decisis*."[26]

With due regard to precedent, the legal and privacy implications of this case are arguably more consistent with *United States v. Jones*.[27] *Jones*, decided in 2012,[28] is more recent than *Smith*.[29] Additionally, while *Jones* is not as directly on point, it deals with an equally important matter—the ability to be tracked by a device from different locations.[30] *Jones* analyzed a Global Positioning System (GPS) device placed on a car by a government agent;[31] in the present case the issue is the ability to be tracked by a series of triangulation beacons through cellular phone towers.[32] In *Jones*, the Supreme Court held that the use of a GPS is considered a search because it tracks the location of the user.[33] This is similar in theory to the present case, which involves Fourth Amendment privacy concerns through mobile phone technology. Although no one can argue with the outcome of this case based on legal precedent, the court made four critical mistakes when analyzing the law in light of current technology. First, it failed to correctly analyze an individual's reasonable expectation of privacy by overestimating the average mobile phone user's knowledge of and consent to the collection of his data. Second, the court claimed it was exercising judicial deference when, in reality, it should

19. *Id.*
20. *Id.* at 615.
21. Smith v. Maryland, 442 U.S. 735, 741 (1979).
22. *Id.*
23. *Id.* at 744.
24. *Id.* at 744–45.
25. *Application II*, 724 F.3d at 610–13.
26. Hilton v. S. Carolina Pub. Rys. Comm'n, 502 U.S. 197, 201 (1991).
27. *See* United States v. Jones, 132 S. Ct. 945, 945 (2012).
28. *Id.*
29. *Smith*, 442 U.S. at 735.
30. *Jones*, 132 S. Ct. at 947.
31. *Id.*
32. *Id.*
33. *Id.*

have yielded to the principle of constitutional avoidance. Third, the scope of the court's holding is unclear and does not explicitly exclude collection of data from non-voice data streams. Finally, and most importantly, the court did not consider the policy implications of its decision in light of present-day technology, which is vastly different from the technology originally contemplated by the statute.

The court's analysis of an individual's reasonable expectation of privacy was most noticeably flawed.[34] This is readily apparent when examining the "consent" given and "knowledge" possessed by a mobile phone user in giving up a reasonable expectation of privacy, as expressed in the court's holding.[35] Inaccurately, the court assumes that every mobile phone user fully understands and consents to a mobile phone company's use of his data. However, a U.S. Department of Education study, released in April of 2012, found that between forty and forty-four million Americans performed in the lowest literacy level, and as many as fifty-four million performed in the second lowest literacy level.[36] This group comprised almost 29% of Americans in 2012.[37] Conversely, between thirty and forty million Americans performed in the highest two reading levels, being capable of tasks "involv[ing] long and complex documents and text passages."[38] Yet, as of 2011, there were about 315 million wireless subscribers in the United States.[39] Did the court believe that people with a mobile phone fully understood and consented to sharing their information with their wireless service provider?

According to the court, "[S]ervice providers' and subscribers' contractual terms . . . and providers' privacy policies expressly state that a provider uses a subscriber's location information to route his cell phone calls . . . [T]hese documents inform subscribers that the providers not only use the information, but collect it."[40] Although this may be true, it does not mean that each consumer thoroughly read and understood the contract and its terms. In fact, 22.8% of people in the United States did not complete high school on time or at all,[41] and only 30% have a bachelor's degree.[42] Moreover, even if people understand and consent to providing their location data,[43] constitutional rights have previously been protected

34. *Application II*, 724 F.3d 600, 610–14 (5th Cir. 2013).

35. *Id.*

36. Irwin S. Kirsch, et al., *Adult Literacy in America: A First Look at the Findings of the National Adult Literacy Survey*, NAT'L CTR. FOR EDUC. STATISTICS at xvi-xvii (3d ed. 2002), *available at* http://nces.ed.gov/pubs93/93275.pdf.

37. *See id.* at xx.

38. *Id.* at xvii.

39. *Wireless History Timeline*, CTIA, http://www.ctia.org/your-wireless-live/now-wireless-works/wireless-historytimeline (last updated Nov. 2013).

40. *Application II*, 724 F.3d at 613.

41. Cameron Brenchley, *High School Graduation Rate at Highest Level in Three Decades*, OFFICIAL BLOG U.S. DEP'T OF EDUC. (Jan. 23, 2013), http://www.ed.gov/blog/2013/01/high-school-graduation-rate-at-highest-level-in-three-decades/.

42. Daniel de Vise, *Number of U.S. Adults with College Degrees Hits Historic High*, WASH. POST (Feb. 23, 2012), http://articles.washingtonpost.com/2012-02-23/national/35442376_1_college-degrees-college-educated-population-liberal-arts.

43. *Application II*, 724 F.3d at 612.

against unknowing waiver.[44] The court should protect individual rights of those with little ability to understand difficult contract language, rather than assume that they can understand and sign away such rights. This concept does not erode personal responsibility or contractarian principles because this is not a contract issue[45] but, rather, is a protection of one of the most important constitutional rights.[46]

Furthermore, the court is incorrect in its assertion that consumers give express consent to data collection because they do not have to use mobile phones and may choose between different providers if a mobile phone is truly required.[47] Although this may be true in theory, it is devoid of any modicum of reality. This is especially true considering that 86% of people in the United States have a mobile phone[48] and the mobile phone industry is rapidly consolidating.[49] When considering other industries, especially the technology industry, it is hard to believe that any of the four large companies would not have a provision "obtaining" the consumer's position regarding data collection or mobile tower location. Without a true choice between companies, it is difficult for the consumer to "consent." Essentially, one must conclude that mobile phone contracts are contracts of adhesion: "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power."[50] In addition, a consumer may be forced to use a certain provider due to a lack of phone coverage in his area.

The court also erred in claiming judicial deference while failing to follow the canon of constitutional avoidance. Constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[51] Here, the court held that the legislature, rather than the court, should decide the policy in controversy.[52] This is an idealistic statement that is not grounded in reality. It appears that the court implied some form of judicial deference to the legislature when it could have avoided this constitu-

44. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966).

45. The argument is not about allowing people out of a contract they agreed to; rather, it is about protecting a constitutional right that those people did not understand they were giving away.

46. Fixel v. Wainwright, 492 F.2d 480, 483 (5th Cir. 1974).

47. *Application II*, 724 F.3d at 613.

48. *Social Networking Popular Across Globe: Arab Publics Most Likely to Express Political Views Online*, PEW RESEARCH (Dec. 12, 2012), http://www.pewglobal.org/2012/12/12/social-networking-popular-across-globe/.

49. The "big four" mobile phone companies have an 86% market share in new smartphone sales. *T-Mobile Sees Growth in Sales on Strength of iOS in the US*, KANTAR WORLDPANEL (Sept. 30, 2013), http://www.kantarworldpanel.com/global/News/news-articles/T-Mobile-sees-growth-in-sales-on-strength-of-iOS-UNcarrier-strategy; *see also OS (Operating System) and Network Shares–Smartphone Sales in the USA*, KANTAR WORLDPANEL, http://www.kantarworldpanel.com/dwl.php?sn=news_downloads&id=299 (last visited Jan. 17, 2014).

50. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 600 (1991).

51. Clark v. Martinez, 543 U.S. 371, 381 (2005).

52. *Application II*, 724 F.3d at 614.

tional problem by exercising the ability of constitutional avoidance.[53] Instead, the court cloaked its opinion in the language of judicial deference, which is at odds with the statutorily constructed opinion of the Third Circuit.[54] Courts have an obligation to protect against Fourth Amendment encroachments; just because the legislature has the ability to consider a matter does not mean the legislature's decision is correct or constitutional.[55] According to the Supreme Court, "the Constitution invests the Judiciary, not the Legislature, with the final power to construe the law."[56]

This opinion is also flawed because the court was unclear in claiming to have a "narrow" opinion.[57] The court articulates no meaningful distinction between data from a phone call and other types of data routinely communicated.[58] Moreover, the court purports not to address orders requesting data when the phone is "idle," but does not clearly define this word.[59] Does "idle" mean that the phone is not being used as an actual phone, or that no data is being transmitted? The first option is more likely, as "[c]ell location information is quietly and automatically calculated by the network, without unusual or overt intervention that might be detected by the target user. . . . Some carriers also store frequently updated, highly precise location. . . . as the device moves around the network."[60] Additionally, the mobile phone user sends location data to cell phone towers twenty-four hours a day, and there is no way to disable the data.[61] There must be some expectation of privacy when not using one's phone. The court did not clearly define "idle"; it is difficult to tell when data is actually taken.

The overriding problem with this opinion is that it attempts to take an opinion from 1979[62] and apply it to today's technological world. The ECPA's language is unsuited to a time in which mobile phones do much more than originally contemplated. When the Act was passed in 1986, there were only 340,213 mobile phone subscribers in the United States;[63] there were approximately 315 million mobile phone subscribers in 2011.[64] This dramatic change is also evident in cell towers, of which only 913 existed in 1985 and now number 251,000.[65]

The modern mobile phone is used in ways not remotely contemplated by the 1986 ECPA. Originally, mobile phones could only make telephone

53. *Id.* at 616–17 (Dennis, J., dissenting).
54. *See generally In re* Application of the U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't, 620 F.3d 304 (3d Cir. 2010).
55. *See generally* United States v. Windsor, 133 S. Ct. 2675 (2013).
56. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 325 (1992).
57. *Application II*, 724 F.3d at 615.
58. *Id.*
59. *Id.*
60. *Application I*, 747 F. Supp. 2d 827, 833–34 (S.D.T.X. 2010).
61. *Id.*
62. *See generally* Smith v. Maryland, 442 U.S. 735 (1979).
63. *Wireless History Timeline*, *supra* note 39.
64. *Id.*
65. *Application I*, 747 F. Supp. 2d at 832.

calls; today, they serve many functions. "Basic" phones feature text messaging, Bluetooth, and the mobile web.[66] "Smart" phones contain a host of features including a camera, games, the internet, movies, a "mobile wallet," music players, and email.[67] In the United States, smart phones began to outsell basic phones in 2011.[68] Moreover, phones are not the only devices that use cell towers—today, tablets such as the iPad and notebook computers also access cellular networks.[69] Should the authorities have access to location data for all of the above activities? In theory, tracking location by data may sound appropriate when one is only placing a call. However, when the phone is used to access a bank account[70] or update a Facebook Status,[71] these activities are more akin to those in a private residence under protection of the Fourth Amendment. The ECPA did not contemplate these mobile phone activities.

After examining the case, the court's opinion seems correct according to precedent. However, the court makes several vital mistakes and fails to fully consider the Fourth Amendment in the context of current-day technology. Instead of its stated rationale, the court should have applied the Fourth Amendment more strictly. It should have been more aware of the legal implications of current wireless technology. If the Fifth Circuit's opinion is allowed to stand, government agencies will be further encouraged to violate privacy rights of Americans without any hesitation. This opinion not only extends the holding in *Smith*,[72] but opens a totally new government system to spy on Americans using "articulable facts" and "reasonable grounds," bypassing Fourth Amendment protections entirely.[73] Although the court held that its opinion does not apply when the phone is "idle," this definition is not clear and will not prevent the expansion of unauthorized monitoring of every aspect of daily life. This opinion is a slippery slope that may be used to justify future erosions of the Fourth Amendment.

66. *See Basic Phones*, VERIZON, http://www.verizonwireless.com/b2c/device/cell-phone (last visited Jan. 17, 2014).

67. *See Smartphones. Do More of the Things You Love.*, VERIZON, http://www.verizonwireless.com/wcms/consumer/explore/smartphones.html (last visited Jan. 17, 2014).

68. Peter Svensson, *Smart Phones Now Outsell 'Dumb' Phones*, 3 NEWS (Apr. 29, 2013, 12:01PM), http://www.3news.co.nz/Smartphones-now-outsell-dumb-phones/tabid/412/articleID/295878/Default.aspx.

69. *See* AT&T, http://www.att.com/shop/wireless/devices/ipad.html. (last visited Jan. 17, 2014).

70. BANK OF AM. MOBILE BANKING, https://www.bankofamerica.com/online-banking/mobile.go (last visited Jan. 17, 2014).

71. FACEBOOK MOBILE, https://www.facebook.com/mobile/ (last visited Jan. 17, 2014).

72. *See generally* Smith v. Maryland, 442 U.S. 735 (1979).

73. *Application II*, 724 F.3d 600, 618 (5th Cir. 2013).

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.

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