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NOTES

HOMOSEXUALITY IN HIGH SCHOOL: RECOGNIZING A STUDENT'S RIGHT TO PRIVACY

BARI NADWORNY[†]

INTRODUCTION

Skye Wyatt was a straight-A student at her high school in the East Texas town of Kilgore.¹ She had participated in school athletics since eighth grade, including two years of playing softball at Kilgore High School.² She was a well-liked player on the softball team and led a normal teenage life.³ On March 3, 2009, Skye attended a meeting of the varsity softball team on which she played.⁴ The meeting was held at an off-campus playing field where practices regularly took place.⁵ When Skye arrived at the meeting, her two softball coaches dismissed the rest of the team and led Skye to a nearby locker room and locked the door.⁶ They began to question her about an alleged relationship with a young woman named Hillary Nutt.⁷

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¹ *Wyatt v. Fletcher*, 718 F.3d 496, 500 (5th Cir. 2013); Brief of Plaintiff-Appellee, *Wyatt*, 718 F.3d 496 (No. 11-41359), 2012 WL 2374254, at *5.

² Complaint ¶ 11, *Wyatt*, 718 F.3d 496 (No. 610-cv-674), 2010 WL 5409514.

³ *Id.* ¶ 12.

⁴ *Wyatt*, 718 F.3d at 500.

⁵ *Id.*; Complaint, *supra* note 2, ¶ 13.

⁶ *Wyatt*, 718 F.3d at 500; Complaint, *supra* note 2, ¶¶ 13-14.

⁷ *Wyatt*, 718 F.3d at 500; Complaint, *supra* note 2, ¶ 15. The facts after this point in the story are in dispute and certain inconsistencies exist. The Fifth Circuit notes that in her Complaint, Skye alleges that her coach asked if she was gay, but in her deposition she definitively stated that her coaches did not directly ask her if she was a lesbian. *Wyatt*, 718 F.3d at 501. Additionally, in her Complaint, Skye states

According to Skye, the coaches then yelled at her, falsely accused her of spreading rumors regarding the sexual orientation of one of the coaches, and threatened to tell her mother that she was in a sexual relationship with another woman.⁸

Following this meeting, the coaches called Skye's mother and requested that they meet at the softball field.⁹ During this meeting, the coaches disclosed to Mrs. Wyatt that her daughter was a lesbian and was dating an eighteen-year-old woman.¹⁰ After this meeting, the coaches removed Skye from the softball team, potentially damaging her future educational opportunities.¹¹ The disclosure of Skye's sexual orientation to her mother caused Skye severe emotional distress, resulted in social isolation, and robbed Skye of her freedom to consider her sexuality privately in her own way and on her own terms.¹² In a sworn statement, Skye explained that she had trouble sleeping, contemplated suicide, and started skipping school.¹³

Mrs. Wyatt promptly informed the school's principal, the assistant athletic director, and the superintendent of what had happened.¹⁴ She shared her concern that Skye had been confronted alone by two authority figures, that they decided to reveal private information about Skye without her permission, and that Skye was suffering negative social consequences as a result.¹⁵ No disciplinary action was taken against the coaches, effectively permitting and condoning their actions.¹⁶ The formal justification provided by the school for the coaches'

that at the time of the confrontation she was dating Nutt, but in her appellate brief she states that the two were not in a relationship. *Id.*

⁸ *Wyatt*, 718 F.3d at 500; Complaint, *supra* note 2, ¶¶ 15, 18; Brief of Plaintiff-Appellee, *supra* note 1, at *8. In contrast, the coaches claim to have asked Skye about her relationship with Nutt because they thought Nutt was a bad influence on Skye and they never asked her if she was gay or a lesbian. Brief of Appellants, *Wyatt*, 718 F.3d 496 (No. 11-41359), 2012 WL 1339287, at *7-8.

⁹ *Wyatt*, 718 F.3d at 501; Complaint, *supra* note 2, ¶ 19.

¹⁰ Complaint, *supra* note 2, ¶ 20. The parties' characterizations of this event differ and the claim involving the revelation of Skye's sexual orientation became "ever more nuanced over the course of the briefing" before the appeal. See *Wyatt*, 718 F.3d at 501.

¹¹ Complaint, *supra* note 2, ¶ 23.

¹² *Id.* ¶¶ 12, 23; Brief of Plaintiff-Appellee, *supra* note 1, at *10-11.

¹³ John Wright, *Softball Coaches Accused of Outing E. Texas Teen*, DALLASVOICE.COM (Dec. 15, 2011, 6:05 PM), <http://www.dallasvoice.com/softball-coaches-accused-outing-e-texas-teen-1096869.html>.

¹⁴ Complaint, *supra* note 2, ¶ 24.

¹⁵ *Id.*

¹⁶ *Id.*

nonconsensual disclosure of Skye's sexual orientation was that they were "legally obligated to share this information with the parent."¹⁷

Mrs. Wyatt filed three separate grievances with Kilgore Independent School District alleging that the coaches acted inappropriately by disclosing her daughter's sexual orientation, but all three grievances were dismissed.¹⁸ She then filed a complaint in federal court as next-friend of her minor daughter against the school district, and, in their individual capacities, the athletic director, and both of the coaches.¹⁹ Mrs. Wyatt brought her claim under the Fourteenth Amendment to the United States Constitution alleging that the named defendants violated her daughter's federal rights.²⁰

Skye's unfortunate experience raises a constitutional question that has rarely been litigated: whether a high school student has a right to privacy with respect to his or her sexual orientation, even with regard to the student's parent.²¹ This Note attempts to identify the constitutional rights that minors hold, specifically in the high school context, over information about their sexual orientation. As more teens are "coming out" at younger ages,²² identifying and understanding the contours of this privacy right is relevant to increasing numbers of students. This Note argues that high school officials disclosing information about a student's sexual orientation without the student's permission is a violation of the student's constitutional right to informational privacy. Part I examines the Supreme Court's informational privacy jurisprudence. This Part also examines the circuit court opinions that have contributed to the law in this area regarding personal sexual matters. Part II examines the current split of authority between the Third Circuit Court of Appeals, which has held that such a privacy right exists, and the

¹⁷ *Id.* ¶ 27 (internal quotation marks omitted).

¹⁸ *Wyatt v. Fletcher*, 718 F.3d 496, 501 (5th Cir. 2013).

¹⁹ *Id.* at 502.

²⁰ *Id.* Mrs. Wyatt also brought claims under the Fourth Amendment to the United States Constitution and under the Texas Constitution, but only the claim involving the Fourteenth Amendment is at issue here. *See id.*

²¹ The issues discussed in this Note may also concern the privacy rights of other members of the LGBTQ community. However, based on the factual details of the two main cases that this Note highlights, only homosexuality is at issue in this Note.

²² *See* Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES MAG. (Sept. 23, 2009), http://www.nytimes.com/2009/09/27/magazine/27out-t.html?page-wanted=all&_r=0.

Fifth Circuit Court of Appeals, which has held that it does not.²³ Part III aims to illuminate the privacy rights of high school students regarding sexual orientation by analyzing and analogizing their privacy rights in other sexual matters such as pregnancy, abortion, and contraception.

I. HISTORY AND BACKGROUND

A. *Constitutional Right to Informational Privacy*

The constitutional right to privacy is derived from the Fourteenth Amendment to the United States Constitution.²⁴ The Supreme Court first recognized a constitutional right to privacy in *Griswold v. Connecticut*,²⁵ in which the Court declared unconstitutional a state law prohibiting the use of contraceptives by married couples.²⁶ The Court found that this right to privacy emanated from the “penumbras” of rights protected by the Bill of Rights.²⁷ This decision validated a dissent written nearly forty years earlier by Justice Brandeis in *Olmstead v. United States*,²⁸ a case that addressed whether the use of evidence of private telephone conversations intercepted by means of wire tapping amounted to a constitutional violation.²⁹ Justice Brandeis described the privacy right as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized

²³ See *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000); *Wyatt*, 718 F.3d at 499.

²⁴ The Fourteenth Amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

²⁵ 381 U.S. 479 (1965).

²⁶ *Id.* at 485. In *Griswold*, the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician, who was also the Medical Director for the League and its Center in New Haven, were arrested for violating Connecticut state law which made it a crime to assist or counsel anyone who used any drug or medicinal article for the purpose of preventing contraception. *Id.* at 480. They gave “information, instruction, and medical advice” to married people concerning the methods of preventing conception. *Id.*

²⁷ *Id.* at 484–86 (explaining that the right of marital privacy is protected because it is within the protected penumbras of specific guarantees of the Bill of Rights).

²⁸ 277 U.S. 438 (1928).

²⁹ *Id.* at 455.

men.”³⁰ In order to protect this right, “every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a [constitutional] violation.”³¹ The *Griswold* decision emphasized the intimacy of the marital relationship by determining that personal decisions relating to marriage must be free from governmental intrusion.³²

The narrow holding of *Griswold* was later expanded in *Eisenstadt v. Baird*.³³ In *Eisenstadt*, the Court invalidated a Massachusetts law that deemed it a felony to give anyone other than a married person contraceptive medicines or devices.³⁴ The Court held that the right to privacy was not dependent on being in a certain relationship, stating that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁵

The Court next considered the right to privacy in the context of abortion.³⁶ A year after *Eisenstadt*, in *Roe v. Wade*,³⁷ the Court observed “that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”³⁸ However, this guarantee of certain zones of privacy encompasses “only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”³⁹ Such rights generally include “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.”⁴⁰

³⁰ *Id.* at 478 (Brandeis, J., dissenting).

³¹ *Id.*

³² *Griswold*, 381 U.S. at 485–86.

³³ 405 U.S. 438 (1972). William Baird was convicted under Massachusetts state law for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University, and for giving a young woman a package of Emko vaginal foam at the close of his address. *Id.* at 440.

³⁴ *Id.* at 453.

³⁵ *Id.*

³⁶ *Roe v. Wade*, 410 U.S. 113 (1973), *holding modified* by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

³⁷ 410 U.S. 113.

³⁸ *Id.* at 152.

³⁹ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁴⁰ *Paul v. Davis*, 424 U.S. 693, 713 (1976).

A few years later, the constitutional right to privacy was further developed in *Whalen v. Roe*,⁴¹ a case in which the Court addressed the nature of an individual's right to privacy over the individual's own information.⁴² In *Whalen*, the Court considered the constitutionality of a New York statute that required doctors to provide the state with copies of prescriptions for certain drugs with legitimate but also dangerous illegitimate uses.⁴³ The statute was designed to help prevent: the use of stolen or revised prescriptions, patients from obtaining the same prescription from multiple doctors, and doctors from over-prescribing.⁴⁴ Although the constitutionality of the statute was upheld, the Court described two types of connected privacy rights as protected under the Fourteenth Amendment: an individual's interest in autonomy in intimate matters, and an individual's interest in avoiding disclosure of personal matters.⁴⁵

The Court reaffirmed the sentiment of *Whalen* in *Nixon v. Administrator of General Services*,⁴⁶ a case in which former President Nixon challenged the Presidential Recordings and Materials Preservation Act.⁴⁷ This Act allowed the Administrator of General Services to take custody of presidential materials, including personal and private materials, and have them screened by Government archivists.⁴⁸ Despite the public nature of the President's role, the Court acknowledged the right of individuals to control certain aspects of their own personal information, such as the contents of private and personal communications.⁴⁹

Since the 1970s, the Supreme Court has said little more about the right of individuals to control certain aspects of their own personal information. In 2011, in *National Aeronautics and Space Administration (NASA) v. Nelson*,⁵⁰ the Court considered the constitutionality of the extensive background checks required

⁴¹ 429 U.S. 589 (1977).

⁴² *Id.* at 599–600.

⁴³ *Id.* at 591.

⁴⁴ *Id.* at 592.

⁴⁵ *Id.* at 599–600.

⁴⁶ 433 U.S. 425 (1977). “One element of privacy has been characterized as ‘the individual interest in avoiding disclosure of personal matters.’” *Id.* at 457 (quoting *Whalen*, 429 U.S. at 599).

⁴⁷ *Id.* at 429–30.

⁴⁸ *Id.* at 429.

⁴⁹ *Id.* at 465.

⁵⁰ 131 S. Ct. 746 (2011).

to work at federal NASA facilities and ultimately upheld the background checks.⁵¹ The Court did not describe the scope of the right to informational privacy; it simply assumed, “without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”⁵²

In the absence of guidance from the Supreme Court, the United States circuit courts have clarified the scope of the constitutional right to informational privacy. Several circuit courts have considered how this right applies to personal sexual matters.⁵³ In doing so, the courts explain why these personal sexual matters, such as sexual orientation, should be protected within this constitutional right.

B. *Personal Sexual Matters*

Although the Supreme Court has not spoken on the issue of whether the right to informational privacy applies to personal sexual matters, several United States circuit courts have found that it does. The Second Circuit, in *Doe v. City of New York*,⁵⁴ established the connection between the constitutional right to informational privacy and a personal sexual matter.⁵⁵ In *Doe*, the court held that the plaintiff possessed a constitutional right to confidentiality under *Whalen* concerning his HIV status.⁵⁶ The plaintiff had sued the City of New York Commission on Human Rights for revealing that he had contracted HIV, something he kept very private, to the public in the context of a dispute with his employer.⁵⁷ The court recognized that the right to confidentiality includes the right to protection regarding information about one's health.⁵⁸ Moreover, the court noted that the “[e]xtension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so

⁵¹ *Id.* at 751.

⁵² *Id.*

⁵³ *See infra* Part I.B.

⁵⁴ 15 F.3d 264 (2d Cir. 1994).

⁵⁵ *Id.* at 267 (“[T]his right to privacy can be characterized as a right to ‘confidentiality,’ to distinguish it from the right to autonomy and independence in decision-making for personal matters also recognized in *Whalen*.”).

⁵⁶ *Id.*

⁵⁷ *Id.* at 264–65.

⁵⁸ *Id.* at 267.

personal as the status of one's health, and few matters the dissemination of which one would prefer to maintain greater control over."⁵⁹

In *Powell v. Schriver*,⁶⁰ the Second Circuit relied on its holding in *Doe* and held that the Constitution protects the right to maintain the confidentiality of one's transsexualism.⁶¹ The *Powell* court "conclude[d] that the reasoning that supports the holding in *Doe* compels the conclusion that the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism."⁶² The court drew a parallel between the desire one might have to keep one's HIV status private and the desire one might have to keep one's transsexualism private because of the social stigma that often attaches to each.⁶³ The court further noted that for individuals who wish to preserve privacy in this matter, "[t]he excruciatingly [sic] private and intimate nature of transsexualism" is "beyond debate."⁶⁴

The Sixth Circuit, by contrast, has narrowly construed the holdings of *Whalen* and *Nixon*⁶⁵ and has extended the right to informational privacy only to interests that implicate a "fundamental liberty interest."⁶⁶ However, despite this narrow reading of *Whalen* and *Nixon*, the Sixth Circuit, in *Bloch v. Ribar*,⁶⁷ held that information regarding private sexual matters warrants constitutional protection against public

⁵⁹ *Id.*

⁶⁰ 175 F.3d 107 (2d Cir. 1999).

⁶¹ *Id.* at 111.

⁶² *Id.*

⁶³ *Id.* The court explained:

Individuals who have chosen to abandon one gender in favor of another understandably might desire to conduct their affairs as if such a transition was never necessary. That interest in privacy, like the privacy interest of persons who are HIV positive, is particularly compelling. Like HIV status as described in *Doe*, transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others.

Id.

⁶⁴ *Id.*

⁶⁵ These cases describe two types of connected privacy rights protected under the Fourteenth Amendment: an individual's interest in autonomy in intimate matters and an individual's interest in avoiding disclosure of personal matters. See *supra* notes 41–49 and accompanying text.

⁶⁶ *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998); see *J. P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

⁶⁷ 156 F.3d 673.

dissemination.⁶⁸ In *Bloch*, the confidential and highly personal details of a victim's rape by an unknown assailant were released to the public through a press conference.⁶⁹ The Sixth Circuit recognized that "sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood. Publically revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private."⁷⁰ Similar to the Second Circuit in *Powell and Doe*, the Sixth Circuit noted the social stigma and humiliation that often attaches itself to someone who is a victim of a crime of sexual violence.⁷¹

The Ninth Circuit, in *Thorne v. City of El Segundo*,⁷² also held that sexual activities are within the zone of privacy protected by the Constitution.⁷³ The plaintiff in *Thorne* was asked about her sexual past by a polygraph examiner during an examination to become an officer on the city police force.⁷⁴ The court reached its holding by reviewing earlier Supreme Court cases⁷⁵ which held "that such basic matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion."⁷⁶

The Tenth Circuit, in *Eastwood v. Department of Corrections of the State of Oklahoma*,⁷⁷ has also recognized that the "constitutionally protected right is implicated when an individual is forced to disclose information regarding personal sexual matters."⁷⁸ In *Eastwood*, a former employee of the Oklahoma Department of Corrections was harassed with questions about her sexual history in connection with a claim she made about a sexual assault.⁷⁹ The court found that the employee's right to

⁶⁸ *Id.* at 685–86.

⁶⁹ *Id.* at 676.

⁷⁰ *Id.* at 685.

⁷¹ *Id.*

⁷² 726 F.2d 459 (9th Cir. 1983).

⁷³ *Id.* at 468.

⁷⁴ *Id.* at 462.

⁷⁵ The cited cases were: *Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

⁷⁶ *Thorne*, 726 F.2d at 468.

⁷⁷ 846 F.2d 627 (10th Cir. 1988).

⁷⁸ *Id.* at 631.

⁷⁹ *Id.* at 629.

privacy was implicated.⁸⁰ Similarly, the Eleventh Circuit, in *James v. City of Douglas*,⁸¹ held that the plaintiff's clearly established right to privacy was violated when police disclosed a sexually explicit videotape of the plaintiff in connection with an ongoing criminal investigation.⁸²

These cases demonstrate that while the Supreme Court has not spoken on the issue of whether the constitutional right to informational privacy extends to personal sexual matters, several of the United States circuit courts have. These courts recognize that one's sexuality and personal choices about sex should be protected by the Constitution because of their private and intimate nature. Public disclosure of this information often leads to social stigma and humiliation. Similarly, sexual orientation is a matter individuals may choose to keep private for several reasons, but often because of this same social stigma. While the circuit courts have established a relationship between the constitutional right to informational privacy and personal sexual matters, the courts are less certain about how this constitutional right applies to sexual orientation when a minor is the one claiming the right. The issue is further complicated when the minor claiming this right is doing so in school, even with regard to the minor's own parent.

II. THE CONFLICTING CIRCUITS

The issue, which has divided two of the United States circuit courts, is whether the constitutional right to informational privacy extends to information about a student's sexual orientation. The Third Circuit Court of Appeals was the first to address this issue but it did so outside of the school context.⁸³

⁸⁰ *Id.* at 631.

⁸¹ 941 F.2d 1539 (11th Cir. 1991).

⁸² *See id.* at 1540.

⁸³ There is also a Fourth Circuit case that deals with this issue, *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), but it is no longer instructive. In *Walls*, the Fourth Circuit held that mandatory disclosure on a police questionnaire of sexual activities with members of the same sex did not violate any constitutional right. *Id.* at 193. The Fourth Circuit cited *Bowers v. Hardwick*, 478 U.S. 186 (1986), as controlling precedent, finding that if there was no protected right to engage in consensual sodomy, then there was no bar to a police questionnaire asking about the applicant's sexual orientation. *Walls*, 895 F.2d at 193. However, *Bowers* was overruled by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that *Bowers* was not correct when it was decided and it should not remain binding precedent. *Id.* at 578. Accordingly, the decision in *Walls* is no longer

However, the element of parental notification was still present in the case. The Fifth Circuit Court of Appeals, in a more recent case,⁸⁴ addressed this precise issue in the school context and came to a very different conclusion than the one reached by the Third Circuit.

A. *The Third Circuit*

The Third Circuit grappled with this issue in a case called *Sterling v. Borough of Minersville*.⁸⁵ At issue in this case was whether a police officer's threat to disclose the suspected sexual orientation of an arrested young man to his family member violated the young man's constitutional right to privacy.⁸⁶ Marcus Wayman, an eighteen-year-old, and a seventeen-year-old male friend were parked in a lot adjacent to a beer distributor while the car and both young men were being observed by defendant police officer, F. Scott Wilinsky.⁸⁷ Wilinsky was concerned about previous burglaries of the beer distributor and was suspicious that the car's headlights were out so he called for backup and Officer Thomas Hoban, the second defendant, swiftly arrived to the scene.⁸⁸ The officers' investigation did not show any sign of a burglary but it was apparent to the officers that the two young men had been drinking alcohol. A search of the car uncovered two condoms.⁸⁹ Wilinsky questioned the boys about whether they were in the parking lot for a sexual encounter and testified that both Wayman and his companion eventually acknowledged that they were homosexuals and were in the parking lot to engage in consensual sex.⁹⁰ The two boys were then arrested for underage drinking and taken to the Minersville police station.⁹¹ At the station, Wilinsky first lectured them about the Bible's views on homosexual activity and then warned

instructive on this issue because it relied primarily on a case that has since been overruled. Additionally, *Walls* did not deal with the issue of minors in the school context.

⁸⁴ *Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. 2013).

⁸⁵ 232 F.3d 190 (3d Cir. 2000).

⁸⁶ *Id.* at 192.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* However, the seventeen-year-old companion denied making such admissions. *Id.*

⁹¹ *Id.*

Wayman that if he did not inform his grandfather about his sexual orientation then Wilinsky would take it upon himself to disclose this information.⁹² After hearing this, Wayman confided in his friend that he was going to kill himself and upon release from custody, Wayman committed suicide in his home.⁹³

Wayman's mother, as executrix of Wayman's estate, filed suit under 42 U.S.C. § 1983 against the Borough of Minersville, Wilinsky and Hoban, as individuals and in their capacity as police officers, and the Chief of Police of Minersville.⁹⁴ The complaint alleged that the officers and the borough violated Wayman's Fourteenth Amendment right to privacy.⁹⁵ The defendants filed a motion for summary judgment, which the district court denied with respect to the right to privacy claim.⁹⁶ The court also ruled that the officers were not entitled to qualified immunity⁹⁷ since their conduct violated Wayman's "clearly established right to privacy as protected by the Constitution."⁹⁸ Wilinsky and Hoban appealed this ruling.⁹⁹

In analyzing the right to privacy claim, the Third Circuit noted that its jurisprudence takes an "encompassing view of information entitled to a protected right to privacy."¹⁰⁰ The court highlighted several of its opinions demonstrating this encompassing view.¹⁰¹ The court concluded, "It is difficult to

⁹² *Id.* at 192–93.

⁹³ *Id.* at 193.

⁹⁴ *Id.*

⁹⁵ *Id.* The complaint also alleged that the officers and the borough violated the laws of the Constitution of the Commonwealth of Pennsylvania and Wayman's Fourth Amendment right against illegal arrest. *Id.* These claims are not at issue in this Note.

⁹⁶ *Id.*

⁹⁷ "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

⁹⁸ *Sterling*, 232 F.3d at 193.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 195.

¹⁰¹ *Id.* at 195–96. The Third Circuit first highlighted its opinion in *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980), in which the court held that private medical information is entitled to privacy protection but cautioned that the right is not absolute. *Sterling*, 232 F.3d at 195. In *Fraternal Order of Police*,

imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."¹⁰² Accordingly, Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection under the Supreme Court's privacy jurisprudence.¹⁰³ The Third Circuit then noted that this zone of privacy protection is not absolute and can be overridden by a compelling government interest.¹⁰⁴ However, no such compelling government interest was identified in this case.¹⁰⁵

The dissent disagreed with the majority on qualified immunity grounds.¹⁰⁶ However, the dissent agreed with the majority in that Wayman did possess a privacy interest in his sexual orientation.¹⁰⁷ The dissent concluded that it is "fair to say that our society regards a person's sexual orientation as intimate information of a personal nature and, accordingly, recognizes a reasonable and legitimate expectation of privacy in that information."¹⁰⁸

Lodge No. 5 v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987), the Third Circuit held that questions posed concerning medical, financial, and behavioral information relating to whether police officer applicants were capable of working in stressful and dangerous conditions did not unconstitutionally infringe on the applicant's privacy rights, but determined that there were inadequate safeguards on unnecessary disclosure of this information. *Sterling*, 232 F.3d at 195. Next, the Third Circuit looked to *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133, 1135 (3d Cir. 1995), in which the court considered the alleged violation of an employee's right to privacy when the employer discovered, through records of drug purchases made through the employee health program, that the employee had AIDS. *Sterling*, 232 F.3d at 195-96. Finally, the Third Circuit looked to *Gruenke v. Seip*, 225 F.3d 290, 302-03 (3d Cir. 2000), in which the court held that a swim team coach requiring one of the team members to take a pregnancy test and then failing to take appropriate steps to keep the information confidential infringed on the girl's right to privacy. *Sterling*, 232 F.3d at 196.

¹⁰² *Sterling*, 232 F.3d at 196.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* The Third Circuit also went on to consider whether a threat of disclosure, rather than actual disclosure, constitutes a violation of the constitutional right to privacy. *Id.* at 196-97.

¹⁰⁶ *Id.* at 198 (Stapleton, J., dissenting).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 198-99.

B. *The Fifth Circuit*

More recently, the Fifth Circuit also grappled with the issue of a student's right to privacy regarding sexual orientation in a case called *Wyatt v. Fletcher*.¹⁰⁹ As highlighted above, Barbara Wyatt, as next-friend of her minor daughter Skye, brought suit under 42 U.S.C. § 1983 against high school softball coaches Rhonda Fletcher and Cassandra Newell.¹¹⁰ Wyatt alleged that the coaches disclosed her daughter's sexual orientation during a disciplinary meeting, and she claimed that this disclosure constituted an invasion of her daughter's Fourteenth Amendment right to privacy.¹¹¹

On the coaches' motion for summary judgment, the district court denied qualified immunity to Fletcher and Newell on the ground that there existed genuine issues of material fact.¹¹² The Fifth Circuit disagreed and reversed.¹¹³ The court 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 sexual activity of the student."¹¹⁴ The court therefore concluded that the individual defendants were entitled to qualified immunity and, accordingly, the federal claims against them were barred.¹¹⁵

¹⁰⁹ 718 F.3d 496 (5th Cir. 2013).

¹¹⁰ *Id.* at 499.

¹¹¹ *Id.* Wyatt also alleged a Fourth Amendment claim based on a disciplinary confrontation in a locked locker room but that claim is not at issue in this Note. See *id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* The Fifth Circuit began its analysis by laying out the standard for qualified immunity. Evaluating qualified immunity is a two-step process and the burden is on the plaintiff to prove that a government official is not entitled to qualified immunity. *Michalik v. Hermann*, 422 F.3d 252, 257 (5th Cir. 2005). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional or statutory right. *Jones v. City of Jackson*, 203 F.3d 875, 879 (5th Cir. 2000). A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that the official's actions violate that right. *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000). If this first step is met, then the second step is to determine whether the defendant's conduct was objectively reasonable. *Jones*, 203 F.3d at 879. This Note focuses on the first step of the qualified immunity analysis: whether the specific right to privacy at issue in this Note is a clearly established constitutional right.

In analyzing Wyatt's claim, the Fifth Circuit first noted that there is no Fifth Circuit authority on which types of disclosures are personal enough to trigger the constitutional protection of informational privacy.¹¹⁶ Wyatt argued that the contours of her daughter's asserted right were well-established and relied on two Fifth Circuit cases for support: *Fadjo v. Coon*¹¹⁷ and *ACLU of Mississippi v. Mississippi*.¹¹⁸ The court concluded that neither of these cases even touched on the privacy rights between a student and a parent.¹¹⁹ *Fadjo* concerned the disclosure of an insurance beneficiary's personal information in the context of a criminal investigation.¹²⁰ In that case, the Fifth Circuit noted that the plaintiff had been promised that the information he provided to investigators would remain confidential, but no such promise was made to Skye.¹²¹ *ACLU of Mississippi* concerned the dismantling of a state agency committed and devoted to the perpetuation of racial segregation in Mississippi whose purpose was to act as the state's secret intelligence arm.¹²² The Fifth Circuit distinguished this case from the present case on two grounds: First, the disclosure involving Skye was only to her mother; and second, unlike the facts in *ACLU of Mississippi*, the government was not illegally collecting information in order to cause harm to private citizens.¹²³

The Fifth Circuit then looked for authority from other circuits and did not find any cases to be particularly persuasive.¹²⁴ The court noted the *Sterling* case from the Third Circuit but did not give it much weight and dismissed its value rather flippantly.¹²⁵ The court considered several aspects of the *Sterling* case in an effort to dismiss its authority: First, the Third Circuit's decision is not controlling authority on the Fifth Circuit; second, the victim of the "outing" in *Sterling* was not a minor, which suggests that if the victim had been a minor the

¹¹⁶ *Wyatt*, 718 F.3d at 505 (quoting *Zaffuto v. City of Hammond*, 308 F.3d 485, 490 (5th Cir. 2002)).

¹¹⁷ 633 F.2d 1172 (5th Cir. 1981).

¹¹⁸ 911 F.2d 1066 (5th Cir. 1990).

¹¹⁹ *Wyatt*, 718 F.3d at 506.

¹²⁰ *Id.*; *Fadjo*, 633 F.2d at 1174.

¹²¹ *Wyatt*, 718 F.3d at 506-07.

¹²² *Id.* at 507; *ACLU of Miss.*, 911 F.2d at 1068.

¹²³ *Wyatt*, 718 F.3d at 508.

¹²⁴ *Id.*

¹²⁵ *Id.* at 509 (explaining that the Third Circuit's opinion is "not controlling authority" and thus, "its reasoning, standing alone, is not dispositive").

case could have been decided differently; and third, the cases from within the Third Circuit that the Third Circuit relied on were dubious at best.¹²⁶ In sum, the Fifth Circuit held that Wyatt had not alleged “a clearly established constitutional right—drawn either from the Supreme Court’s jurisprudence, from [the Fifth Circuit’s] own precedent or from that of other circuits—that the coaches violated.”¹²⁷

The dissent highlighted that despite the majority’s attempt to distinguish the cases cited by Wyatt on the basis that none occurred in the school context, the majority ultimately conceded that individuals have a privacy interest in personal sexual matters.¹²⁸ The dissent then noted a number of cases from outside of the Fifth Circuit that have recognized a right to privacy regarding personal sexual matters.¹²⁹ The dissent also noted that the majority failed to provide any authority for its finding that the right to privacy in personal sexual matters does not extend to high school students.¹³⁰ To the contrary, the dissent found that the constitutional right to privacy does extend to minors, and the school context does not defeat the existence of this right.¹³¹ Rather, the school context comes into play with regard to a balancing test and whether the government’s interest outweighs a student’s privacy right.¹³² The question then becomes whether the coaches had a legitimate interest that outweighed Skye’s right to privacy. The dissent agreed with the lower court, which conducted this balancing test, and concluded that whatever the state’s interest may have been, it did not outweigh Skye’s interest in keeping her sexual orientation confidential, especially with regard to her mother.¹³³

The Third and Fifth Circuits, due to their conflicting holdings, did not solve the issue of whether the constitutional right to informational privacy extends to information about a student’s sexual orientation. Since the Supreme Court has been

¹²⁶ *Id.*

¹²⁷ *Id.* at 510.

¹²⁸ *Id.* at 513 (Graves, J., dissenting).

¹²⁹ *See supra* Part I.B.

¹³⁰ *Wyatt*, 718 F.3d at 513 (Graves, J., dissenting).

¹³¹ *Id.* at 514.

¹³² *Id.*

¹³³ *Id.* at 515.

silent on this issue, an examination of the Court's holdings in other areas of student privacy, such as pregnancy, abortion, and contraception, sheds light on this unanswered question.

III. AREAS OF STUDENT PRIVACY

As a general matter, the Constitution protects the rights of both minors and adults.¹³⁴ In *In re Gault*,¹³⁵ the Supreme Court declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹³⁶ The protections of the Constitution do not fade away as a minor enters different situations. In *Tinker v. Des Moines Independent Community School District*,¹³⁷ the Supreme Court, in the context of the First Amendment, held that neither students nor teachers shed their constitutional rights "at the schoolhouse gate."¹³⁸ However, the Court also noted that it has repeatedly emphasized the comprehensive authority of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in schools.¹³⁹ The Court further noted:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.¹⁴⁰

¹³⁴ *In re Gault*, 387 U.S. 1, 12-13 (1967).

¹³⁵ 387 U.S. 1.

¹³⁶ *Id.* at 13. The Court relied on three previous cases in reaching this conclusion. See generally *Kent v. United States*, 383 U.S. 541 (1966) (considering the requirements for a valid waiver of the 'exclusive' jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (concerning the confession of a fourteen-year-old boy who had been held for five days without officers sending for his parents or seeing that he had advice of a lawyer or an adult friend); *Haley v. Ohio*, 332 U.S. 596 (1948) (involving the admissibility of a confession by a fifteen-year-old boy in a state criminal court of general jurisdiction).

¹³⁷ 393 U.S. 503 (1969).

¹³⁸ *Id.* at 506.

¹³⁹ *Id.* at 507; see also *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 830 (2002) ("A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.")

¹⁴⁰ *Tinker*, 393 U.S. at 511.

In a later case, *New Jersey v. T.L.O.*,¹⁴¹ the Court confirmed the indisputable nature of the proposition that the Fourteenth Amendment protects the rights of students against infringement by public school officials.¹⁴² The Supreme Court further clarified this holding in *Vernonia School District 47J v. Acton*.¹⁴³ In *Vernonia*, the Court held, in the context of drug testing of student athletes, that while children do not shed their constitutional rights at the schoolhouse gate, "the nature of those rights is what is appropriate for children in school."¹⁴⁴

The Third and Fifth Circuits, over ten years apart, grappled with the issue of a student's right to privacy regarding sexual orientation and reached different results. As more teens are "coming out" at younger ages,¹⁴⁵ identifying and understanding the contours of this right becomes relevant to increasing numbers of students. The Supreme Court has clarified that constitutional protections do extend to minors and these protections do not disappear once a minor enters the school building.¹⁴⁶ In order to determine whether a high school student possesses the right to informational privacy in school regarding the student's sexual orientation, this Part examines and analogizes the privacy rights of students in other personal and intimate areas such as pregnancy, abortion, and contraception.

A. *Pregnancy*

Pregnancy, like sexual orientation, is an intimate area of a student's life that she would want protected from unwarranted government intrusion and disclosure. Similar to sexual

¹⁴¹ 469 U.S. 325 (1985).

¹⁴² *Id.* at 334.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 334 (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)) (internal quotation marks omitted).

¹⁴³ 515 U.S. 646 (1995).

¹⁴⁴ *Id.* at 655–56.

¹⁴⁵ See Denizet-Lewis, *supra* note 22.

¹⁴⁶ See *supra* notes 134–44 and accompanying text.

orientation, pregnancy in high school is something that might lead to social stigma, humiliation, and judgment. A student may wish to handle her pregnancy in her own way, perhaps by seeking an abortion, discussed *infra*, without parental involvement. If a school is alerted to the fact that a student is pregnant, automatic disclosure to the student's parent may not be in the best interests of the student. Similarly, if a school is alerted to the fact that a student is homosexual, automatic disclosure to the student's parent may not be in the best interests of the student. Several of the United States circuit courts have held that the right to informational privacy extends to personal sexual matters because of their private and intimate nature,¹⁴⁷ and this could not be more true than in the context of a high school student who is faced with pregnancy.

The Third Circuit, in *Gruenke v. Seip*,¹⁴⁸ recognized the private nature of pregnancy in the context of high school.¹⁴⁹ The court held that disclosure of a high school student's pregnancy "falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters."¹⁵⁰ Leah Gruenke, an eleventh grader, was a member of the varsity swim team.¹⁵¹ The varsity swim coach suspected that Leah might be pregnant, but Leah continually denied that there was any possibility that she was or could be pregnant.¹⁵² Ultimately, Leah took a pregnancy test, allegedly at her coach's request, the results of which were positive.¹⁵³ Leah then took two more tests, the results of which were negative.¹⁵⁴ After learning of the first positive test result, the coach inquired as to whether it would be safe to keep Leah on the team, and upon learning that it was, allowed Leah to continue competing.¹⁵⁵ The coach did not attempt to talk directly to Leah's parents, and Leah repeatedly denied that she was pregnant until she finally visited a doctor who informed her that she was six months pregnant.¹⁵⁶ Even

¹⁴⁷ See *supra* Part I.B.

¹⁴⁸ 225 F.3d 290 (3d Cir. 2000).

¹⁴⁹ *Id.* at 302–03.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 295.

¹⁵² *Id.* at 295–96.

¹⁵³ *Id.* at 296–97. The parties differ in their recount of the facts. See *id.* at 296.

¹⁵⁴ *Id.* at 297.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

then, Leah did not reveal her condition to anyone because she wanted to keep competing, but eventually Leah's teammates, their parents, and Leah's mother learned that she was pregnant.¹⁵⁷

Leah's mother, for herself and on her daughter's behalf, filed suit under 42 U.S.C. § 1983 alleging that their rights under the Constitution were violated when the coach required Leah to take a pregnancy test.¹⁵⁸ The Gruenkes subsequently amended their complaint, which included, among other claims, that the required pregnancy test violated Leah's right to privacy regarding personal matters.¹⁵⁹ The coach moved for summary judgment claiming qualified immunity and the district court granted the coach's motion, which was then followed by an appeal.¹⁶⁰

The Third Circuit concluded that not only did Leah's claim "fall[] squarely within the contours of the recognized right of one to be free from disclosure of personal matters," but also concerned medical information, which the Third Circuit previously held is entitled to that very same protection.¹⁶¹ The court also noted that if, as Leah alleged, the information about her pregnancy tests was confidential and the coach compelled Leah to take the tests, then his alleged failure to take appropriate steps to keep that information confidential by discussing the tests with Leah's other teammates and the results with his assistant coaches would infringe on Leah's right to privacy.¹⁶²

Leah's situation is analogous to Skye's situation in *Wyatt v. Fletcher*. In both cases, a high school student had a personal sexual matter that she wished not to be disclosed by school officials. Despite this, in both cases, disclosure was made, albeit to different individuals. The results of the disclosure for Leah and Skye were also somewhat similar as both experienced a kind

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* The Gruenkes also brought their claims under Pennsylvania state tort law. *Id.*

¹⁵⁹ *Id.* The Gruenkes also alleged that the required pregnancy test constituted an illegal search in violation of Leah's Fourth Amendment rights, violated Leah and her mother's right to familial privacy, violated Leah's right to free speech and association protected by the First Amendment, and violated Leah and her mother's rights under state tort law. *Id.*

¹⁶⁰ *Id.* at 297-98.

¹⁶¹ *Id.* at 302-03 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980)).

¹⁶² *Id.* at 303.

of social isolation.¹⁶³ The Third Circuit recognized that pregnancy falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters, despite the reality that a pregnant teenager may need the guidance of a parent.¹⁶⁴ In the context of homosexuality, the same kind of parental guidance is likely not as necessary because the health risks and lifestyle changes that accompany pregnancy do not accompany homosexuality. If sexual actions and their results are squarely within the contours of the recognized right of one to be free from disclosure of personal matters, then sexual orientation should fall squarely within these same contours.

A few years after *Gruenke*, a judge in the Eastern District of New York denied a motion for a preliminary injunction to prohibit the Port Washington School District from implementing a policy requiring school officials, including school nurses, to notify parents when the officials learn of a student's pregnancy.¹⁶⁵ The court denied the motion on the grounds that the plaintiffs lacked standing and the case was not yet ripe for judicial review.¹⁶⁶ However, in doing so, the court also based its decision on whether the plaintiffs were likely to succeed on the merits.¹⁶⁷ The court found that they were not.¹⁶⁸ The court based this finding on the idea that the cases regarding a minor's right to an abortion without parental involvement, discussed *infra*, do not apply in the pregnancy context.¹⁶⁹ The court stated that the "[p]laintiffs may not stretch the protections that apply to a minor seeking an abortion to cover the disclosure of her pregnancy to her parents."¹⁷⁰ In doing so, the court completely missed the mark.

Although pregnancy and abortion are certainly separate concepts, they are "inextricably linked and the right to an abortion means nothing if the law can be circumvented by

¹⁶³ See *id.* at 297; Complaint, *supra* note 2, ¶¶ 12, 23.

¹⁶⁴ See *Gruenke*, 225 F.3d at 302–03.

¹⁶⁵ *Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist.*, 361 F. Supp. 2d 69, 81 (E.D.N.Y. 2005); see also Melissa Prober, Note, *Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy*, 71 BROOK. L. REV. 557, 557 (2005).

¹⁶⁶ *Port Wash. Teachers' Ass'n*, 361 F. Supp. 2d at 77.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 77–79.

¹⁶⁹ *Id.* at 78.

¹⁷⁰ *Id.*

requiring the disclosure of a minor's pregnancy to her parents."¹⁷¹ School policies that require mandatory notification of a student's pregnancy violate her constitutional right to privacy by eliminating her right to seek an abortion without parental involvement.¹⁷² Furthermore, a majority of the states have laws or policies that allow pregnant minors to receive prenatal care and delivery services without parental consent or notification.¹⁷³ Specifically in New York, "[a]ny person who is pregnant may give effective consent for medical, dental, health and hospital services relating to prenatal care."¹⁷⁴ In Pennsylvania, any minor who "has been pregnant" may consent to health services for herself, even without the consent of the minor's parents.¹⁷⁵ Minors in California may also consent to medical care relating to the treatment of pregnancy.¹⁷⁶

Although many courts have not articulated the contours of a high school student's right to privacy with respect to pregnancy, there is authority to suggest that high school students possess such a right. Pregnancy is accompanied by serious physical changes for the student and the possibility of bringing new life into the world. The consequences associated with sexual orientation are not nearly as substantial. A student may need guidance and support from a parent in the event of a pregnancy due to the health risks and serious life choices that are involved. In contrast, though sexual orientation also involves important decisions, it does not carry with it the same health risks or serious life choices that accompany a pregnancy. A student's decision to be open about the student's sexual orientation in high school thus does not require or necessitate the same kind of, or any, parental involvement. Accordingly, if information regarding a high school student's pregnancy is a personal sexual matter

¹⁷¹ Prober, *supra* note 165, at 563.

¹⁷² *Id.*

¹⁷³ See Guttmacher Inst., *State Policies in Brief: Minors' Access to Prenatal Care* (2015), http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf; Heather Boonstra & Elizabeth Nash, *Minors and the Right To Consent to Health Care*, GUTTMACHER REP. ON PUB. POLY, Aug. 2000, 4, 4, available at <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

¹⁷⁴ N.Y. PUB. HEALTH LAW § 2504 (McKinney 2012).

¹⁷⁵ 35 PA. STAT. ANN. § 10101 (West 2012) ("Any minor who is eighteen years of age or older, or has graduated from high school, or has married, or has been pregnant, may give effective consent to medical, dental and health services for himself or herself, and the consent of no other person shall be necessary.")

¹⁷⁶ CAL. FAM. CODE § 6925 (West 2013).

that can be protected by the constitutional right to informational privacy despite the potential need for parental involvement, then information regarding a high school student's sexual orientation should be protected as well. A student who identifies as homosexual should be able to do so freely in school without parental notification. In the context of both pregnancy and homosexuality, disclosure to parents may not always be in the student's best interests.

B. Abortion

Abortion, unlike pregnancy, is an area that the Supreme Court has ruled on with respect to minors' rights. In the abortion context, unlike in the sexual orientation context, issues of parental consent as well as parental notification are implicated.¹⁷⁷ Parental consent statutes require that at least one of the minor's parents consent to the minor's abortion before the doctor is able to perform the procedure.¹⁷⁸ Parental notification statutes require that one or both parents be notified that the minor plans to obtain the abortion before the doctor is able to perform the procedure.¹⁷⁹ While consent and notification are separate concepts, they are closely related. In order for a parent to consent or not consent to a minor's abortion, the parent must first be notified that the child is pregnant and seeking an abortion. If parental consent is required, a child cannot legally conceal an abortion from her parents and thus her right to privacy with regard to her parents will be eliminated.¹⁸⁰ However, the Supreme Court has recognized a minor's right to privacy with respect to both parental consent and parental notification statutes to a certain degree.¹⁸¹

¹⁷⁷ See Jennifer C. Friedman, *Parental Notice in State Abortion Statutes: Filling the Gap in Constitutional Jurisprudence*, 29 COLUM. HUM. RTS. L. REV. 437, 445 (1998).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* Usually, there is a twenty-four to forty-eight-hour waiting period after the notification and before the minor may undergo an abortion that accompanies these laws. See, e.g., *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997); *Hodgson v. Minnesota*, 497 U.S. 417, 422 (1990); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507 (1990).

¹⁸⁰ See generally Wynn Heather Sourial, Note, *The Erosion of Roe v. Wade: Do Minors Have Any Rights?*, 13 WHITTIER L. REV. 285 (1992).

¹⁸¹ See *infra* notes 182–212 and accompanying text.

The Supreme Court, in *Planned Parenthood v. Danforth*,¹⁸² considered the constitutionality of several provisions of a Missouri abortion statute.¹⁸³ One of the provisions required the written consent of a parent or a person in loco parentis if the woman seeking the abortion was unmarried and under the age of eighteen, unless a physician certified that the abortion was necessary to save the life of the mother.¹⁸⁴ The Supreme Court held that a state may not impose a blanket provision requiring the consent of a parent or person in loco parentis as a condition for an unmarried minor to obtain an abortion during the first twelve weeks of her pregnancy.¹⁸⁵ In arriving at this holding, the Supreme Court reiterated the sentiment of *In re Gault*¹⁸⁶ and expressed that “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”¹⁸⁷ The Court also noted, “Any independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.”¹⁸⁸

¹⁸² 428 U.S. 52 (1976).

¹⁸³ *Id.* at 58.

¹⁸⁴ *Id.* at 72.

¹⁸⁵ *Id.* at 74. The Court stated:

Just as with the requirement of consent from the spouse, so here, the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.

Id. The Court made clear that it was not suggesting that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy. *Id.* at 75. Rather, the issue with the parental consent provision in the Missouri statute was that it imposed a special consent provision that could be exercised by a person other than the woman and her physician as a prerequisite to a minor’s termination of her pregnancy without sufficient justification for the restriction. *Id.*

¹⁸⁶ “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.” *In re Gault*, 387 U.S. 1, 13 (1967).

¹⁸⁷ *Danforth*, 428 U.S. at 74. However, the Court did recognize “that the State has somewhat broader authority to regulate the activities of children than of adults.” *Id.* (citing *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968)).

¹⁸⁸ *Id.* at 75.

A few years later, the Supreme Court, in *Bellotti v. Baird* (*Bellotti II*),¹⁸⁹ continued the inquiry it began in *Danforth* regarding parental consent to abortion.¹⁹⁰ The Court began its analysis by reaffirming its prior holding that the Constitution extends its protections to minors.¹⁹¹ It also noted the unique nature of the abortion decision as compared to many other decisions made by minors. The Court observed that “[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.”¹⁹² The Court then reaffirmed its holding in *Danforth* by stating that a state may not impose a “blanket provision” requiring the consent of a parent or person in loco parentis as a condition for an unmarried minor to obtain an abortion during the first twelve weeks of her pregnancy.¹⁹³ Although deference to parents may be appropriate in certain circumstances, the unique nature and consequences of the abortion decision make it inappropriate to give a parent the power of “parental veto.”¹⁹⁴ Accordingly, the Court concluded “that if the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.”¹⁹⁵ The Court further clarified that if, on one

¹⁸⁹ 443 U.S. 622 (1979) (plurality opinion).

¹⁹⁰ *Id.* at 624.

¹⁹¹ *Id.* at 633 (“A child, merely on account of his minority, is not beyond the protection of the Constitution.”).

¹⁹² *Id.* at 642.

¹⁹³ *Id.* at 643 (quoting *Danforth*, 428 U.S. at 74).

¹⁹⁴ *Id.* at 639–40, 643 (citing *Danforth*, 428 U.S. at 74).

¹⁹⁵ *Id.* at 643 (footnote omitted). The Court explained:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the “absolute, and possibly arbitrary, veto” that was found impermissible in *Danforth*.

Id. at 643–44 (footnote omitted). The requirements derived from *Bellotti II* were restated in *Lambert v. Wicklund* as follows:

hand, a court determines that an abortion is in a minor's best interests, she is entitled to court authorization without any parental involvement.¹⁹⁶ On the other hand, a court may deny an abortion request by an immature minor if it concludes that the minor's best interests would be served by parental consultation, or the court may defer the decision until the parent or parents become involved.¹⁹⁷

The Supreme Court has clarified the judicial "bypass" procedures relating to parental consent to the abortion decision but it has not been as clear on the procedures relating to parental notification.¹⁹⁸ Parental notification, as opposed to parental consent, is more analogous to what might occur in the context of sexual orientation. In *H. L. v. Matheson*,¹⁹⁹ the Court reviewed its earlier holdings and confirmed that an abortion statute setting out a "mere requirement of parental notice" does not violate the constitutional rights of a dependent, immature minor.²⁰⁰ In *Matheson*, the Court was considering the constitutionality of a Utah abortion statute and ultimately held that the fact that the Utah statute may inhibit some minors from seeking abortions was not a valid basis to void the statute.²⁰¹ However, the Court's holding was limited to the particular circumstances of a minor: (1) who was dependent on her parents, (2) who was not emancipated by marriage or otherwise, and (3) who made no claim or showing as to her maturity.²⁰² The Court's holding thus suggests that if a minor is able to demonstrate her maturity, she might be able to obtain an abortion without parental notification.

[A] constitutional parental consent statute must contain a bypass provision that meets four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures.

520 U.S. 292, 295 (1997).

¹⁹⁶ *Bellotti II*, 443 U.S. at 647.

¹⁹⁷ *Id.* at 647-48.

¹⁹⁸ Friedman, *supra* note 177, at 444.

¹⁹⁹ 450 U.S. 398 (1981).

²⁰⁰ *Id.* at 409 (internal quotation marks omitted).

²⁰¹ *Id.* at 413.

²⁰² *Id.* at 407.

In *Hodgson v. Minnesota*,²⁰³ the Court considered the constitutionality of the forty-eight-hour waiting period after parental notification and the two-parent notification requirement to seek an abortion.²⁰⁴ In considering the forty-eight-hour delay, the Court found that it “imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy.”²⁰⁵ In considering the two-parent notification requirement, however, the Court found “that the requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest.”²⁰⁶

Moreover, in *Ohio v. Akron Center for Reproductive Health (Akron II)*,²⁰⁷ the Court noted that while it had required bypass procedures for parental consent statutes, it had not decided whether parental notification statutes must contain the same bypass procedures.²⁰⁸ However, the Court decided to leave that question open because it was not necessary to answer the question in determining the constitutionality of the Ohio statute before the Court.²⁰⁹ The Court did comment, however, that “it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute.”²¹⁰ In *Lambert v. Wicklund*,²¹¹ the Supreme Court reiterated that it has not decided whether a parental notification statute must include some sort of bypass provision in order to be constitutional.²¹²

Though abortion and homosexuality differ in significant ways, certain parallels regarding how they affect a minor's life can be drawn between the two. The choice to obtain an abortion and the choice to openly identify as homosexual are both choices that a minor may wish to make without parental involvement. While parents certainly have an interest in raising and guiding

²⁰³ 497 U.S. 417 (1990).

²⁰⁴ *Id.* at 422–23.

²⁰⁵ *Id.* at 449.

²⁰⁶ *Id.* at 450.

²⁰⁷ 497 U.S. 502 (1990).

²⁰⁸ *Id.* at 510.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 511.

²¹¹ 520 U.S. 292 (1997).

²¹² *Id.* at 295.

their child, alerting parents to a high school student's pregnancy and subsequent choice to abort the pregnancy may do more harm for the student than good. The Supreme Court has recognized this by considering and emphasizing the significance of a minor's maturity in making the abortion decision.²¹³ The Court has established a procedure by which a minor can seek an abortion without any parental involvement.²¹⁴ A state statute containing a judicial bypass procedure is unconstitutional to the extent that it mandates parental notification of the minor's choice to seek an abortion, specifically if the minor is a mature minor who can demonstrate that having an abortion would be in her best interests.²¹⁵ Though the Court has not clarified the constitutionality of parental notification statutes in the same way that it has clarified the constitutionality of parental consent statutes, the overarching message of the Court's rulings in this area is that under certain circumstances, minors possess a right to seek and obtain an abortion without parental involvement. In other words, minors possess a right to privacy with respect to this difficult and significant decision.

The Supreme Court cases in this area deal with abortion in the context of the minor, her parent or parents, and the medical facility that will be performing the abortion. In the school context, "policies that require parental notification of a student's pregnancy, yet do not provide the student with the required judicial bypass procedure, effectuate an unconstitutional regime because they take away the ability of the student to seek an abortion without the involvement of a third-party."²¹⁶ It follows that if a student discloses that she is pregnant in a confidential conversation with a school official, the school official may not notify the student's parents about the pregnancy because to do so would remove the student's ability to seek an abortion without parental involvement by means of a judicial bypass procedure.²¹⁷ This comports directly with the Supreme Court's conclusion in *Bellotti II*:

²¹³ *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 643-44 (1979) (plurality opinion).

²¹⁴ *Id.*

²¹⁵ See William H. Danne, Jr., *Validity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor's Abortion*, 77 A.L.R.5th 1, § 4(c) (2000).

²¹⁶ Prober, *supra* note 165, at 564.

²¹⁷ *Id.* at 567-68.

[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.²¹⁸

Thus, if a school has a mandatory notification policy, in order for it to withstand constitutional scrutiny, the school district would have to provide an “expeditious, confidential bypass procedure where the pregnant student could demonstrate that she is mature enough to make a reproductive medical decision on her own or, even if she is not, that an abortion is in her best interests.”²¹⁹ Moreover, from a public policy standpoint, promising confidentiality will encourage more students to use school-based health care providers.²²⁰ Teenagers are hesitant to seek certain types of medical care if their parents will be notified. However, if they are confident that the services will be kept confidential, teenagers will be likely to utilize medical services available to them at school.²²¹

Abortion, like pregnancy, but unlike homosexuality, carries with it the weight of a life-changing decision and serious health risks. Despite this, the Supreme Court has recognized that under certain circumstances, a minor should have the ability to seek an abortion without parental involvement. The choice to identify as homosexual does not carry with it the same kinds of severe consequences. If mature minors are afforded a right to privacy with respect to their parents in their choice to seek an abortion, they should also be afforded a similar right to privacy in their choice to identify as homosexual in the school setting. If a minor, specifically a student, has chosen to keep his or her sexual orientation private, a school's disclosure of this information to the minor's parent is a violation of the minor's constitutional right to privacy.

²¹⁸ *Bellotti II*, 443 U.S. at 647.

²¹⁹ Prober, *supra* note 165, at 568.

²²⁰ *See id.* at 574–75.

²²¹ *Id.*

C. Contraception

Another intimate area encompassed in a minor's right to privacy involves access to contraception. Contraception, like pregnancy, abortion, and homosexuality, is a personal sexual matter in which a minor may not want parental involvement. As a general rule, the Supreme Court has concluded that the "constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed."²²² In *Carey v. Population Services, International*,²²³ the Court reiterated that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."²²⁴ The Court also noted that the state's interest in the protection of the health of a pregnant minor and of potential life is more implicated by the abortion decision than by the decision to use a "nonhazardous contraceptive."²²⁵ Accordingly, the New York statute at hand in *Carey*, which contained a prohibition on nonprescription contraceptives to persons under the age of sixteen, was declared invalid.²²⁶

Parental notification regarding a minor's decision to use contraception creates constitutional dilemmas. A minor's right to privacy and the issue of patient confidentiality are at odds with parental rights and parental notification.²²⁷ Although the Supreme Court has not yet addressed the judicial bypass requirement in the context of regulations constraining a minor's contraceptive choices, the constitutional contours that apply to abortion cases "inherently apply to contraceptive cases."²²⁸

In light of the fact that the Supreme Court has not ruled on the constitutionality of parental notification in the context of contraception, the opinions of the circuit courts help to clarify the issue. The Third Circuit, in *Anspach v. City of Philadelphia*,

²²² *Carey v. Population Servs., Int'l*, 431 U.S. 678, 694 (1977) (plurality opinion).

²²³ 431 U.S. 678.

²²⁴ *Id.* at 693.

²²⁵ *Id.* at 694.

²²⁶ *See id.* at 691-94.

²²⁷ *See* Dean J. Haas, "Doctor, I'm Pregnant and Fifteen—I Can't Tell My Parents—Please Help Me": *Minor Consent, Reproductive Rights, and Ethical Principles for Physicians*, 86 N.D. L. REV. 63, 104 (2010).

²²⁸ Elizabeth Frost, Note, *Zero Privacy: Schools Are Violating Students' Fourteenth Amendment Right of Privacy Under the Guise of Enforcing Zero Tolerance Policies*, 81 WASH. L. REV. 391, 401 (2006); *see also Carey*, 431 U.S. at 694.

Department of Public Health,²²⁹ considered a minor's access to contraceptives from the perspective of the parents' constitutional rights.²³⁰ Melissa Anspach, a sixteen-year-old, visited the City's Department of Public Health because she feared she might be pregnant.²³¹ After taking the second dose of the morning-after pill, Melissa started to get very ill and was taken by her father to the emergency room of a nearby hospital.²³² Melissa and her parents filed a complaint alleging that the Center violated her parent's constitutional right of parental guidance by providing Melissa with medication without parental consent.²³³

In terms of parental interference with minors' rights, the Third Circuit noted that while the Fourteenth Amendment "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children,"²³⁴ "the right is neither absolute nor unqualified."²³⁵ The type of interference that the Anspachs were asserting they had a right to would impose a constitutional obligation on state actors to contact parents of a minor or encourage minors to contact their parents in this type of situation.²³⁶ "Either requirement would undermine the minor's right to privacy and exceed the scope of the familial liberty interest protected under the Constitution."²³⁷ In terms of parental notification, the Third Circuit articulated "that there is no constitutional right to parental notification of a minor child's exercise of reproductive privacy rights."²³⁸

The Third Circuit distinguished the Supreme Court's rulings concerning parental notification in the abortion context, rejecting the claim that parental consent is required unless a court allows the minor to "bypass" the parents.²³⁹ The Supreme Court's jurisprudence with respect to a minor's right to seek an abortion "concern[s] the constitutional limitations on a state to interfere

²²⁹ 503 F.3d 256 (3d Cir. 2007).

²³⁰ *Id.* at 258.

²³¹ *Id.* at 259.

²³² *Id.* at 259–60.

²³³ *Id.* at 260.

²³⁴ *Id.* at 262 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)) (internal quotation marks omitted).

²³⁵ *Id.* (quoting *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005)) (internal quotation marks omitted).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 269.

²³⁹ *Id.* at 269–70.

with a minor's right to abortion, rather than a parent's affirmative right to be apprised of a minor's reproductive decisions generally."²⁴⁰ Moreover, the abortion cases do not "create a constitutional right of parental notification about an abortion, or any other reproductive health decision—they merely find such notification constitutionally *permissible* when paired with a judicial bypass provision to protect the minor's health and safety."²⁴¹

Similarly, the Sixth Circuit also considered the distribution of contraceptives to minors without parental notification by a publicly operated family planning clinic.²⁴² The court recognized that the constitutional right being implicated by those who desire to use the services of the clinic is "the right of personal privacy."²⁴³ The Sixth Circuit found that there was no deprivation of the liberty interest of parents in the practice of not notifying them of their children's voluntary decisions to participate in the activities of the clinic.²⁴⁴ The court considered the Supreme Court's opinion in *Carey* and concluded that the "various opinions of the Justices do not indicate a belief that parents have a constitutional right to be notified by a public facility which distributes contraceptives to unemancipated minors."²⁴⁵

The choices a minor makes with respect to contraception are similar to the choices a minor makes with respect to pregnancy, abortion, and homosexuality. In each context, the minor may desire a lack of parental involvement. Thus, in each context, the constitutional right to informational privacy is implicated. In the contraception context, although the Supreme Court has not officially ruled on the issue, there is authority to suggest that a minor's right to privacy should protect the minor's decision to use contraception without parental involvement or notification. If abortion decisions are within a realm of privacy for minors, it follows that contraception decisions, which are likely less dangerous and less grave, should also be protected within that same realm of privacy. Similarly, if choices about sexual health

²⁴⁰ *Id.* at 270.

²⁴¹ *Id.*

²⁴² *Doe v. Irwin*, 615 F.2d 1162, 1163 (6th Cir. 1980).

²⁴³ *Id.* at 1166.

²⁴⁴ *Id.* at 1168.

²⁴⁵ *Id.* at 1169.

are encompassed in a minor's right to privacy, this same right should protect choices about sexual preference. Just as a student may wish to use contraception without parental involvement, a student may wish to identify as homosexual in school without parental notification.

CONCLUSION

Courts have recognized the rights of minors to make independent decisions when it comes to pregnancy, abortion, and contraception. This need comes from an understanding that parental involvement is not always in the best interests of a minor, and that a mature minor should be able to make decisions about sexual health and sexual activities without parental notification or consultation. The same rationale used by different courts in arriving at this conclusion applies to homosexuality as well. The Third Circuit recognized this when it decided *Sterling v. Borough of Minersville*, and the Fifth Circuit unfortunately failed to recognize this when it decided *Wyatt v. Fletcher*.

A minor may be open about his or her sexual orientation in school but choose to keep this information private at home. If a school discloses to a student's parent without the consent of the student that the student is pregnant, is seeking an abortion, or is using contraception, the school is eliminating the student's right to informational privacy regarding personal sexual matters. Similarly, if a school discloses to a student's parent without the consent of the student that the student is openly identifying as homosexual, the school is once again eliminating the student's right to informational privacy regarding personal sexual matters. While the contours of this right will vary based on the facts of the situation, school officials must recognize that they cannot make this kind of disclosure without violating a student's constitutional rights.

