

# KEEPING CLOSETS IN OUR CLASSROOMS: HOW THE QUALIFIED IMMUNITY TEST IS FAILING LGBT STUDENTS

*Natalie Knight* \*

## CONTENTS

INTRODUCTION.....	35
I. ESTABLISHED LGBT STUDENT RIGHTS, THE NEED FOR PRIVACY, AND IMPORTANT PRECEDENTS.....	38
II. BACKGROUND ON THE QUALIFIED IMMUNITY DOCTRINE.....	43
III. HOW COURTS CAN EXPLOIT QUALIFIED IMMUNITY TO AVOID RECOGNIZING LGBT STUDENT PRIVACY.....	44
A. <i>Orientation Versus Activities</i> .....	44
B. <i>The School Environment</i> .....	46
C. <i>Age</i> .....	46
D. <i>The Parent-Child Relationship</i> .....	47
IV. <i>WYATT V. FLETCHER</i> : A CASE STUDY OF HOW COURTS CAN ABUSE QUALIFIED IMMUNITY.....	48
V. PROPOSED SOLUTIONS.....	51
A. <i>Reinstate Mandatory Sequencing of the Qualified Immunity Inquiry</i> .....	51
B. <i>Good Judges Write Good Decisions</i> .....	53
C. <i>Statutory Protections</i> .....	53
CONCLUSION.....	54

---

\* Joint J.D. and M.P.P. candidate at UCLA School of Law and UCLA Luskin School of Public Affairs. The author also received her undergraduate degree at UCLA.

---

## INTRODUCTION

Two-thousand thirteen was a year of major victories for the lesbian, gay, bisexual, and transgender (LGBT) community. The United States Supreme Court struck down part of the Defense of Marriage Act, allowing for federal recognition of same-sex marriages for the first time.<sup>1</sup> California's long battle over marriage recognition was resolved in favor of same-sex couples, and legalization of same-sex marriage came to seven new states.<sup>2</sup> It was also the year that finally saw a vote on the Employment Non-Discrimination Act, which passed the Senate with the support of several conservatives.<sup>3</sup> Despite these victories, 2013 was also the year of *Wyatt v. Fletcher*,<sup>4</sup> a case that largely escaped media headlines, but will likely have profound implications for thousands of LGBT youth.<sup>5</sup>

In *Wyatt v. Fletcher*, the Fifth Circuit held that two high school softball coaches were not liable for disclosing a teen's perceived sexual orientation to her mother.<sup>6</sup> *Wyatt* poses a substantial threat to adolescents in the LGBT community. Adolescence is a critical period for

---

1. Morgan Little, *Gay Marriage Movement Wins Significant Victories in 2013*, L.A. TIMES, Dec. 9, 2013, <http://www.latimes.com/nation/nationnow/la-pn-gay-marriage-movement-gains-2013-20131206,0,1888807.story#axzz2nCEIA77A>.

2. In June 2013, the Supreme Court invalidated California Proposition 8 which attempted to ban same-sex marriage in the state. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). Seven states (Rhode Island, Delaware, Minnesota, New Jersey, Hawaii, Illinois, and New Mexico) legalized marriage through state legislation in 2013. See Aaron Blake, *New Mexico Supreme Court Legalizes Gay Marriage*, WASH. POST, Dec. 19, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/12/19/new-mexico-supreme-court-legalizes-gay-marriage; Little, supra note 1>.

3. David Weigel, *Senate Passes Bill to Ban Job Discrimination Against LGBT People; 10 Republicans Sign On*, SLATE (Nov. 7, 2013), [http://www.slate.com/blogs/weigel/2013/11/07/employment\\_non\\_discrimination\\_sailing\\_through\\_senate\\_with\\_10\\_republican.html?wpisrc=burger\\_bar](http://www.slate.com/blogs/weigel/2013/11/07/employment_non_discrimination_sailing_through_senate_with_10_republican.html?wpisrc=burger_bar). The U.S. House of Representatives had not voted on the legislation at the time of printing. See Employment Non-Discrimination Act of 2013, S. Res. 815, 113th Cong. § 2 (as passed by Senate, Nov. 7, 2013).

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

5. While *Wyatt v. Fletcher* involved allegations that a female student was romantically involved with another female, suggesting the student is bisexual or a lesbian, this Comment and the problems it identifies are applicable to all LGBT students as well as those that identify as queer or are exploring their sexualities, and to some extent, to students who are accused or believed to be engaging in same-sex relationships, regardless of whether these allegations are true. Transgender students are included insofar as they express their gender differently at school than at home. To simplify things, the Comment will refer to all as "LGBT students" though the relevant group is potentially broader.

6. *Wyatt*, 718 F.3d at 510.

personal exploration during which teens need privacy. A violation of privacy in this period could threaten a teen's sense of identity, jeopardize family relationships, and even discourage the use of important health services which can be difficult to access without a family member's knowledge.<sup>7</sup> This is a period where LGBT youth may be in particular need of role models and relationships with trusted adults, such as teachers or coaches. *Wyatt* threatens these relationships by ensuring that public school officials are not responsible for protecting what may be their students' most private secrets and denying students control over when and how to disclose their identities to family members.

Sadly, *Wyatt* is not the first case of its kind. Three years before the Supreme Court's ruling in *Lawrence v. Texas*,<sup>8</sup> the Third Circuit held in *Sterling v. Minersville* that a police officer violated an eighteen-year-old's constitutional right to privacy by threatening to disclose his sexual orientation to the teen's family.<sup>9</sup> The officer had first questioned the teen and his friend who were parked in a lot at night near a business that had recently been burglarized.<sup>10</sup> Though the officer did not find any indication that the teens were planning a burglary, he continued to question them since they appeared to be drinking.<sup>11</sup> The officer searched the car, found two condoms, and arrested the two teens.<sup>12</sup> At the police station, the officer lectured them about the immorality of homosexuality and threatened to tell the eighteen-year-old's grandfather that the young man was gay.<sup>13</sup> The teen committed suicide shortly after he was released from the police station.<sup>14</sup>

In *Nguon v. Wolf*, a teen sued for violations of her First Amendment rights and privacy rights after a principal outed her to her mother.<sup>15</sup> The district court held that the student had a reasonable expectation that she would not be outed to her mother, but that the principal had not

---

7. Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & EDUC. 417, 432-46 (2011).

8. *Lawrence v. Texas*, 539 U.S. 558 (2003).

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

10. *Id.* at 192.

11. *Id.*

12. *Id.* at 193.

13. *Id.*

14. *Id.*

15. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1192-93 (C.D. Cal. 2007). Throughout this Comment, "outed" will be used to indicate the disclosure of one person's perceived or actual sexual orientation or gender identity by another person to a third person. Thus, a teacher has outed a student when the teacher discloses the student's orientation to a parent.

violated the student's privacy rights under the First Amendment because the principal had made the disclosure in the context of reasonable disciplinary actions.<sup>16</sup> The court also ruled in favor of school officials on the freedom of expression claim.<sup>17</sup> It reasoned that the officials disciplined *disruptive* conduct but allowed non-disruptive conduct that expressed the students' sexuality, such as holding hands with her girlfriend.<sup>18</sup> Thus, the student had not been singled-out for discipline on the basis of her sexuality.<sup>19</sup>

*Wyatt* is factually similar to *Nguon*, but it is the first case in which a court granted qualified immunity to the defendant. This means that the student-plaintiff could not even proceed to trial to show that her privacy had been violated.<sup>20</sup> Qualified immunity protects government employees like teachers and coaches from liability even when they violate a plaintiff's constitutional rights.<sup>21</sup> A plaintiff can only overcome this protection by proving that the right the government official violated is "clearly established."<sup>22</sup> This initial hurdle deprives LGBT students of their rights by giving them the impossible task of providing a precedent which does not exist. There is no precedent specifically stating that LGBT students have a right to not be outed by school officials. There might also never be such a precedent because qualified immunity can be used to preclude a case from proceeding to trial to establish such a precedent. Thus, qualified immunity puts LGBT students in a catch-22, a paradoxical set of rules that precludes students from constitutional protection.

This Comment will demonstrate that the qualified immunity test can be used to deprive LGBT students of their privacy by its paradox of requirements. Part I will discuss the importance of privacy in one's sexual orientation, especially between an adolescent and her parent(s), and provide background on cases illuminating the right to privacy under the Fourteenth Amendment. Part II will provide background on the qualified immunity doctrine as it relates to privacy interests, and discuss the extent to which existing precedents may or may not protect LGBT students. Part III will show that existing precedents do not explicitly protect: 1) privacy of sexual orientation, 2) privacy in the school environment, 3) privacy of minors, and 4) privacy in the parent-child

---

16. *Id.* at 1195.

17. *Id.* at 1.

18. *Id.* at 1189-91.

19. *Id.*

20. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013).

21. *Id.* at 502.

22. *Id.*

relationship. Part IV will use *Wyatt* to demonstrate how courts can exploit the qualified immunity doctrine to avoid recognizing LGBT student privacy.<sup>23</sup> Part V will discuss possible interventions and also address counterarguments from those who would defend the continued use of qualified immunity in this context. This Comment concludes that while LGBT students' privacy rights are jeopardized and perhaps non-existent under some judges' applications of the qualified immunity doctrine, advocates for LGBT student privacy should pursue state legislation and keep a watchful eye out for claims that may serve as test cases in more favorable circuits.

### **I. ESTABLISHED LGBT STUDENT RIGHTS, THE NEED FOR PRIVACY, AND IMPORTANT PRECEDENTS**

LGBT students have been relatively successful in demonstrating a clear claim to constitutional protections under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment in some contexts.<sup>24</sup> These rights are well-suited to addressing LGBT student needs in the realm of bullying. The First Amendment protects students' expressive behavior including how a student dresses, acts, and interacts with other students. The Equal Protection Clause ensures an even-handed disciplinary response by school officials to that expression and to other students' responses to that expression. In combination, these rights guarantee a minimum level of protection of LGBT student conduct and prevent school administration from being complicit in the bullying of LGBT students by other students.

However, these rights are not protected when the school official *is* the bully or is reckless with student privacy. By outing students, the school does not directly interfere with a student's expression on campus or at home. While outing LGBT students does entail unequal treatment, there is no way to make it equal since straight students cannot be outed. Thus, the most recognized rights of LGBT students are useful in the context of bullying by other students, but are ill-suited to defending LGBT students from unauthorized disclosure of their sexuality by school officials.

This invasion of student privacy poses unique and serious dangers to LGBT students. While student-to-student bullying is abhorrent and can be both physically and psychologically destructive, it often leaves

---

23. As Part IV illustrates, courts can use each of the identified factors in combination. Thus, the case study of *Wyatt* is most easily understood after each of the factors has been discussed in greater detail.

24. See STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 8-12, 23-32, 35-42 (2010).

evidence of it harms. A black eye or a defaced locker can alert supportive administrators of a need for disciplinary action. In these situations, parents may be on the frontlines of defending the student and if a lawsuit is brought at all, it will almost certainly be due to the action of a parent or other family member.<sup>25</sup>

However, there are dangers that accompany being out to one's parents. While support for LGBT rights has grown substantially over the years, a youth's coming out or being outed to her parents can have severe consequences. Even among the "millennial" generation who are now in their twenties—who were born when the stigma of HIV was loosening its hold on the LGBT community, who could get married in at least some states before many ever seriously considered marriage, and who have watched the steady erosion of anti-LGBT laws—even the millennial generation faces serious risks in being out to their parents.<sup>26</sup> Among this generation there are those who are not permitted to discuss their relationships in their parents' house, who do not feel welcome in their parents' house at all since coming out, and who lose financial support from their parents as a result of coming out.<sup>27</sup>

Sadly, other LGBT youth face even greater burdens. A survey of providers of services to homeless youth found that 30% to 40% of clients are LGBT youth.<sup>28</sup> Family rejection of clients' sexual orientation or gender expression was the number one contributor to LGBT youth homelessness.<sup>29</sup> LGBT youth who are not out to family members report that they remain closeted because their families would be unsupportive, they would get kicked out of their homes, and their family members view LGBT people as "disgusting" or "diseased."<sup>30</sup> These are harms that courts cannot rectify.

Schools cannot rectify these harms either, but they can exacerbate them. Even when a student is outed by a teacher or other school official, it is very unlikely that a student will be able to bring a suit for the

---

25. See Sara Jeruss, *Empty Promises? How State Procedural Rules Block LGBT Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853 (2008-2009) (discussing the impact of various state rules regarding a minor's access to the courts).

26. Annemarie Vaccaro, *Intergenerational Perceptions, Similarities and Differences: A Comparative Analysis of Lesbian, Gay, and Bisexual Millennial Youth with Generation X and Baby Boomers*, 6 J. LGBT YOUTH 113 (2009).

27. *Id.*

28. LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., *SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS* (2012).

29. *Id.*

30. HUMAN RIGHTS CAMPAIGN, *BEING OUT: NATIONAL COMING OUT DAY YOUTH REPORT* (2013).

invasion of the student's privacy without a parent's support. Thus, the courts are very unlikely to hear these cases at all. They will likely never hear the cases in which a school official's disclosure of a student's identity has caused the most damage. This may explain in part why LGBT students' rights have advanced to address bullying, but have failed to advance protections of fundamental privacy rights of one's sexual orientation.

That is not to say that LGBT students' privacy claims are without precedential support. The fundamental right to privacy was first discussed in *Griswold v. Connecticut*, a case in which the U.S. Supreme Court found a state statute impermissibly interfered with the privacy in one's marital decisions by preventing the distribution of contraceptives.<sup>31</sup> While the majority opinion found that the right of privacy was found in the penumbras of other rights, the concurrences had a more lasting effect on subsequent fundamental privacy cases.<sup>32</sup> Justice Goldberg's concurrence emphasized that privacy is among the liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and are protected by the Due Process Clause of the Fourteenth Amendment.<sup>33</sup> Justice Harlan's concurrence noted that the Fourteenth Amendment's privacy protection "stands, in my opinion, on its own bottom" and so is not dependent on other Amendments and rights.<sup>34</sup> Justice Harlan even went so far as to say that he wanted to be sure judges were not "confined" and "thereby . . . restrained from introducing their own notions of constitutional right and wrong into the vague contours [of the right to privacy]."<sup>35</sup> Justice Harlan's concurrence supports a very flexible view of privacy that depends on judges for reasonable expansion.

Subsequent justices took Justice Harlan up on his offer. In *Roe v. Wade*, the Court endorsed the Fourteenth Amendment as the appropriate source of a fundamental right to privacy and held that it protected a woman's right to an abortion.<sup>36</sup> Justice Kennedy also relied on the Fourteenth Amendment in his majority opinion in *Lawrence v. Texas*.<sup>37</sup> The case invalidated criminal sodomy laws and held that adults could not be penalized for private, consensual, same-sex sexual conduct.<sup>38</sup>

---

31. *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

32. *Id.*

33. *Id.* at 487 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

34. *Id.* at 500 (Harlan, J., concurring).

35. *Id.* at 500-01.

36. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

37. *Lawrence v. Texas*, 539 U.S. 558 (2003).

38. *Id.* at 578.

Although this narrow description of the holding does not apply to the outing of teens by school officials, the decision includes ample language that supports the argument that such an action would be an unconstitutional invasion of privacy. In reviewing the privacy precedents, Justice Kennedy stated that “*Roe* recognized the right of a woman to make certain fundamental decisions affecting her destiny.”<sup>39</sup> Studies show that a parent’s knowledge of a child’s sexual orientation can certainly affect a child’s destiny.<sup>40</sup> Justice Kennedy’s majority opinion also emphasized “the respect the Constitution demands for the autonomy of the person” in “personal decisions relating to marriage, procreation, contraception, *family relationships*, child rearing, and education.”<sup>41</sup> The unauthorized disclosure of a student’s sexual orientation to her parents clearly undermines her autonomy in her family relationships.

Admittedly, Justice Kennedy specified that *Lawrence* did not involve minors, but his decision echoes Justice Harlan’s expansive approach to the right to privacy protected by the Fourteenth Amendment as he concludes, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>42</sup> Thus, while scholars still debate whether *Lawrence* is an acknowledgment of the privacy rights of all LGBT people or much more limited to its specific facts, it contains substantial language that supports the idea that teachers and school officials may not constitutionally out LGBT students to their parents.<sup>43</sup>

Some scholars and courts have characterized cases like *Griswold*, *Roe*, and *Lawrence* as protecting conduct and point to a separate line of cases to protect disclosure of information such as sexual orientation.<sup>44</sup> This distinction dates back to *Whalen v. Roe*, a 1977 case involving the dissemination of prescription drug information to the state government to prevent illegal drug use.<sup>45</sup> The Supreme Court described the privacy protected by the Fourteenth Amendment as covering two distinct interests: “[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making

---

39. *Id.* at 565.

40. HUMAN RIGHTS CAMPAIGN, *supra* note 30.

41. *Lawrence*, 539 U.S. at 574 (emphasis added).

42. *Id.* at 578.

43. STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA’S PUBLIC SCHOOLS* 15 (Univ. of Minn. Press, 2010).

44. *See, e.g., Whalen v. Roe*, 429 U.S. 589 (1977); Cullitan, *supra* note 7.

45. *Whalen*, 429 U.S. at 589-609.



certain kinds of important decisions.”<sup>46</sup> Arguably, cases like *Griswold*, *Roe*, and *Lawrence* relate only to the second interest while the outing of LGBT students by teachers and school officials would relate to the first. Since *Whalen* dealt with disclosures to the government, the Court specifically left open the question of disclosures of information from the government under the Fourteenth Amendment.<sup>47</sup>

Though the Supreme Court has said very little about the Fourteenth Amendment’s protection against government disclosures of personal information, there are two federal circuit cases worth noting, both from 2000. In *Gruenke v. Seip*, the Third Circuit held that a swim coach had interfered with a student’s fundamental privacy right when he forced her to take a pregnancy test.<sup>48</sup> The court did not discuss the privacy protections established by *Griswold* and later expanded in *Roe* and *Lawrence*. However, the court held that the coach had clearly interfered with the student’s informational privacy rights and that the student’s claim “[fell] squarely within the contours of the recognized right of one to be free from disclosure of personal matters” as established in *Whalen*.<sup>49</sup> Later that same year, the Third Circuit also decided *Sterling v. Minersville* and held that a police officer unconstitutionally violated an eighteen-year-old’s privacy when the officer threatened to out the teen to his grandparent.<sup>50</sup> Though the case dealt with disclosure, the court relied on the *Griswold*, *Roe* and *Lawrence* and also the informational privacy cases.<sup>51</sup> Since *Sterling* was decided before *Lawrence* and there was Supreme Court precedent for the punishment of same-sex conduct under *Bowers v. Hardwick*,<sup>52</sup> the court had to distinguish *Bowers* in order to rule for the plaintiff.<sup>53</sup> It used the informational privacy cases to draw a distinction between being able to punish sexual conduct and being able to disclose (or threaten to disclose) a person’s sexuality.<sup>54</sup> The court reasoned that even though same-sex conduct was punishable, being gay was not and concluded that the teen’s “sexual orientation was an intimate aspect of his personality entitled to privacy protection

---

46. *Id.* at 599-600.

47. *Id.* at 605.

48. *Gruenke v. Seip*, 225 F.3d 290, 302 (3d Cir. 2000).

49. *Id.* at 302-03.

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

51. *Id.* at 193-96.

52. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

53. *Sterling*, 232 F.3d at 194-95.

54. *Id.*

under *Whalen*.<sup>55</sup> Thus, while the Supreme Court has given little guidance on informational privacy, these circuit cases can be used to bolster student claims that there is a fundamental right to the privacy of their sexual orientation and gender identities.

## II. BACKGROUND ON THE QUALIFIED IMMUNITY DOCTRINE

Student claims in this context, however, face a major complication: qualified immunity. Qualified immunity protects government employees like teachers and coaches from liability even when they violate constitutional rights, unless the plaintiff can prove that the right they have violated is clearly established.<sup>56</sup> Qualified immunity is intended to strike a balance between holding government officials accountable for irresponsible action and ensuring that officials are not needlessly subjected to the legal process when they act reasonably.<sup>57</sup> A court answers two questions to determine if a government employee is entitled to qualified immunity.<sup>58</sup> It first examines if the facts stated in the light most favorable to the plaintiff describe a violation of a constitutional right.<sup>59</sup> Second, a court determines if the right at issue was “clearly established.”<sup>60</sup> If both conditions are met, the official is not entitled to qualified immunity and the case may proceed to trial. If the facts as described by the plaintiff do not make out a constitutional claim then the case is dismissed for failure to state a claim. If the claim involves a right that was not clearly established, the official is entitled to qualified immunity and the plaintiff is denied recovery even if her rights have been violated.

The Supreme Court has in the past required that courts first address whether the facts as stated by the plaintiff describe the violation of a constitutional right before proceeding to the determination of whether that right was “clearly established.”<sup>61</sup> Addressing the qualified immunity in this order is sometimes called “sequencing.”<sup>62</sup> However, the Supreme Court currently allows courts to address the two questions in any order.<sup>63</sup> Therefore, a court may first decide that a right is not clearly

---

55. *Id.* at 196.

56. *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013).

57. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

58. *Id.* at 232.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See, e.g., Id.* at 240.

63. *Id.* at 236.

established and end its inquiry there, since qualified immunity will be granted and the case concluded whether or not the alleged actions constituted a violation.

The Supreme Court recently illustrated how qualified immunity shields officials from violations of student privacy in *Safford Unified School District v. Redding*.<sup>64</sup> In *Safford*, a thirteen-year-old student alleged a violation of her Fourth Amendment privacy rights when school officials strip-searched her to try to find painkillers.<sup>65</sup> The Court concluded that the strip search lacked the reasonableness that precedent required and was therefore unconstitutional.<sup>66</sup> However, the Court found that since judges varied greatly in their understanding of precedent on school searches, a student's right to be free from strip searches was not clearly established.<sup>67</sup> Thus, the case demonstrates that even where school officials take actions that some (if not most) would consider extreme and the Supreme Court agrees are unconstitutional, qualified immunity may shield school officials from liability.

### III. HOW COURTS CAN EXPLOIT QUALIFIED IMMUNITY TO AVOID RECOGNIZING LGBT STUDENT PRIVACY

The above cases demonstrate that there is ample precedent suggesting the Fourteenth Amendment protects a student's right to privacy of her sexual orientation and gender identity. However, qualified immunity shows that the suggestion of such a right, even in light of extreme privacy violations, may not be enough to ensure school officials are held accountable for their actions. This section will assess the extent to which existing precedents, particularly *Lawrence*, do not explicitly protect four dimensions of student privacy where a school official discloses a student's sexuality to her parent(s): 1) orientation versus activities, 2) the school context, 3) age, and 4) the parent-child relationship. These dimensions are gaps that a court may exploit to assert that a school official has not violated a "clearly established" right under the qualified immunity inquiry.

#### A. Orientation Versus Activities

The distinction between a student's sexual orientation and sexual (or merely romantic) activity directly parallels the distinction in *Whalen*

---

64. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009).

65. *Id.* at 368.

66. *Id.* at 377.

67. *Id.* at 378-79.

between “disclosure of personal matters” and “interest in independence in making certain kinds of important decisions.”<sup>68</sup> Courts might regard revealing a student’s orientation as a disclosure of a personal matter and the revelation of a student’s activity such as kissing or holding hands with a person of the same-sex (possibly leading to a parent’s restriction of such behavior) as interfering with the student’s independence in making decisions like whether to engage in this activity and with whom. The *Sterling* decision used this distinction in a pre-*Lawrence* world to uphold protection of sexual orientation, even though homosexual activity was not yet constitutionally protected.<sup>69</sup> At the time, the precedent required making such a distinction because same-sex activity was not only unprotected, but also punishable. Since then, *Lawrence* made it clear that at a minimum same-sex sexual activity, and arguably also sexual orientation, is protected under the Fourteenth Amendment. Despite Justice Kennedy’s language emphasizing autonomy in family relationships that supports the argument that sexual orientation should also be protected, *Lawrence* dealt with the regulation of sexual activity, leaving a gap that qualified immunity can exploit.

Though courts have developed separate lines of cases to deal with the separate privacy interests identified in *Whalen*, the distinction is fairly irrelevant in this context. When a teacher or school official discloses a student’s orientation, he has also interfered with the student’s actions because he has denied the student the choice of if or when to disclose her orientation. The disclosure could also impact how the student chooses to express her orientation through activities, such as whether or where she might engage in same-sex activities.<sup>70</sup> LGBT youth advocates could reasonably use cases that focus on privacy of information (like *Whalen*) as well as cases that focus on privacy of conduct (like *Griswold*, *Roe*, and *Lawrence*) to assert that students are entitled to privacy of both their orientation and activities that could reveal their orientation. Significantly, the Supreme Court has not clarified whether there is a difference in constitutional protection between violations of privacy related to conduct and those related to information such as gender identity or sexual orientation.<sup>71</sup>

---

68. *Whalen v. Roe*, 429 U.S. 589 (1977).

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

70. Ingrid Schüpbach Martin, *The Right to Stay in the Closet: Information Disclosures by Government Officials*, 32 SETON HALL L. REV. 407, 412 (2001-2003).

71. *Id.* at 423.

---

### B. The School Environment

*Lawrence* says nothing about the contours of Fourteenth Amendment privacy in the school environment and the Supreme Court has generally been very deferential to school officials when deciding Fourth Amendment search and seizure cases.<sup>72</sup> In *Nguon v. Wolf*, a district court held that the fact that a female student publically held hands and kissed a student of the same gender at school did not negate the student's Fourth Amendment expectation of privacy with respect to her orientation at home.<sup>73</sup> Still, the court held that the principal's disclosure of the student's orientation did not violate her Fourth Amendment rights because the California Education Code required conversations with parents when a student is suspended, as the student in *Nguon* was for inappropriate public displays of affection.<sup>74</sup> Thus, while the student's orientation and the gender of the other student involved had no bearing on the suspension, the court held that the disclosure was reasonable under the Fourth Amendment in the context of the school disciplinary process.<sup>75</sup> The case did not address whether there was a violation of the student's fundamental privacy under the Fourteenth Amendment.

### C. Age

As Justice Kennedy specifically noted, *Lawrence* involved adults, not minors.<sup>76</sup> Similarly, the outed decedent in *Sterling* was eighteen-years-old. While the Supreme Court has recognized that young people may have vulnerabilities that adults do not have, this logic does not always create higher protections for adolescents' privacy.<sup>77</sup> For example, lower courts have used age as a justification for reduced privacy in the informational privacy context.<sup>78</sup> As a factual matter, youth will often go hand-in-hand with the school context. Thus, courts may use the deference given to school officials and adolescents' need for additional

---

72. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (holding that the "special needs" of the school environment allows administrators to invade the privacy of any student without probable cause that the student is doing something wrong).

73. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007).

74. *Id.* at 1192-95.

75. *Id.*

76. *Lawrence v. Texas*, 539 U.S. 578 (2003).

77. Cullitan, *supra* note 7, at 419.

78. *Id.*

protection to reinforce each other as justifications that a minor student's right to privacy is not clearly established.

#### *D. The Parent-Child Relationship*

The Supreme Court has long ago recognized that parents have some right to control the upbringing of their children, especially a child's education.<sup>79</sup> As previously explained, courts are especially unlikely to hear cases in which parents are not supportive of a child's identity or decision to bring a claim since it is only with the support of a parent or other adult that a student might seek judicial action to vindicate her rights. The Supreme Court has not discussed how the parent-child relationship impacts disclosures of sexual orientation, but it has discussed the Fourteenth Amendment privacy rights of minor children with respect to their parents when such disclosures could harm the child.<sup>80</sup> The Supreme Court has rejected laws requiring a female minor to notify her parents before she seeks an abortion, instead requiring that a minor is entitled to an opportunity to show that she is capable of making the decision herself or that an abortion would be in her best interests.<sup>81</sup> This demonstrates that while the Court has regarded the parent-child relationship as special, it also has shown some signs that the autonomy and well-being of minors can be more important than the parental relationship. However, the Court has also regarded the abortion decision as a particularly unique situation,<sup>82</sup> and has yet to discuss the uniqueness of coming out or being outed to one's parents.

Lower courts provide limited support for privacy within the parent-child relationship. The Fourth Circuit has stated that "the Constitution does not impose a duty of parental notification before the pupil's disciplinary detainment" but the student's Fourteenth Amendment right to privacy was not at issue in that case.<sup>83</sup> Lower court cases that have involved the Fourteenth Amendment, and specifically informational privacy, have generally dealt with information that is disclosed to or risks disclosure to the general public, not the release of information about children to parents or between other closely related parties.<sup>84</sup>

---

79. Meyer v. Nebraska, 262 U.S. 390 (1923).

80. Bellotti v. Baird, 443 U.S. 622 (1979).

81. *Id.* at 643-44.

82. *Id.* at 642.

83. Wofford v. Evans, 390 F.3d 318, 325 (4th Cir. 2004).

84. See, e.g., United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) (concerning the public disclosure of medical records); Slayton v. Willingham, 726 F.2d 631 (10th Cir. 1994) (concerning the public's interest in seeing personal photographs).

---

#### IV. WYATT V. FLETCHER: A CASE STUDY OF HOW COURTS CAN ABUSE QUALIFIED IMMUNITY

The “clearly established right” prong of qualified immunity can be used to exploit gaps in precedent thereby preventing new precedent from coming into existence that might confirm LGBT students’ fundamental right to privacy in their sexual orientation and gender identity. This is true even in the school environment and even (if not especially) from their parents. When used in this way, qualified immunity guts all meaning from Justice Kennedy’s optimistic assertion that, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>85</sup> LGBT students are instead left with an impossible set of rules that asks them to point to exceedingly specific precedent while preventing the demanded precedent from ever coming into existence, thus preserving the status quo. The Fifth Circuit’s decision in *Wyatt* is a perfect example of how qualified immunity creates this catch-22 and deprives students of their ability to recover for violations of their privacy.

In *Wyatt v. Fletcher*, the Fifth Circuit held that:

there is no clearly established law holding that a *student* in a public secondary *school* has a privacy right under the Fourteenth Amendment that precludes school officials from discussing *with a parent* the student's private matters, including matters relating to [the] sexual *activity* of the student.<sup>86</sup>

The italicized portions show how the Fifth Circuit’s decision takes advantage of each of the distinctions discussed above. “Student” and “school” both emphasize the school-setting as well as the plaintiff’s age. The court added that, “perhaps the most salient distinguishing factor in all [the cases the plaintiff cited as precedent] is that none occurred in a school context.”<sup>87</sup> “With a parent,” which the court italicized, emphasizes the court’s incredulity that precedent protects privacy rights within the parent-child relationship. The court further added that none of the cases relied upon by the plaintiff “even touch on privacy rights between a student and a parent,”<sup>88</sup> and also states that, “[i]t is of major significance

---

85. *Lawrence*, 539 U.S. at 578.

86. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013) (first, second, and fourth emphases added).

87. *Id.* at 509.

88. *Id.* at 506.

that neither occurred in the context of public schools' relations with their students and the students' parents."<sup>89</sup> The court combines the school context, age, and parent-child relationship—which as a factual matter will nearly always go together—as independent reasons that undermine the possibility that a student's right to privacy of her sexual orientation are clearly established.

While the court describes the right as relating to “activity” in the statement of the holding above, it later describes the claimed right to privacy as protecting “orientation.” The court again emphasizes the parent-child relationship as it states that, “even to speculate that an established right to the non-disclosure of one's sexual orientation exists does not help [the plaintiff's] case ...because such speculation does not establish specifically that school officials are barred from communicating with parents regarding minor students' behavior and welfare.”<sup>90</sup> Thus, the court is upfront in its assertion that to deny qualified immunity in this case, there would have to be a precedent holding that a minor has a right to privacy in her sexual orientation in the school setting and that such a right prevents school officials from disclosing the student's orientation to a parent. In other words, the court demands a case that *simultaneously* covers each of the gaps in precedent noted above and at the same time concludes that *Wyatt*, a case that could become exactly such a precedent were it to overcome qualified immunity, will not proceed forward.

This is the impossible task that the *Wyatt* plaintiff faced, and it gets worse for future plaintiffs since other courts can now point to *Wyatt* as evidence that an LGBT student's right to privacy in her sexual orientation is not clearly established. Thus, even though the clearly-established-right prong was designed to ensure officials did not violate laws that a reasonable person would not be aware of, it goes much further. In this context, it operates to alert school officials to a new right: the right of school officials to out or threaten to out students without fear of personal liability.

Defenders of the current qualified immunity regime will claim that *Wyatt* was an exception and point out that the plaintiffs in *Sterling* and *Nguon* were both able to overcome the qualified immunity hurdle to challenge government officials' threatened and actual disclosure of their sexual orientations. However, it is more likely that *Wyatt* is the norm and *Sterling* and *Nguon* were the exceptions. *Sterling* involved an extreme harm since the threat of disclosure led to the suicide of an eighteen-year-old.<sup>91</sup> While the harm suffered is not factored into the qualified

---

89. *Id.* at 508.

90. *Id.* at 507.

91. *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000).



immunity test, application of the qualified immunity test involves discretion and a judge may be more willing to give the plaintiff the opportunity to bring charges when the harm is so great. Given that *Sterling* was decided before *Lawrence* and the judge had to overcome a very damaging precedent disfavoring the treatment of LGBT people,<sup>92</sup> it is quite possible that the judge was influenced by the tragic suicide of the teen. Because of the circumstances of the case, scholars have cast doubt on whether *Sterling* can be relied upon as precedent for the outing or threatened outing of teens.<sup>93</sup> Additionally, *Sterling* was not a school case and the decedent was not a minor. A police officer, not a teacher or school official, had threatened to out the teen, who was an adult in the eyes of the law. Thus, qualified immunity allows *Sterling* to be distinguished as merely demonstrating a clearly established right to privacy in a legal adult's sexual orientation in a non-school context, even if these distinctions are not actually relevant. This is exactly the approach the Fifth Circuit took to distinguish *Sterling*.<sup>94</sup>

The plaintiff in *Nguon* was also able to clear the hurdle of qualified immunity. However, *Nguon* brought claims under the First and Fourth Amendments and under California privacy statutes, but not the Fourteenth Amendment's fundamental right to privacy. With virtually no discussion, the court held simply that, "[w]ith respect to the [qualified immunity] inquiry, the Court finds that the Complaint implicates [the student's] Constitutional rights to equal protection, freedom of expression, and privacy, that these are clearly established rights, and that there is no basis for assessing the objective reasonableness of the conduct."<sup>95</sup> Thus, the fact that the student brought numerous claims could have contributed to the denial of qualified immunity. For example, since equal protection is very well-established in the school context, qualified immunity with regard to the privacy violations would be useless to the official who would still have to be involved in the ongoing litigation. Even if this played no role in the court's decision, the plaintiff did not assert a Fourteenth Amendment privacy claim, only a Fourth Amendment privacy claim and a Fourteenth Amendment equal protection claim. The plaintiff chose not to appeal so *Nguon's* significance for future privacy cases is uncertain at best.<sup>96</sup>

One important conclusion one could draw from *Sterling* and *Nguon* is that the qualified immunity inquiry greatly depends on judicial

---

92. *Bowers v. Hardwick*, 478 U.S. 186, 186-221 (1986).

93. *See, e.g., Martin supra* note 70, at 412.

94. *Wyatt*, 718 F.3d at 508-09.

95. *Nguon*, 517 F. Supp. 2d at 899.

96. *Biegel, supra* note 43, at 33.

discretion. The contours of what counts as a “clearly established right” vary from circuit to circuit and are ultimately up to judges. Thus, the grant of qualified immunity in *Wyatt* is not a forgone conclusion at all. The qualified immunity inquiry does not require judges to demand as precise a precedent as was demanded in *Wyatt*. Indeed, in his dissent, Judge James Graves agreed with the district court judge who found that the coaches were not entitled to qualified immunity.<sup>97</sup> Judge Graves stated that while a Fifth Circuit court had “never explicitly held that a student has a right to privacy in keeping his or her sexual orientation confidential, an analysis of precedent compels the finding of such a right.”<sup>98</sup> It is therefore fair to say that qualified immunity is not always a catch-22 for LGBT students, but it permits judges to make it one. Thus, as in many areas of the law, judges who understand LGBT issues are more likely to render LGBT-friendly decisions. The qualified immunity inquiry thus creates a catch-22 at worst and a gamble on a favorable judge at best. Surely, the privacy of LGBT students is worthy of more than a gamble.

## V. PROPOSED SOLUTIONS

Progressive LGBT advocates are likely to want more than a judicial gamble to determine LGBT students’ rights. There are several possibilities for surmounting the seemingly impossible hurdle that qualified immunity has created in this context.

### A. Reinstate Mandatory Sequencing of the Qualified Immunity Inquiry

A possible solution would be to return to a sequenced qualified immunity inquiry which would require judges to first address whether the facts in the light most favorable to the plaintiff amount to the violation of a constitutional right. Only then could they proceed to whether the right was clearly established. As the Supreme Court has stated, “the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.”<sup>99</sup> The outing of students by public school teachers and officials will probably *never* arise in a case where qualified immunity is unavailable since all public school teachers are protected by it.

---

97. *Wyatt*, 718 F.3d at 514 (Graves, J., dissenting).

98. *Id.*

99. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

By requiring courts to engage in the first part of the inquiry, courts could determine that a particular set of facts, like the outing of a student to a parent by a teacher, is unconstitutional and *then* proceed to grant qualified immunity if the court found that a reasonable teacher would not have known that such an action was unconstitutional.<sup>100</sup> Thus, reinstating sequencing would resolve the catch-22 while still protecting qualified immunity's purpose of ensuring that government officials are not held liable for violations they would not reasonably have known about (if outing a student is indeed such a case in the first place). After a court has determined in one suit that a teacher or school official outing a student to her parent is unconstitutional, the decision would give notice to schools such that future defendants would have an increasingly difficult time showing that despite past rulings, a right is still not clearly established.<sup>101</sup>

Empirical evidence supports that giving courts the discretion to address only the clearly established right prong when granting qualified immunity has led courts to avoid making a determination of whether a constitutional violation may have occurred.<sup>102</sup> Since the Supreme Court lifted the sequencing requirement, circuit courts have avoided the constitutional inquiry and granted qualified immunity in 24.6% of claims that were ultimately dismissed either due to a grant of immunity or due to the absence of a constitutional violation, compared to only 6.2% when sequencing was required.<sup>103</sup>

Still, mandatory sequencing has raised concerns about its potential to create bad constitutional law since it requires judges to make constitutional determinations on a limited record with potentially low-quality briefs.<sup>104</sup> Additionally, a unanimous Supreme Court decided to lift sequencing in part because of the substantial criticism it received from judges.<sup>105</sup> Thus, while sequencing may help LGBT students, numerous judges are wary of its broader consequences and a return to sequencing is not especially likely. Given this reality, advocates should focus on more promising reforms like working for the appointment of LGBT-friendly judges and advocating for statutory protections.

---

100. Colin Rolfs, Note, *Qualified Immunity After Pearson v. Callahan*, 59 UCLA L. REV. 468, 478-79 (2011).

101. *Id.* at 479.

102. *Id.* at 496-97.

103. *Id.* at 496 tbl.1.

104. *Id.* at 484.

105. *Pearson*, 555 U.S. at 233.

---

### B. Good Judges Write Good Decisions

Perhaps the most obvious approach, as previously alluded to, is to appoint judges who are willing to agree with Justice Harlan and Justice Kennedy that the Fourteenth Amendment right to privacy can be periodically expanded to include new rights. Simply because courts have not yet seen a particular set of facts does not mean that an entire vulnerable population ought to be stripped of its constitutional privacy protections. However, judicial confirmations under President Obama have slowed to a crawl as Senate Republicans have shown an unprecedented willingness to obstruct new nominees.<sup>106</sup> The Senate's recent change in judicial confirmation rules may enable the appointment of judges that would have a favorable view of the privacy rights of LGBT students, but this change will come slowly, if at all.<sup>107</sup> Since judges have lifetime appointments, it would likely be a very long time before LGBT students could be assured their claims would be heard by judges with broader views of the Fourteenth Amendment's privacy protections, especially since *Wyatt* has created a precedent that at least Fifth Circuit judges will likely feel compelled to follow. Judicial nominations are very meaningful and important, but a slow route to protecting LGBT student privacy. However, another option for advocates in the interim may be to target circuits that potentially have more amenable judges, a more expansive interpretation of the Fourteenth Amendment, or a less stringent application of qualified immunity than the Fifth Circuit.

### C. Statutory Protections

Though statutes would not resolve the inadequacy of constitutional privacy protections for LGBT students that qualified immunity creates, they could provide an alternative basis for LGBT student privacy. For example, statutes are already in place in some jurisdictions that give privacy protections between minors and parents in the medical context, such that a doctor could be liable for disclosing a student's sexual orientation.<sup>108</sup> Statutory protections have the advantage of allowing the

---

106. See, e.g., Karen McVeigh, *Senate GOP Blocks Obama's Third Nomination to DC Court of Appeals*, GUARDIAN, Nov. 19, 2013, <http://www.theguardian.com/world/2013/nov/19/judge-appointment-blocked-senate-republicans>.

107. See Eleanor Clift, *The GOP's Nuclear Winter Strategy*, DAILY BEAST, Dec. 2, 2013, <http://www.thedailybeast.com/articles/2013/12/02/the-gop-s-nuclear-winter-strategy.html>.

108. Abigail English & Carol A. Ford, *The HIPAA Privacy Rule and Adolescents: Legal Questions and Clinical Challenges*, 36 PERSP. ON SEXUAL & REPROD. HEALTH 80, 80-86 (2004).

creation of relatively narrow laws that could protect the privacy of students' sexual orientations and gender identities without upsetting teachers' ability to discuss other matters, such as disciplinary action, with parents.<sup>109</sup> The creation of a statute could allow for the public, and especially school officials and LGBT advocacy groups, to weigh in on the contours of an appropriate rule.

However, this may not be a perfect fix. Even well-intentioned statutes can have unintended consequences. For example, the Massachusetts Legislature passed a law that included many provisions designed to reduce bullying of LGBT students, but the law also included a provision requiring school officials to notify parents of bullying incidents which could lead to intentionally or incidentally outing students to their parents.<sup>110</sup> Legislation to protect LGBT students from being outed in a school environment may also be very difficult to pass. Federal legislation would depend on congressional agreement, which can be hard to attain.<sup>111</sup> Since the current House majority leadership vehemently fought federal recognition of same-sex marriages, there is little reason to expect LGBT-friendly legislation would be considered in the current House. State legislation will almost certainly be more difficult to pass in some states, leaving perhaps many LGBT youth without statutory privacy protections. Still, increasing support for LGBT rights suggests that some states would pass a statute, and the risks of unintended consequences seem low for a law that simply requires school officials to not out students and creates a cause of action when they do.

### CONCLUSION

LGBT students' privacy rights are jeopardized and perhaps unenforceable under some judges' applications of the qualified immunity doctrine. By requiring that students point to very specific precedent to show their rights are clearly established *and* preventing their claims to go forward and create such a precedent, qualified immunity presents LGBT students with an impossible task. In the long-run, judges may play a critical role in advancing a more expansive view of the Fourteenth

---

109. Martin *supra* note 70, at 450.

110. For a discussion of the Massachusetts statute and its implications for the privacy of LGBT youth, see Michael Stefanilo, Jr., *Identity, Interrupted: The Parental Notification Requirement of the Massachusetts Anti-Bullying Law*, 21 TUL. J.L. & SEXUALITY 125, 125-45 (2012).

111. See, e.g., Richard Socardies, *Kennedy's ENDA: A Seventeen-Year Gay-Rights Fight*, NEW YORKER, Nov. 5, 2013, <http://www.newyorker.com/online/blogs/newsdesk/2013/11/kennedys-enda-a-seventeen-year-gay-rights-fight.html>.

---

Amendment's promise of privacy, in line with the views of the justices who helped establish the fundamental privacy right in the first place. Until then, advocates for LGBT student privacy should pursue state legislation and keep a watchful eye out for claims that may serve as test cases in more favorable circuits.