

# ABOUT OUTING: PUBLIC DISCOURSE, PRIVATE LIVES

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Out of sight, out of mind.  
*We're here. We're Queer. Get used to it.*  
*You made your bed. Now lie in it.*<sup>1</sup>

## I. INTRODUCTION

"Outing" is the forced exposure of a person's same-sex orientation. While techniques used to achieve this end vary,<sup>2</sup> the most visible examples of outing are employed by gay activists in publications such as *The Advocate*<sup>3</sup> or *OutWeek*,<sup>4</sup> where ostensibly, names are published to advance a rights agenda. Outing is not, however, confined to fringe media. The mainstream press has joined the fray, immortalizing in print "the love[r] that dare[s] not speak its name."<sup>5</sup>

The rules of outing have changed since its national emergence in the early 1990s. As recently as March of 1995, the media forced a relatively unknown person from the closet.<sup>6</sup> The polemic engendered by outing

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1. So chanted the members of "Queer Nation" during a Gay Pride parade in New York City. *Out and About*, *ECONOMIST*, July 27, 1991, at 21.

2. *E.g.*, Outpost, another gay-rights organization, plastered Manhattan with posters of Hollywood stars, bearing the slogan "absolutely queer." *Id.* at 31.

3. Richard Rouillard, Editor in Chief of *The Advocate*, claims that the magazine supports outing "only in extremely limited circumstances." *Letters to the Editor*, *L.A. DAILY NEWS*, Sept. 1, 1991, at 16.

4. *Outweek* closed its doors July, 1991, purportedly in part due to advertisers who "shied away" from its controversial nature. *Open Closets, Closed Doors*, *TIME*, July 8, 1991, at 47.

5. I use the term "primary" outing to denote publication with revelation of sexual orientation as its goal. "Secondary" outing, more common with the press, is the same revelation made incidentally through commenting on the outing phenomenon or by revealing information that suggests same-sex orientation. *See, e.g.*, Bruce Shenitz & Annetta Miller, *The New Facts of Life*, *NEWSWEEK*, Mar. 20, 1995, at 58.

6. *Id.*

transcends gay and lesbian communities, affecting a larger social context; privacy squares off against the freedom of speech in an arena where no one really wins.<sup>7</sup>

The issue presents a multi-faceted paradox, replete with cruel ironies and false dichotomies. As Part II discusses, societal, personal, political, and legal double-binds plague homosexuality: Lesbians and gay men might be persecuted, but they do not deserve legal protection; they may be criminals, but their crimes often go unpunished; they merit no "special benefits," for they are just like everyone else; they suffer extra burdens, because "they are not like everyone else." Outing reveals these tensions created by life and law. Moreover, outing inflames and reinforces them to inflict real harm on real people and deprive their dignity, privacy, and autonomy of vital content and force. As a rhetorical strategy, outing is ill-suited to combat the indignity and intolerance of heterosexism and homophobia. Despite laudable goals, it hurts individuals and arguably gay "communities" more than it helps.

Through that paradox, outing brings the internal flaws of both the homosexual social construct and privacy/free speech jurisprudence into sharp relief. Astonishingly, the harm that outing occasions will escape redress. Part III reveals that traditional tort doctrine and analysis lack any framework within which to remedy the harm. The published information is either true or false. If false, the plaintiff must pursue defamation. As the paradigm outing case presents a true statement of fact, the plaintiff will lose. Alternatively, the plaintiff could pursue an action for publication of private facts. As most outing victims by definition are public figures or officials, the private information is deemed newsworthy or non-private, and the plaintiff will lose. Pursuit of an action for intentional infliction of emotional distress is also fruitless; a failed defamation claim will not

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7. See, e.g., David Armstrong, *Media's Role in 'Outings' Spurs Ethical Questions*, SAN DIEGO UNION-TRIB., Mar. 17, 1995, at E1; David Gelman, "Outing": *An Unexpected Assault on Sexual Privacy: Gay Activists are Forcing Others Out of the Closet*, NEWSWEEK, Apr. 30, 1990, at 66; Richard Goldstein, *Do We Know Too Much?*, NEWSDAY, Aug. 29, 1991, at 122; Colette Guadagnino, "Outing" *Advocate Says Sexuality Shouldn't Be Secret to Michelangelo Signorile, The Homosexual "Closet" is a Prison that Needs to be Smashed*, POST-STANDARD (Syracuse, N.Y.), Nov. 18, 1993, at B2; William A. Henry III, *To "Out" or Not to "Out,"* TIME, Aug. 19, 1991, at 17; Dirk Johnson, *Privacy v. the Pursuit of Gay Rights*, N.Y. TIMES, Mar. 27, 1990, at A21; Irene Lacher, *Public Good-Or Private Matters?*, L.A. TIMES, Apr. 20, 1995, at E6; Richard Pyle, *News Executives Discuss AIDS, Activism, "Outing,"* AP, Sept. 12, 1993; Andrew Sullivan, *Sleeping with the Authoritarians*, OTTAWA CITIZEN, Sept. 15, 1991, at B3; Stan P. Vansun, *Hi Ho, an Outing We Will Go*, VANCOUVER SUN, Aug. 31, 1991, at D2; Jacob Wirtschafter, *Forcing the Gay Issue*, THE JERUSALEM POST, Nov. 1, 1991, available in LEXIS, News Library, ARCNEWS File.

succeed if reworked under a distress theory.

Constructions of and responses to homosexual orientation are already beset by internal inconsistencies, as is tort law. Applying that law to the societal phenomenon of outing fortifies those dilemmas. Further, the futility of pursuing a cause of action for outing under the current framework demonstrates that Anglo-American legal conceptions of privacy are theoretically infirm. Outing provides a valuable vehicle through which to explore the double-binds of both schemes and their reinforcement of each other. Part IV proposes internal legal reform to better accommodate the competing interests of freedom of speech and privacy, and suggests that the most potent and appropriate response to outing lies less in superficial reconstruction of tort doctrines than in drastic societal and legal reconceptualization of sexual orientation and its dynamics.

## II. THE SOCIO-LEGAL CONUNDRUM: A PARADOX OF CONFLICTING RIGHTS

### A. *Constructing the Tension*

In a society with structures and inhabitants marked by pervasively heterosexist ideology,<sup>8</sup> same-sex orientation is either invisible and ignored or acknowledged and condemned by every major institution: religion, law, psychiatry and psychology, education, and mass media.<sup>9</sup> When recognized, complex identities of gay men and lesbians are reduced to caricatures of deviant, amoral, disease-ridden, and often murderous aberrations. Psycho-

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8 On heterosexism generally, see, e.g., PATRICIA BEATTIE JUNG & RALPH F. SMITH, *HETEROSEXISM: AN ETHICAL CHALLENGE* (1993); RICHARD D. MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW* (1988).

The presumption of heterosexuality is most apparent in the rare instances where it is reversed. A director of an AIDS service organization where approximately 80% of the employees are gay observes that disclosure is no longer an issue. "When someone straight joins the organization . . . they have to come out, or everyone will just assume they're gay." JAMES D. WOODS & JAY H. LUCAS, *THE CORPORATE CLOSET* 57 (1993). The situation seems ludicrous to heterosexuals. This calls to mind my experience during a discussion on outing at Yale Law School. Yale Law School Symposium, *Outing & The Debate over Forcing Lesbian and Gay Officials Out of the Closet* (Dec. 4, 1991) [hereinafter *Yale Symposium*]. A panelist opened by asking "How many of you are out to your grandparents?" I felt offended by the presumption that to be a member of the audience, i.e., concerned about the issue, one had to be gay. Yet the exact reverse assumption assaults gay men and lesbians daily, in ways far more offensive than that which I experienced.

9. See Marshal A. Phillips, *Perspectives on Homosexuality: Hypocritical Rule of Invisibility Reigns*, L.A. TIMES, Aug. 7, 1991, at B7 (commenting on the failure of the mainstream media to cover the sexual orientation of a Pentagon official).

logical heterosexism (and worse, overt homophobia) ensures that the private individual will pick up where the state leaves off to invalidate or eradicate "the homosexual."

The history of gay and lesbian communities parallels this invisible/invalid model. In the early 1950s, discrete gay and lesbian groups, such as the Mattachine Foundation and the Daughters of Bilitis, were in nascent stages.<sup>10</sup> Society was largely unaware that such groups existed and was certainly unconcerned with their necessity.<sup>11</sup> The societies themselves emphasized secrecy and discretion lest their existence or membership be revealed.<sup>12</sup> Acceding to mainstream virtues of traditional family life, these early organizations accommodated social norms to gain tolerance, understanding, education, and assimilation in a world largely blind to their concerns.<sup>13</sup> In short, they were invisible and sought invisibility in return. When acknowledged, they were vilified and sought forgiveness in return.

The Stonewall riots of the late 1960s signified radical, liberalizing change in the doctrine and action of the gay and lesbian movement.<sup>14</sup> Disgusted with society's treatment of gay men and lesbians and the self-hatred that it inculcated, activists embraced gay pride and its public revelation to "transform[] private language into public proclamation. This was consistent with their general strategy of openness and defiance, summed up in the slogan, 'Out of the closets and into the streets!'"<sup>15</sup> As one activist noted, "[W]e'll never have the freedom and civil rights we deserve as human beings unless we stop hiding in closets and in the shelter

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10. JOHN D'EMILIO, MAKING TROUBLE 17-56 (1992); JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 57-91 (1983) [hereinafter D'EMILIO, SEXUAL POLITICS].

11. D'EMILIO, SEXUAL POLITICS, *supra* note 10, at 62.

12. *Id.* at 67.

13. *See, e.g., id.* at 81; LILLIAN FADERMAN, ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA 149 (1991). As D'Emilio observes, "the Mattachine Foundation was originally more radical, and accommodation to social norms replaced the affirmation of a distinctive gay identity." D'EMILIO, SEXUAL POLITICS, *supra* note 10, at 81; A CERTAIN TERROR: HETEROSEXISM, MILITARISM, VIOLENCE AND CHANGE 190 (Richard Cleaver & Patricia Myers eds., 1993) (quoting Barbara Gittings, editor of *The Ladder* and founder of Daughters of Bilitis, New York).

14. *See generally* MARGARET CRUIKSHANK, THE GAY AND LESBIAN LIBERATION MOVEMENT (1992). "Although revolutionary movements do not usually have a single spark, most gays believe that June 27, 1969 is the date marking their passage from homosexual to gay. When police raided a Greenwich village bar, the Stonewall Inn, bar patrons responded with a riot lasting through the weekend. Stonewall unleashed the fury of those no longer willing to be victims. Soon afterwards, New York City lesbians and gay men founded the Gay Liberation Front, and the idea quickly spread to other cities. 'Gay Power' was born." *Id.* at 3.

15. Richard Cleaver, *Sexual Dissidents and the National Security State, 1942-1992*, in A CERTAIN TERROR, *supra* note 13, at 194.

of anonymity.”<sup>16</sup> Despite the promise of its youth, a quarter of a century finds Stonewall and the activism that it inspired ineffective against the passive denial and overt persecution to which gay men and lesbians remain subject.

In the mid-1980s there was a growing feeling that the institutions that had arisen in the early 1980s to deal with the AIDS crisis “had become stultified social agencies that had no political verve anymore.”<sup>17</sup> Activists initiated highly charged political demonstrations, calling themselves ACT UP.

Out of ACT UP’s freshness in frankly raising issues about money and politics and power, people who were involved with ACT UP said everything that is wrong with Gay Men’s Health Crisis is wrong with the rest of the national lesbian and gay organizations, so why don’t we start thinking in terms of making demonstrations to replace them?

Out of that group grew an even more aggressive political organization called Queer Nation.<sup>18</sup>

Given this historical and societal milieu, the deconstructive nature of outing suggests that it is a necessary, though drastic, strategy for change. Outing a cultural hero or even the woman next door breaks the silence of oppressive ideology. It forces recognition and perhaps reconsideration of alternate sexual identities or expressions. This revelation reconstructs a homosexuality less dependent on myth and more on truth.<sup>19</sup> “As long as the overwhelming majority of the gay community remains hidden to family, friends, and co-workers, we will continue to be dismissed, omitted, and brutalized by others and ourselves. If I were a closeted public figure, I would hope to be courageous enough to get ahead of this issue rather than waiting for my name to appear in the tabloids. The personal price we pay for hiding is enormous.”<sup>20</sup>

Outing is a logical extension of the premise of Stonewall: that progress requires visibility and collective action. The difference is that while the

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16 Lacey Fosburgh, *Thousands of Homosexuals Hold a Protest Rally in Central Park*, N.Y. TIMES, June 29, 1970, at A1, A20, cited in TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 170 (1981)

17. Cleaver, *supra* note 15, at 7.

18. *Id.*

19 See, e.g., Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

20. Phillips, *supra* note 9, at B7 (quoting Lynn Shepodd, former executive director of National Coming Out Day).

former strategy encouraged self-revelation, the latter commands it. Proponents offer four justifications:

1. Heighten sensitivity to gay concerns, especially Acquired Immune Deficiency Syndrome (AIDS);
2. Increase public awareness of gay rights;
3. Provide positive gay role models;<sup>21</sup> and
4. Expose the hypocrisy of those in power positions.<sup>22</sup>

As even critics of outing admit its potential benefit in restructuring beliefs about homosexuality,<sup>23</sup> it is enticing to concede that outing is vital to gay and lesbian liberation. But opposition to outing commands broad-based support through equally powerful arguments.<sup>24</sup> Opponents condemn this encroachment on privacy, arguing that one's sexual orientation should never be unwillingly bared in a public forum irrespective of the ends

21. This justification supports the implicitly related attempt to instill acceptance of homosexuality as natural. Michelangelo Signorile, features editor of the now defunct *OutWeek*, has said "[w]e're saying homosexuality is natural; it's normal . . . [I]s [homosexuality] so horrible [that] we should hide it? How can we ever convince the public that homosexuality is normal unless we show the public who is gay?" "Outing: Comes Out of the Closet and Into the Press, *PLAYBOY*, Sept. 1990, at 20. "By virtue of their individual and collective cowardice, those gays who remain 'in the closet' validate societal, personal and institutional homophobia." *Letter to the Editor*, *S.F. CHRON.*, Aug. 22, 1991, at A30.

22. Hypocrisy is a form of dishonesty. Some commentators refer to outing as "enforced honesty." LARRY GROSS, *CONTESTED CLOSETS* 29 (1993) (quoting Taylor Branch, *Closets of Power*, *HARPERS*, Oct. 1982, at 46-47 (suggesting that the only reason anyone protects this information is to actively lie)).

23. See Beth Ann Krier, *Some Say Practice of 'Outing' May Have Benefitted Gay Rights*, *L.A. TIMES*, Dec. 31, 1990, at E2. Gross states, "AIDS thus taught two lessons. First, a disease that strikes gay people . . . will not receive adequate attention. Second, people will begin to pay attention when famous and important people are involved—even if they are revealed to be gay—or when 'innocent' victims untainted by minority stigma are featured." GROSS, *supra* note 22, at 34.

24. The lesbian and gay movement itself is divided over whether sexual orientation is properly a private or public concern and whether an individual's status affects this determination. For example, John D'Emilio published an article urging professors to "come out" to their students, but the piece itself states that "the decision to do so must, of course, be an individual one, made after careful thought and with a strong support network to count on." John D'Emilio, *Homosexual Professors Owe it to their Students to Come Out*, *CHRON. HIGHER EDUC.*, Oct. 28, 1987, at A52. Some activists view "privileged closet gays" as traitors, asserting that "those who participate in the gay community and then vote against it are guilty of hypocrisy. . . . Their duplicitous, devious, harmful behavior ought to be exposed." GROSS, *supra* note 22, at 37-38 (quoting Vic Basile, then head of the Human Rights Campaign Fund (citation omitted)). Others assert that "our movement should [not] be about the business of dragging other people out of the closet." *Id.* at 37 (quoting Urvashi Vaid, Executive Director of the National Gay and Lesbian Task Force, 1988 (citation omitted)). See generally Scott Martelle, *Gays Pay Price for Openness, Poll Shows*, *DET. NEWS*, Apr. 25, 1993, at 1A (citing surveys that found opposition to outing among 60% of lesbians or gay men and 88% of heterosexual men or women; figure decreased to 10% opposition when "closeted" person actively worked against lesbian or gay issues).

sought.<sup>25</sup>

Critics assert that less indelibly cruel methods can promote the goals of gay activism and suggest that glib assertions of "exposure of hypocrisy" mask the true motive behind outing: the enforcement of political control.<sup>26</sup> "[T]o force anybody's homosexuality into public is rather like the 'tool of terror' that anti-homosexuals used throughout history to blackmail gays."<sup>27</sup> A common response to the claim that outing provides role models questions the character of one who must be forced to reveal a same-sex orientation: "No one can force a coward to be a hero."<sup>28</sup>

Confronting the socio-legal context of outing clarifies the urgency of the issue. Gay men and lesbians face constant tension with all facets of existence: community, law, and self. They suffer friction with society at large by living in a predominantly heterosexual world, interacting daily with heterosexual employers, co-workers, friends and family.<sup>29</sup> "[T]he homosexual exists as a curiously split creature, one relegated to the privacy of a closet and yet required to traverse public spaces in order to live in the world; a creature not quite fully a citizen of the polis."<sup>30</sup> This enforced duplicity taxes those who have not chosen to reveal same-sex orientation. They must play different roles depending on the situation,<sup>31</sup> lead dual lives,<sup>32</sup> and constantly fear discovery.<sup>33</sup> "You are encouraged . . . to be

25. GROSS, *supra* note 22, at 49-50 (citing Nancy Walker, *Yanking Them Out*, GAY COMMUNITY NEWS, May 14, 1983, at 5). Walker stated:

I understand the yearning for an honor roll composed of gays who were, or are, famous. It makes us feel better and maybe is a selling point we could use in our campaign to win gay rights. But if in the course of our battle for freedom we injure our fellows we disregard the very cause we claim to espouse. I have put a great deal of my life into the fight for justice for gay people, but if that is not also a fight for justice and kindness to be meted out by gays, what is the battle for?

*Id.*

26. Andrew Sullivan, *Sleeping with the Authoritarians*, OTTAWA CITIZEN, Sept. 15, 1991, at B3.

27. *Out and About*, *supra* note 1, at 21 (quoting Richard Goldstein of the Village Voice).

28. *Id.*

29. Heterosexism is so dominant that it is rarely recognized. Commenting on his first day of work where his name was questioned as feminine, his marital status was explored, and homophobic remarks were made, one author reflected "it didn't occur to me, not even for a moment, that my initiation into the working world had been hostile or demeaning." WOODS, *supra* note 8, at xiv.

30. Debra D. Burrington, *Constructing the Outlaw, Outing the Law, and Throwing Out the Law*, 1994 UTAH L. REV. 255, 264.

31. As one man poignantly relates, "I can never be myself in interviews, which means that an employer never gets to know me. That chemistry that they're always looking for is never going to be there, unless it's artificial. So the person they hire is not me, it's someone I've made up." WOODS, *supra* note 8, at 4.

32. Research reveals that impression management is extensively developed among gay males and lesbians. See, e.g., VIRGINIA R. BROOKS, *MINORITY STRESS AND LESBIAN WOMEN* (1981); HOWARD

open, to socialize with people, to be friendly. But when you get to be too honest and too open and start talking about your sexual orientation, people get very uncomfortable . . . [Y]ou're . . . stuck in a bind as to how much to reveal about yourself;<sup>33</sup> “[y]ou’re always walking a tightrope between the two worlds . . . hoping they won’t collide[.]”<sup>35</sup>

Bias against gay men and lesbians is reified through violence,<sup>36</sup> the

BROWN, *FAMILIAR FACES, HIDDEN LIVES: THE STORY OF HOMOSEXUAL MEN IN AMERICA TODAY* (1976); JOSEPH HARRY & WILLIAM B. DEVAL, *THE SOCIAL ORGANIZATION OF GAY MALES 15* (1978); ALICE E. MOSES, *IDENTITY MANAGEMENT IN LESBIAN WOMEN* (1978). On impression management generally, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, (1959); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); ERVING GOFFMAN, *STRATEGIC INTERACTION*, (1969). Woods describes the management techniques of gay men:

By necessity gay men become adept at thinking about self-disclosure and learn, sometimes at great cost, that different sexual identities bring different social consequences. They become self-conscious. They learn to control and monitor outward appearances, to distort them when necessary. They learn to dodge. For many the result is a calculating, deliberate way of approaching social encounters. One can say . . . that they *manage* their sexual identities at work.

WOODS, *supra* note 8, at 28 (discussing identity management strategies among gay males such as: (1) counterfeiting, or actively claiming heterosexual identity; (2) avoidance, or withdrawal, vagueness, and privacy; and (3) integrating, or identifying as homosexual but minimizing its relevance and/or difference).

33. These fears are not unfounded. For example, a 1992 survey conducted in Philadelphia revealed that 30% percent of gay men and 24% of lesbian women reported having experienced employment discrimination on the basis of orientation. WOODS, *supra* note 8, at 8, citing Larry Gross & Steven K. Aurand, *Discrimination and Violence Against Lesbian Women and Gay Men in Philadelphia and the Commonwealth of Pennsylvania: A Study by the Philadelphia Lesbian and Gay Task Force* (Philadelphia Lesbian and Gay Task Force, Philadelphia, PA), 1992. The same survey showed that 76% of gay men and 81% of lesbians remained closeted at work and that 78% of the men and 87% of the women feared job discrimination if their sexual orientation were known. *Id.*

34. A recent article on stress in the legal profession observes that “[h]omophobia is as deep-seated in the legal profession as it is in the community at large,” forcing lesbians and gay men into the discussed double bind. Judith L. Maute, *Balanced Lives in a Stressful Profession: An Impossible Dream?* 21 CAP. U. L. REV. 797, 810 (citing David Margolis, *At the Bar: When a California Legal Magazine portrays Gay Lawyers, the Response is X-rated*, N.Y. TIMES, Oct. 9, 1992, at B10; and quoting Jane Goldman, *Coming Out Strong*, CAL. LAW., Sept. 1992, at 31, 34, 86). For example, a Cincinnati attorney filed suit alleging that defendant law firm fired him because he was gay and because of his pro bono work supporting retention of a city Human Rights Ordinance protecting gay men and lesbians. *Greenwood v. Taft*, 1995 WL 540221 (Ohio Ct. App. Sept. 13, 1995). Although the court ruled against plaintiff on his wrongful termination claim, his action for invasion of privacy was preserved on appeal. *Id.*

35. WOODS, *supra* note 8, at 111.

36. The stories are countless and real. On October 30, 1994, a car mowed down a gay couple holding hands near the Castro District in San Francisco. The driver pinned one victim to a wall with his car and shot him in the chest. *Gays Assaulted in San Francisco*, BOSTON GLOBE, Nov. 1, 1994, at 15. In August, 1993, a U.S. Marine smashed a flower pot and concrete block over the head of a Japanese man three times, killing him, after the former allegedly made a sexual advance. *Gay Issue Raised at Marine's Murder Trial*, L.A. TIMES, Aug. 11, 1993, at A10. In Fayetteville, North Carolina,



"logical, albeit extreme, extension of the heterosexism that pervades American society."<sup>37</sup> This ever-present brutality<sup>38</sup> has abated little since 1986 when a United States House of Representatives subcommittee convened a public hearing to address the rampant violence faced by gay and lesbian citizens.<sup>39</sup> Over half of socially active lesbians and gay men experience violence;<sup>40</sup> the rate of anti-gay and lesbian violence is

a soldier entered a restaurant on August 6, 1993, shouting "I'll show you about gays in the military" before opening fire on the patrons. Four died, seven others were wounded. *Army Sergeant on Rampage Kills 4, Hurts 7*, L.A. TIMES, Aug. 8, 1993, at A20. In Humboldt, Nebraska, local authorities publicized that a community member known as a man had been born female. Within days, the woman was stripped, kidnapped, and sexually assaulted by two local men who were not arrested. A week later, they murdered her. Roger Worthington, *Deadly Deception: Teena Brandon's Double Life May Have Led to a Triple Murder*, CHI. TRIB., Jan. 17, 1994, at C1. In Laguna Beach, California, three teenagers attacked a 55-year-old man so viciously that hospital personnel could not identify his race. One perpetrator admitted to having set out to "beat up some fags." Dianne Klein, *When We Bleed from Hatred's Wounds*, L.A. TIMES, Jan. 24, 1993, at E3. In Woodhaven, Michigan, a man hiding in a lesbian woman's car punched her and raped her twice; during the two-hour attack, he intoned "This should teach you not to be a queer . . . It's wrong . . . This is what you need." NATIONAL GAY & LESBIAN TASK FORCE POLICY INST., ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION, & DEFAMATION IN 1993 23 (1994) (citing HERITAGE NEWSPAPER (Woodhaven, Mich.), Dec. 1, 1993)) [hereinafter ANTI-GAY/LESBIAN VIOLENCE].

37 Gregory M. Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, in A CERTAIN TERROR, *supra* note 16, at 221.

38 Many states imposed the death penalty for sodomy in the early nineteenth century. GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 8, 14-20 (1991).

39 *Committee on the Judiciary, Anti-gay violence: Hearing before the Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives* (Serial No. 132) Washington, D.C.: Government Printing Office; *Committee on the Judiciary, Anti-gay Violence: Hearing before the Subcommittee on Criminal Justice of the Committee on the Judiciary, Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary on S. 702, S. 797 and S. 2000* (Serial No. J-100-79) Wash., D.C. Government Printing Office (1989).

Data reported under the Hate Crimes Statistics Act reveals that approximately 10% of the hate crimes reported in 1991 and 1992 were motivated by sexual orientation. U.S. DEP'T OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993 (Kathleen Maguire & Ann Pastore eds., 1994). 28 U.S.C. § 534 (Supp. IV. 1992) mandates gathering statistics on hate crimes. Of the 34 states having enacted such legislation as of 1993, 22 include sexual orientation as a basis for data collection or enhanced penalties: *See, e.g.*, CONN. GEN. STAT. § 53a-181b(a) (West 1990 & Supp. 1994); FLA. STAT. ch. 877.19 (Harrison 1994); IOWA CODE § 729A.1-A.2 (West 1993); MASS. GEN. L. ch. 22, § 16 (West 1990 & Supp. 1994); MINN. STAT. § 626.5531 (1983 & Supp. 1995); N.H. REV. STAT. ANN. § 651:6 (1994 Supp.); N.J. REV. STAT. §§ 2A:53A-21(a), 2C:12-1(E), 2C:33-4(d), 2C:44-3(E) (1986)); OR. REV. STAT. § 181.550 (1991); R.I. GEN. LAWS § 42-28-46 (1956 & Supp. 1994); VT. STAT. ANN. tit. 13, § 1455 (1974 & Supp. 1994).

40. *See* COMSTOCK, *supra* note 38, at 31-37. *See generally* Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* (J. Gonsiorek & J. Weingrick eds., 1991). In 1993, 1,813 anti-gay incidents were documented in 6 cities alone. ANTI-GAY/LESBIAN VIOLENCE, *supra* note 36, at 7.

disproportionately (possibly 400%)<sup>41</sup> higher than the rate of criminal violence experienced by the general population.<sup>42</sup> Further, gay or lesbian homicide victims are “more apt to be stabbed a dozen or more times, mutilated, *and* strangled, [and] in a number of instances stabbed or mutilated after being fatally shot.”<sup>43</sup> Apparently, the violence is often executed by those bearing a duty to protect: the police.<sup>44</sup> AIDS and HIV compound the problem as “gay men in particular have been victims of random violent acts that are indicative of a society that is not reacting rationally to the epidemic.”<sup>45</sup> “Violence against individual gay men and lesbians—on the streets, in the workplace, at home—is a structural feature of life in American society.”<sup>46</sup> It is doubtful that will soon change.<sup>47</sup>

Some argue that the law, which both shapes and reflects society, aggravates the tension by constructing the gay or lesbian persona<sup>48</sup> and condemning it to invisible, criminal, outlaw, or “other” status.<sup>49</sup> Further,

41. Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 166 (1992) (citing PETER FINN & TAYLOR MCNEIL, RESEARCH APPLICATION REVIEW: THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME (1987)).

42. COMSTOCK, *supra* note 38, at 55. The numbers are probably more devastating given problems with under-reporting or official refusal to characterize a crime as motivated by sexual orientation. *See id.*, app. C at 158 (*The Police as Perpetrators*); *see also* ANTI-GAY/LESBIAN VIOLENCE, *supra* note 36.

43. COMSTOCK, *supra* note 38, at 47 (citing Brian Miller & Laud Humphreys, *Lifestyles & Violence: Homosexual Victims of Assault and Murder*, 3 QUALITATIVE SOC'Y 169, 179-80 (1980) (statistical analysis of homicides of homosexual victims between 1973 and 1977 conducted by Miller and Humphreys)).

44. *Id.* at 12-24, 152-62. *See also* Donna Minkowitz, *Murder will Out, But it's Still Open Season on Gays*, in A CERTAIN TERROR, *supra* note 13, at 234.

45. PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, FINAL REPORT 140 (June 1988).

46. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464 (1992).

47. *See* David A. Avila, *Hate Crimes Rose 25% in 1992, Study Finds*, L.A. TIMES, Jan. 23, 1993, at B1 (citing study conducted by Hate Crime Network in Orange County revealing that homosexual persons are the third group most likely to be victimized).

48. *See, e.g.*, RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

49. One commentator proposes that excluding “sexual orientation” from hate crime statutes not only casts homosexuals as criminal but also “invisible”—identifiable, yet not important enough to deserve protection. Dan Danielsen, *Law and Violence*, 1994 UTAH L. REV. 247, 249-50. Similarly, Professor Sylvia Law notes that *Bowers v. Hardwick*, 478 U.S. 186 (1986), reflects and reinforces negative attitudes toward gay men and lesbians, and that ostracism is perhaps more injurious than open contempt and hostility. *Law, supra* note 19, at 192-94.

Characterizing gay men and lesbian women as a single, identifiable group troubles some of its “members” in casting them as one-dimensional, solely defined by orientation. Ironically, convincing a court or legislature to accord equal protection based on sexual orientation reinforces the myth, causing gained ground on the legal front to be offset by reinforced stereotypes on the other. *See* Danielsen,

legal positions taken with respect to homosexuality may not only legitimize<sup>50</sup> but latently invite individual violence against gay men and lesbians.<sup>51</sup> Professor Kendall Thomas argues that “a close examination of the political terror directed against gay men and lesbians suggests that the relationship between homosexual sodomy laws and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem.”<sup>52</sup> Whether the law’s role in physical violence is active or passive, it doubly stigmatizes that “group” and its “members” by denying rights and protection with one hand and bestowing onus with the other. “The legal penalties imposed upon homosexual people are deep and cruel, and they enforce a pervasive social censure.”<sup>53</sup>

Although homosexual couples invest in emotional ties identical to those

*supra* See generally Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992).

50. One way law passively permits violence against lesbians and gay men is through the comparatively light sentences imposed against its perpetrators. See generally COMSTOCK, *supra* note 38, at 72-73, tbl. 3.15; 80-81, tbl. 3.16; 84-87, tbls. 3.17-3.18. For example, in 1972, six members of the Gay Activist Alliance distributed leaflets critical of media oppression at a press banquet. As they were leaving, the president of the Uniformed Fireman’s Association led an assault against them. Despite uncontested testimony of four New York City officials, only one person was charged. He was later acquitted. *Id.* at 23-24. Donna Minkowitz related several other instances of gay-bashers receiving light sentences. Minkowitz, *supra* note 44, at 368. For example, in 1983, two college students who tortured a gay man with a knife to his testicles were sentenced to 400 hours of community service. In 1986, after purportedly being propositioned, a defendant who beat the victim until blood sprayed from his face and then returned with a sledgehammer to finish the job was acquitted. In 1988, after the defendant was charged with murdering a gay man, the judge asked “that’s a crime now, to beat up a homosexual?” *Id.*

51. See, e.g., Thomas, *supra* note 46, at 1461 (“[G]overnment not only passively permits, but actively protects, acts of violence directed toward individuals who are, or are taken to be, homosexual”); see also Terry Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209 (arguing that sodomy statutes delegitimize homosexuals as people, legitimize homophobic violence, and cast gay men and lesbians as outlaws whose “crime” often escapes retribution).

Gregory Herek, a social scientist at the University of California at Davis, has stated that “within our society, [gay bashers] can get approval by bashing people who are disliked. In particular, lesbians and gay men[.]” Leslie Earnest, *Gays Beginning to Fight Back*, L.A. TIMES, Jan. 17, 1993, at B2. As Rebecca Chadwick, co-chair of the Elections Committee of Orange County added, “If you are told that a group of people is evil, that they are out to assault your children, that what they do is morally wrong, then it’s okay to beat this person senseless because they’re queer.” *Id.* Not surprisingly, a number of studies report that violence against gay men and lesbians increases when anti-discrimination legislation is defeated or after criminal sodomy laws are upheld. See generally HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (Gregory M. Herek & Kevin T. Berrill eds., 1992).

52. Thomas, *supra* note 46, at 1467.

53. Law, *supra* note 19, at 192.

formed by heterosexual unions, they enjoy none of the benefits of that union. Because same-sex marriages are not recognized,<sup>54</sup> rights allocated through spousal or family status are impossible for same-sex partners to attain. Same-sex partners cannot inherit under intestacy laws, are denied a forced share in decedent's estates,<sup>55</sup> and are often challenged as improper beneficiaries under a will.<sup>56</sup> They are excluded from insurance awards, social security benefits, public pensions, worker's compensation, income tax benefits, and estate tax benefits.<sup>57</sup> Same-sex partners have no right to sue for wrongful death of a spouse,<sup>58</sup> no right to receive compensation given to families of crime victims,<sup>59</sup> no right to be appointed as the conservator

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54. See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. 1974). But see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See generally THOMAS STODDARD & PAULA ETTLEBRICK, *LEGALIZING LESBIAN AND GAY MARRIAGES: A CONVERSATION FOR MANY VOICES* (1989); Lisa R. Zimmer, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681 (1990).

Irrespective of whether state-sanctioned same-sex marriage is necessary or desired, cases prohibiting it often turn on a semantic structural definition of marriage as an opposite-sex union. In typical language, one court intones that "[it] is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense" to reject the claim that the right to marry whomever one chooses, irrespective of gender, is rooted in the tradition of our society and the conscience of our people. *Baker*, 191 N.W.2d at 186 & n.1; see also *Hallahan*, 501 S.W.2d at 589; *Dean*, 653 A.2d at 658. This premise is undercut by recent scholarship asserting that same-sex unions, whether termed "marital" or not, were recognized officially throughout history and sanctioned by the Catholic Church. See JOHN BOSWELL, *SAME SEX MARRIAGES IN PREMODERN EUROPE* (1994); JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY* (1980); PAUL D. HARDMAN, *HOMOAFFECTIONALISM: MALE BONDING FROM GILGAMESH TO THE PRESENT* (1993).

55. Except for the spouse, only blood relatives are considered distributees of a decedent's intestate estate. Attempts by same-sex partners to attain rights based on "quasi-marital status" will fail unless the surviving partner can prove economic consideration to the partnership apart from sexual activity. See, e.g., *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Cal. Ct. App. 1988); *Jones v. Daly*, 176 Cal. Rptr. 130 (Cal. Ct. App. 1981); *Crooke v. Gilden*, 414 S.E.2d 645 (Ga. 1992).

56. See, e.g., Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981).

57. See, e.g., Law, *supra* note 19, at 192, n.18 (1988) (citing LENORE WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW* 367-69 (1981)); Zimmer, *supra* note 54.

58. Because an action for the wrongful death of a spouse by its terms can only be brought by a spouse, same-sex partners are excluded. See *supra* note 54 and accompanying text.

59. See, e.g., *Elden v. Sheldon*, 758 P.2d 582, 592 n.2 (Cal. 1988) (Broussard, J., dissenting) ("Though the majority has not directly addressed the question, presumably their position that marriage is the *sine qua non* to recovery would preclude any gay or lesbian plaintiff from stating a *Dillon* cause of action [for negligent infliction of emotional distress] based on the injury of his or her partner.") *Accord* *Coon v. Joseph*, 237 Cal. Rptr. 873 (Cal. Ct. App. 1987) (preventing recovery to same-sex couples does not advance the State's interest, but instead highlights the resulting injustice).

or guardian of an invalid partner,<sup>60</sup> no right to make health-care decisions for a family member,<sup>61</sup> and no right to hospital or prison visitation rights.<sup>62</sup> Additionally, married couples enjoy non-governmental benefits denied to same-sex partners, including employee family health care, group insurance, discounted "family rates" in assorted organizations, and the ability to hold real estate by the entirety.<sup>63</sup>

Gay men and lesbians endure opposition in attempting to adopt children<sup>64</sup> or even visit<sup>65</sup> or retain custody of their own children after

60. See, e.g., KAREN THOMPSON & JULIE ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? (1988) (describing author Thompson's eight-year battle to be appointed as her life-partner's legal guardian); Dena L. Narbaitz, *Minimizing the Trauma: A Need for Change in State Conservatorship Laws as Applied to Same-Sex Life Partners*, 44 SYRACUSE L. REV. 803 (1993); Gina M. Torrielli, *Protecting the Nontraditional Couple in Times of Medical Crisis*, 12 HARV. WOMEN'S L.J. 220, 222 (1989).

61. Because only family members have a right to make health care decisions on behalf of a family member, same-sex partners do not share such rights. See *supra* note 54 and accompanying text.

62. See generally John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991); Torrielli, *supra* note 60, at 223-25 (citing, *inter alia*, GRAHAM DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 51-53 (1979)); Ruth Colker, *A Bisexual Jurisprudence*, 3 LAW & SEXUALITY 127 (1993) (book review of BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT (Loraine Hutchins & Lani Kannhmanu eds., 1991) and CLOSER TO HOME: BISEXUALITY & FEMINISM (Elizabeth R. Weise ed., 1992)).

63. Rhonda R. Rivera, *supra* note 48, at 874.

64. For example, Florida and New Hampshire have statutes prohibiting gay men or lesbian women from adopting children. FLA. STAT. ANN. § 63.042(3) (West 1995) ("No person eligible to adopt under this statute may adopt if that person is a homosexual"); N.H. REV. STAT. ANN. § 170-B:4 (1991) ("[A]ny individual not a minor and not a homosexual may adopt"); N.H. REV. STAT. ANN. § 161:2IV (1991) ("[T]he department shall not grant a license to any foster family home in which one or more of the adults is homosexual"). For case law applying the New Hampshire statute, see *Stuart v. State*, 597 A.2d 1076 (N.H. 1991). In response to published reports of the placement of two children with two gay men Massachusetts' policy essentially prohibits placement of foster children with homosexuals. *Homosexual Foster Parents Debated*, N.Y. TIMES, May 19, 1985, at A24.

Oklahoma, South Carolina, and Washington are all considering bills to prohibit homosexual, bisexual or lesbian persons from adopting or providing foster care to a child. Graves, H.R.J. 1021, 44th Leg., 1st Reg. Sess. 1993 Oklahoma Laws (introduced to House Committee on Rules Feb. 2, 1993); Fair, 1993 S.C.H.B. 3649, 1993-94 (passed house, to senate general committee Jan. 19, 1994); Stevens, 1993 Washington H.B. 2398 53d leg. 1994 reg. session (introduced to House Committee on the Judiciary Jan. 14, 1994).

65. In *Chicoine v. Chicoine*, 479 N.W.2d 891, 894 (S.D. 1992), a lesbian mother's already restricted visitation rights prohibiting her from entertaining unrelated women or homosexual men when her children were visiting were deemed too liberal. The court ordered a detailed study of the situation and more strictly enforced limits on visitation. *Id.* See also *Pleasant v. Pleasant*, 628 N.E.2d 633 (Ill. App. Ct. 1993) (overturning trial court's order for supervision of visits between lesbian mother and children by heterosexual employees of the Illinois Department of Children and Family Services, elimination of overnight stays, and requirement that the lesbian mother enroll in psychotherapy).

divorce.<sup>66</sup> The law allows gay or lesbian teachers, military personnel, scout troop leaders,<sup>67</sup> or others in a myriad of professions to be fired or never hired.<sup>68</sup> Gay men and lesbians are denied the right to immigrate or seek asylum in the United States based on sexual orientation.<sup>69</sup> And perhaps most viciously, almost half of the states criminalize conduct

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66. See, e.g., *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (considering wife's open homosexuality in awarding custody); *J.L.P.H. v. D.J.P.*, 643 S.W.2d 865 (Mo. Ct. App. 1982) (prohibiting overnight visits); *Spence v. Durham*, 198 S.E.2d 537, 541 (N.C. 1973) (stating that lesbian mother's behavior was "beyond the pale of the most permissive society"); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982) (rescinding lesbian mother's custody after she acknowledged her open, homosexual relationship); *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988); *Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985) (refusing custody to parent in active homosexual relationship because it "flies in the face of . . . society's mores."). But see *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. App. 1994) (overturning trial court decision removing custody from lesbian biological parent). See generally Comment, *Burdens of Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497 (1984).

The cautious hope instilled by the *Bottoms* decision, 457 S.E.2d 102, that law is moving toward according lesbian or gay parents rights coordinate to those enjoyed by heterosexual parents, must be tempered. The case was overturned in 1995, when the Supreme Court of Virginia intoned that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation' attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'" *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).

67. See, e.g., *Curran v. Mount Diablo Council of Boy Scouts of America*, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994) (holding that forcing Boy Scout Council to accept homosexual scout master violates First Amendment rights to expressive association).

68. See *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (declaring that homosexuals have no enhanced constitutional protection from discrimination in hiring decisions); *Dronenberg v. Zech*, 741 F.2d 1388 (D.C. Cir. 1984) (upholding private same-sex activity as basis for discharge); *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (holding announced homosexual activities justified government's denial of employment); *Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340 (Wash. 1977), cert. denied, 434 U.S. 870 (1987).

Apparently this is often viewed as a positive. One state legislator, debating the merits of including sexual orientation in the state's Hate Crimes Bill, remarked:

The next step, and mark my words it will come, the next step will be to legalize sodomy in Utah, and the next step will be to prohibit any kind of distinction based on homosexuality. Churches will not be able to differentiate on the basis of sexual orientation in their hiring, schools will not be able to differentiate on the basis of sexual orientation in their hiring, and landlords will not be able to differentiate in sexual orientation in who they allow to live on their property.

Floor Debate, Statement of Rep. Merrill Nelson, 49th Utah Leg., Gen. Sess. (Feb. 11, 1992) (House recording no. 1, side A), cited in Kogan, *supra* note 51, at 223.

69. See, e.g., Brian J. McGoldrick, *United States Immigration Policy and Sexual Orientation: Is Asylum for Homosexuals a Possibility?*, 8 GEO. IMMIGR. L.J. 201 (1994) (noting the historical attempt to exclude homosexuals from immigrating to the United States and more recent denials of naturalization and/or political asylum on the basis of orientation). See also *In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983) (declaring candidate ineligible for naturalization due to his same-sex orientation).

through which many same-sex partners express sexuality and affirm love.<sup>70</sup> The denial of these rights is particularly egregious given their personal as opposed to merely economic dimensions. In particular, sodomy statutes reinforce self-doubt, solitude, and anxiety about remaining closet-bound lest one be branded a criminal. It appears that gay men and lesbian women are forced to peer out from this closet because the law has backed them into it.

Gay men and lesbians are "the enemy."<sup>71</sup> As our culture "oppresses,

70. The American Law Institute recommended that states adopt its Model Penal Code, which stated "no harm to the secular interests of the community is involved in typical sex practices in private between consenting adult partners." MODEL PENAL CODE § 213.2 note on status of section (Proposed Official Draft 1962). A poll conducted in June, showed that 48% of Americans believe that homosexual relations between consenting adults should be legal; 44% thought they should not; 8% were undecided. Larry Hugick, *Public Opinion Divided on Gay Rights*, GALLUP POLL MONTHLY, June 1992, at 6. Despite these views and the fact that half the states have repealed laws regulating private, adult, consensual sexual behavior, 25 jurisdictions still criminalize sodomy. In 16 jurisdictions, sodomy is a felony. See D.C. CODE ANN. § 22-3502 (1989 & Supp. 1994); GA. CODE ANN. § 16-6-2 (1992); IDAHO CODE § 18-6605 (1987); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. ANN. CODE ART. 27, §§ 553-554 (1992); MASS. ANN. LAWS ch. 272, § 34 (West 1990); MICH. STAT. ANN. § 750.158 (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MONT. CODE ANN. § 45-5-505 (1994); NEV. REV. STAT. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1994); OKLA. STAT. ANN. tit. 21, § 886 (West Supp. 1994); R.I. GEN. LAWS § 11-10-1 (1994); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); VA. CODE ANN. § 18.2-361 (Michie Supp. 1988). In the other nine jurisdictions, it qualifies as a misdemeanor. See ALA. CODE § 13A-6-65 (1994); ARIZ. REV. STAT. ANN. § 13-1411 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1987); CAL. PENAL CODE §§ 286, 288A (West 1988 & Supp. 1995) (applying to prison inmates); FLA. STAT. ANN. § 800.02 (West 1992 & Supp. 1995); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. § 510.100 (Baldwin 1995); MO. ANN. STAT. § 566.101 (Vernon 1979); TEX. PENAL CODE ANN. § 21.06 (West 1994) (ruled unconstitutional in *State v. Morales*, 826 S.W.2d 201 (Tex. Ct. App. 1992)), *rev'd*, No. D-2393, 1194 Tex. LEXIS 17 (Tex. Jan. 12, 1994); UTAH CODE ANN. § 76-5-403 (1995). Most of these statutes apply only to homosexual conduct. See, e.g., MASS. ANN. LAWS ch. 272, § 34 (West 1990).

71. Gay men and lesbians, along with witches, satanists, communists, and Jews, have borne society's characterization as the "enemy." Dr. Mel White, dean of the Cathedral of Hope and a former writer for the Revs. Jerry Falwell and Pat Robertson, comments on this phenomenon. Suggesting that homosexuality did not become a priority for the religious right until the fall of the Soviet Union, he asserts that "[t]hey needed a new enemy to keep their troops moving[.] You can almost take out the term 'Evil Empire' and stick in 'queer.'" David Jackson, *Anti-Gay Comments Spark Fast*, DALLAS MORNING NEWS, Mar. 3, 1995, at A19. See also DIDI HERMAN, RIGHTS OF PASSAGE: STRUGGLES FOR LESBIAN AND GAY LEGAL EQUALITY 90 (1994) (noting historical enemies, including "the association of Jewish men with effeminacy, or the articulation of communists with homosexuals and Jews during the McCarthy witch-hunts," and averring that much anti homosexual rhetoric is directly traceable to Christian anti semitism). In fact, society often conflates enemy groups to create a double mythical evil, such as the homosexual communist and the lesbian witch. GROSS, *supra* note 22, at 12. See generally SANDER L. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE AND MADNESS (1985); SANDER L. GILMAN, DISEASE AND REPRESENTATION: IMAGES OF ILLNESS FROM MADNESS TO AIDS (1988); Lee Edelman, *Tearrooms and Sympathy, or, the Epistemology of the Water Closet*, in NATIONALISMS AND SEXUALITIES (Andrew Parker et al. eds., 1992); John D'Emilio, *The Homosexual*

penalizes, or stigmatizes all forms of homosexuality,"<sup>72</sup> it is unsurprising that for many gay men or lesbians, the choice to openly assert sexual orientation in a heterosexual society is often not voluntarily made.<sup>73</sup> Law is codified or institutionalized policy, text and subtext. Eliminating legal impediments to, or at least persecution of, homosexuality would reduce the violence inflicted against a substantial proportion of our friends, family, and selves.<sup>74</sup>

Outing aggravates these ubiquitous tensions. Ironically, its potential victims now find no sanctuary from the pressures of a heterosexist society within communities that traditionally have championed broad privacy rights: to refuse mandatory AIDS testing and limit access to results;<sup>75</sup> to

*Menace: The Politics of Sexuality in Cold War America*, in *SEXUALITY IN HISTORY, PASSION AND POWER* (Kathy Peiss & Christina Simmons eds., 1989).

72. JOHN E. BOSWELL, *JEWS, BICYCLE RIDERS & GAY PEOPLE: THE DETERMINANTS OF SOCIAL CONSENSUS AND ITS IMPACT ON MINORITIES* 224 (1989).

73. For example, lesbians and gay men are attacked more frequently where they are most identifiable, for example in a gay neighborhood or bar or when they are with a lover. COMSTOCK, *supra* note 38, at 53.

74. An often-cited statistic asserts that 10% of male Americans were primarily homosexual and that many more have had at least one homosexual encounter. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 651 (1948). A more recent and comprehensive empirical study estimates that 25 million Americans are primarily homosexual. William Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* (William Paul et al. eds., 1982).

75. AIDS activists have voiced opposition to mandatory testing schemes, patient disclosure obligations, and practice restrictions as "Orwellian" invasions of privacy. Nina Bernstein, *Death by Silence: A Failure to Notify Costs Lives*, *NEWSDAY*, Jan. 15, 1993, at 7; see also Leonard H. Glantz et al., *Risky Business: Setting Public Health Policy for HIV-Infected Health Care Professionals*, 70 *MILBANK Q.* 43 (1992); Larry Gostin, *The HIV-Infected Health Care Professional: Public Policy, Discrimination and Patient Safety*, 18 *L. MED. & HEALTH CARE* 303 (1990). See generally Allyn L. Taylor & Barry R. Furrow, *AIDS and the Health Care Provider*, in *AIDS AND THE LAW J-1* (American Bar Association Division for Professional Education ed., 1994). AIDS patients and support groups are particularly reluctant to relinquish such information to such federal agencies as the Centers for Disease Control. As Michael Callen, co-founder of Gay Men With AIDS, asserts "the government shows up and asks whether you use drugs, asks whether you've been a prostitute, asks whether you're gay, asks whether you have sex with animals. We have absolutely no control over the dissemination of this sensitive information." Barton Gellman, *Tracing AIDS Cases Raises Privacy Issue*, *WASH. POST*, July 18, 1983, at O1. Virginia Apuzzo, executive director of the National Gay and Lesbian Task Force ("NGLTF"), states:

In this country we are illegal in half of the states, we can't serve in the armed forces, we can't raise our own kids in many states and we sure as hell can't teach other people's kids. When you tell us you're interested in our Social Security numbers when we know we're not permitted to have security clearances . . . we would be naive at best not to ask "what will you do with that information?"

*Id.* The concern is appreciable, particularly in light of the revelation that the FBI once kept files on alleged homosexual persons titled "Sex Degenerates and Sex Offenders," "Sex Perverts in Government



engage in consensual sexual activity;<sup>76</sup> to bear and rear children;<sup>77</sup> to marry;<sup>78</sup> to keep private things private.<sup>79</sup> With the advent of outing arises an iconoclastic faction determined to advance personal or (perceived) group goals through the sacrifice of individual privacy.<sup>80</sup> Richard Mohr observes:

[T]he presumption that every gay person will keep every other gay person's identity secret from the public is a convention and not merely a rule. Any field anthropologist examining the folkways of the gay community would easily notice that among all the variety in the gay community—just for starters divisions of life-styles between lesbians and gay men—The Secret is *the* social convention that most centrally defines the community.<sup>81</sup>

Service," and "Sex Offenders," and shared its findings with executive agencies and universities. *See FBI "Sex Deviate" Hunt Revealed Files Alleged Adlai Stevenson Was a Homosexual*, S.F. EXAMINER, Jan. 13, 1991, at A1.

While a 1991 Newsweek poll demonstrated that 94% of those questioned believed that HIV-infected physicians and dentists should be forced to disclose their health status to their patients, gay rights activists including the National Association of People with AIDS, the Stonewall Committee for Lesbian-Gay Rights, and the legislative director for the ACLU, decried as a threat to privacy a measure proposed in 1989 that would allow doctors and health care officials to exchange information about AIDS patients. *Public Opinion Supports Limiting Practice*, NEWSWEEK, July 1, 1991, at 48. They asserted that it would "cause people to back into the closet even further." David Gering, *AIDS Bill Rekindles Questions of Privacy*, SEATTLE TIMES, Mar. 31, 1989, at B2.

That attitude might be changing. Thomas Stoddard, former head of LAMBDA Legal Defense & Education Fund, has altered his thinking on the issue in light of the AIDS death toll, assuming that contact tracing is sensitive to the parties involved. *See* Bernstein *supra*, at 7.

76. *See, e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (denying gay-rights activists' attempt to invoke the constitutional right to privacy to protect adult consensual sodomy). For example, in 1986, the NGLTF launched its Privacy Project to support state and local attempts to reform sodomy laws. Under those auspices, the NGLTF Policy Institute published the Sodomy Law Repeal Packet in 1989 urging recognition of "the National Day of Mourning for the Right to Privacy." NATIONAL GAY & LESBIAN TASK FORCE POL'Y INST., SODOMY LAW REPEAL PACKET 2 (1989). The handout urged readers to write to local officials and confess "crimes" of sodomy, yet counseled that anonymity (clearly a form of privacy) was best as "law enforcement officials have been known to compose lists or suspected or identified homosexuals." *Id.* at 5.

77. *See supra* notes 64-66 and accompanying text.

78. *See supra* note 54 and accompanying text.

79. Gay and/or lesbian interest groups have filed amicus curiae briefs in many high-profile cases implicating privacy rights. In *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994), the National Center for Lesbian Rights, LAMBDA Legal Defense and Education Fund, Gay and Lesbian Advocates and Defenders, and the National Gay and Lesbian Association filed briefs to support the right of a lesbian mother to retain custody of her son.

80. As *Washington Blade* Editor Lisa Keen noted when questioned about that paper's policy regarding outing, "[t]he allegation of hypocrisy was not enough . . . Privacy is supreme." GROSS, *supra* note 22, at 39 (citation omitted).

81. RICHARD D. MOHR, GAY IDEAS: OUTING AND OTHER CONTROVERSIES 29 (1992). *See also* GROSS, *supra* note 22, at 4 (noting a "long standing agreement among gay people that they kept each others' secrets even after they'd abandoned their own closets"); WOODS, *supra* note 8, at 121.

Former confidence that group membership would remain unrevealed to non-group members or the press<sup>82</sup> has given way to the fear that making one false, "hypocritical" step or receiving too much attention exchanges private sexuality for political expedience.<sup>83</sup> The circle closes, and one is reminded of the aphorism: The farther one goes to the left, the closer one gets to the right.

Perhaps the most wrenching result of outing is the self-conflict that it creates or inflames. Persons already anxious about an orientation that society, and until relatively recently, psychiatry,<sup>84</sup> labels deviant<sup>85</sup> now confront whether keeping that fact private is cowardly, reprehensible, or traitorous to one's self or community.<sup>86</sup> Outing slices into human dignity by stealing individual control over one's life and generating additional fear over the legal and societal consequences of exposure.

The paradoxical nature of outing is vivid in the ironies of its existence and the double binds that it effects. During the witch-hunts of the McCarthy era, suspected homosexuals were targeted as often as suspected

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82. As one journalist notes,

[s]ince the birth of the gay-liberation movement[,] we gay journalists have adhered to a fairly rigid code of conduct on the matter of bringing people unwillingly out of the closet. With the possible exception of closeted political figures who were actively working against the movement . . . it was strictly verboten, an absolute no-no.

GROSS, *supra* note 22, at 4.

83. For example, one writer notes a concern of closeted gay men (and presumably lesbians) at the workplace: with promotions comes visibility. WOODS, *supra* note 8, at 106.

84. After World War II, state legislatures passed laws characterizing homosexuality as a socially threatening disease. Doctors were permitted to experiment on gay men and lesbians in their wards with psychotherapy, castration, hysterectomy, lobotomy, electroshock, aversion therapy, and untested drugs. D'EMILIO, *SEXUAL POLITICS*, *supra* note 10, at 14, 17-18 (1983). See also Robert L. Spitzer, *A Proposal About Homosexuality and the APA Nomenclature: Homosexuality as an Irregular Form of Sexual Behavior and Sexual Orientation Disturbance as a Psychiatric Disorder*, 130 AM. J. PSYCHIATRY 1215 (1973).

The American Psychiatric Association (APA) removed homosexuality from its list of mental disorders in 1973. APA DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261-83, 380 (3d ed. 1980).

85. The suicide rate among gay youth is reportedly significantly higher than that of heterosexual youth. Shira Maguen, *Teen Suicide: The Government's Cover-Up and America's Lost Children*, in *A CERTAIN TERROR*, *supra* note 13, at 240. A 1993 poll determined that lesbians and/or gay men contemplate suicide twice as often as heterosexuals, "mirror[ing] other studies that have found that one in three teen-age suicide attempts [are] tied to sexual confusion . . . reflect[ing] the amount of . . . self-loathing [among that segment of the population]." Martelle, *supra* note 24, at 1A.

86. Larry Gross asserts that "[f]or those who experienced the 1980s as wartime, prominent lesbian and gay people hiding in their closets became silent collaborators at best and active traitors at worst." GROSS, *supra* note 22, at x. Richard Mohr observes that secrecy, not exposure, was the true betrayal. MOHR, *supra* note 81, at 11-48.

communists.<sup>87</sup> The co-optation of outing turns the tactic upon itself as a political strategy for liberation that by no means lessens its blow to privacy, autonomy, and dignity. Those who embrace the tactic substitute the tyranny of the minority for that of the majority and suffer the consequences of weakened freedoms in other contexts. But who is really the “evil” party? Society, for marginalizing lesbian women and gay men; the outers, for using drastic measures to dismantle the hegemony of heterosexism; or closeted lesbians and gay men for perpetuating the taint of same-sex orientation and thereby being traitorous to a community that many deny even exists?

Lesbians and gay men are locked into a prisoner’s dilemma: disclosure versus concealment, each bearing unique costs. The potential dangers of open homosexuality are apparent. But the relative safety of the closet masks the depression and anxiety caused by its confines. “Secrets can become pathogenic. Like cancers they consume an ever-growing share of an individual’s resources as deception is built upon deception.”<sup>88</sup> Maintaining the secret in the closet saps valuable energy, often diverting it from more productive activity.

Which of the two evils is more damaging? Proponents of outing assert that secrecy is more damaging than revelation, both to individual and community. But the parentalism of that argument marks the question as the wrong one to ask. Whether one is entirely open about his or her sexual orientation should be a personal choice made after an individual determination of the costs and benefits of each. Further, the choice is presented as susceptible of only two options: in or out. Individuals can and do reveal information in limited arenas; one need not be wholly “out” to all people to be comfortable with the level of disclosure involved. We return to the quintessential paradox posed: Homosexuality is invisible, but when it is revealed, it is condemned. Now, it is condemned whether revealed or not, merely by different actors.

Further, outing as a paradox is inherent in the dualities that comprise its personal, social, legal, and philosophical dimensions:<sup>89</sup> homosexual or

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87. GROSS, *supra* note 22, at 12.

88. WOODS, *supra* note 8, at 106-07 (citations omitted).

89. In a powerful book, Eve Kosofsky Sedgwick proposed some of these binarisms relating how different binarisms are played out in society, especially as seen through a literary lens. EVE K. SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990). See also DIANA FUSS, *IN/SIDE OUT* (1993) (presenting a series of essays exploring and challenging heterosexual/homosexual and inside/outside dialectics through, *inter alia*, deconstruction, semiotics, and discourse theory).

heterosexual; unnatural or natural; out or in;<sup>90</sup> self or community; essentialist or constructionist; private or public;<sup>91</sup> concealment or revelation; status or conduct. Seen in this light, issues are reduced to simplistic either/or propositions, forcing a flawed choice between non-antipodal forces. The result obscures more relevant questions about identity and privacy and impedes recognition of the middle ground, such as the bisexual or transgendered plane between the homosexual and heterosexual poles;<sup>92</sup> the period of emergence between out and in; the small group revelation possible between self and communal awareness. The zero-sum understanding of these ideals counsels that, despite its probable role in dispelling stereotypes, the legacy of outing is never completely positive—it necessarily harms some interest even assuming that it helps another.

Adding law to the equation raises the stakes and wraps more tightly those ties that double-bind. There are perils to either preserving or revealing same-sex orientation, but courts seem to create a third, hybrid category with its own hazards. For example, gay parents are encouraged to suppress, shield, or even change their orientation, hiding the truth from the court and thus, from everyone, or risk losing their children. That some individuals are unwilling or unable to deny “self” in this manner is condemned: “the [father’s] unfitness is manifested by his willingness to impose this burden [his sexual orientation] upon [the child] in exchange for his own gratifications”;<sup>93</sup> “the [mother’s] gay life was more important than her child.”<sup>94</sup> Into what limbo between self and community or between status and conduct are these people forced?

The false dichotomies and double binds that saturate society’s construction of homosexuality are mirrored in the constitutional and tort arenas in which outing battles are likely to be fought. These arenas include the right to privacy versus the freedoms of speech and the press; the public right to know and the private right of selective disclosure; consequential or essential

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90. The in/out dichotomy and the closet metaphor it suggests, ignore that coming out is an extremely complex process of “managing discrediting information about oneself.” Marny Hall, *The Lesbian Corporate Experience*, 14 J. HOMOSEXUALITY 59, 74 (1986). Andrew Sullivan of the *New Republic* eloquently dismantles the “crude assertion” that there is a “simple ‘closet’” and that one is either in it or out of it. Andrew Sullivan, *Sleeping with the Authoritarians*, OTTAWA CITIZEN, Sept. 15, 1991, at B3.

91. See ALIDA BRILL, *NOBODY’S BUSINESS: THE PARADOXES OF PRIVACY* (1990).

92. See Colker, *supra* note 62.

93. *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985).

94. *Pleasant v. Pleasant*, 628 N.E.2d 633, 639 (Ill. App. Ct. 1993).

free speech;<sup>95</sup> absolutism or interpretivism; truth or falsity; fact or opinion; status or conduct; public figure or private figure; public fact or private fact. As Part III makes clear, the legal structure insists upon the wrong questions and simplistic either/or answers, essentially ensuring that under the current framework, the outing victim will never prevail.

### *B. Individual Dignity and Collective Goals*

Rather than mechanically invoking the First Amendment, the personal and societal costs and benefits of outing should be weighed against the result of allowing a tort-based action as remedy.<sup>96</sup>

#### *1. Personal Rights, Values, and Privacy*

Pluralism, multiculturalism, and autonomy are central to Western democracy and liberal thought.<sup>97</sup>

The assumption throughout is that social diversity is the prevailing condition of modern nation-states and that it *ought* to be promoted. Pluralism is thus treated as a social actuality that no contemporary political theory can ignore without losing its relevance, and also as something that any liberal should rejoice in and seek to protect because it is in diversity alone that freedom can be realized.<sup>98</sup>

Anglo-American jurisprudence purports to celebrate and advance acceptance, allowing members of diverse class, background, ethnicity, race, and religion to pursue autonomy and develop as people within constitutional confines. Society heralds individualism, moral independence, dignity, and self-esteem with particular fervor. These constitute essential values given the heterogeneous nature of communities and the multiple moral systems

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95. See, e.g., STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO!* (1994); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

96. One scholar noted that "[t]he essence of a reasoned decision by the authority of secular values of a public order of human dignity is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects." Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, 1959 AM. SOC'Y INT'L L. PROCEEDINGS 107, 121, cited in Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

97. See EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 10 (1978). Bloustein states that: "The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by the concepts." *Id.* at 12.

98. JUDITH SHKLAR, *LEGALISM, LAW, MORALS, AND POLITICAL TRIALS* 12 (2d ed. 1986).

that characterize them. Singly or in combination, these values create a platform upon which institutional tolerance for same-sex orientation or lifestyles can be built. Nevertheless, the strongest conceptual base is built after adding the element of "privacy," not only inherent in the foregoing values, but crucial in its own right.<sup>99</sup>

As a legal construct, privacy is imprecise and fragmented: "Nobody seems to have any clear idea what it is."<sup>100</sup> This criticism is reflected in the legal system's rigid fragmentation of privacy into three discrete categories: tort privacy, Fourth Amendment search and seizure privacy, and constitutional privacy.<sup>101</sup> Study of any of these strains might impart a conception of privacy within a specific legal doctrine. Privacy as a normative concept, however central to notions of autonomy, human dignity, and pluralism, transcends all three.

For example, privacy is often defined by Thomas Cooley's general maxim as "the right to be let alone."<sup>102</sup> Roger Ingham asserts that privacy "can only be understood in the wider perspective of the nature of social relationships and social structure" and is incapable of proper consideration when isolated from its context.<sup>103</sup> These perspectives overlook the nuances of privacy by slanting it as a negative: the legal ability to erect rights against another's actions.<sup>104</sup> Such focus on third-party activity deflects attention from the proper starting point for defining privacy: the hopes, desires, or overall mental state of the individual who seeks it. Casting privacy as "the right to be let alone" begs many questions: who

99. VINCENT J. SAMAR, *THE RIGHT OF PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 107 (1991).

100. JUDITH J. THOMPSON, *RIGHTS, RESTITUTION, & RISK: ESSAYS IN MORAL THEORY* 117 (William Parent ed., 1986). See also JUSTICE COMMITTEE ON PRIVACY, *PRIVACY AND THE LAW* (1970); ALAN WESTIN, *PRIVACY AND FREEDOM* (1970); David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975 (1992).

101. The court has invoked the "penumbral" right to privacy of the Fifth and Fourteenth Amendments to protect: the decision whether to have an abortion, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1985); the parent-child relationship, *Stanley v. Illinois*, 405 U.S. 645 (1972); the use of obscenity in the home, *Stanley v. Georgia*, 394 U.S. 557 (1969); and the use of contraceptives, *Griswold v. Connecticut*, 381 U.S. 479 (1965). Generally, constitutional privacy relates to decisions concerning marriage, intimacy, and child-birth and childrearing.

102. THOMAS COOLEY, *TORTS* 29 (2d ed. 1888).

103. Roger Ingham, *Privacy and Psychology*, in *PRIVACY*, 37 (John B. Young ed., 1978).

104. For example, Ruth Gavison attempts to define privacy in purely descriptive, value-free terms, as a gradient that varies in secrecy, anonymity, and solitude. Privacy, to Gavison, is lost as *information* is obtained, removing the need to search for violations of social convention. Ruth Gavison, *Privacy and The Limits of the Law*, 89 YALE L.J. 421, 425-40 (1980).

may enjoy the right? Only the powerful<sup>105</sup> or the weak?<sup>106</sup> Is one to be let alone in all respects, as desired, or only those in which society agrees he or she should be let alone? Does the nature of an intrusion ever justify the intrusion? Another paradox is constructed.

While a portion of the privacy value hinges on individualism, the determination of its legal intrusion rests on societal norms. Community thus becomes the enemy of privacy;<sup>107</sup> the media and the global village become the enemy of individual autonomy.<sup>108</sup> Hixson's converse argument—that the escapism of privacy “threatens collective survival” (*i.e.*, community)—reflects the narrower preoccupation with privacy as a physical and spatial construct.<sup>109</sup> The criticism of privacy as “unworkable” seems better placed against “legal” privacy than normative privacy.<sup>110</sup> The idea of privacy must be appreciated in the latter sense before it can be applied meaningfully in adversarial contexts.

Privacy has been defined as “a valuable state of being alone and where others are morally justified in intruding only if intervention is for a superior value;”<sup>111</sup> “a condition of a person's not having undocumented personal information . . . known by [unwanted] others;”<sup>112</sup> and “the claim of individuals, groups or institutions to determine for themselves when, how and to what extent information is communicated to others.”<sup>113</sup> In synthesis, privacy is (1) a valuable state of being alone and (2) the ability to determine for one's self what, when, how, and to what extent personal information<sup>114</sup> is communicated. This interpretation proves far more workable when struggling with the scope of tort privacy. First, it recognizes

105. Historically, privacy was a luxury enjoyed only by the rich, particularly where it was measured through physical distance and space. *See, e.g.*, BLOUSTEIN, *supra* note 97.

106. In contrast to the existing situation in England and colonial America, First Amendment and tort doctrine reverse the situation, virtually precluding the powerful from enjoying privacy.

107. *See* Robert Post, *Social Foundations of Privacy*, 77 CAL. L. REV. 957, 958 (quoting BARRINGTON MOORE, *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 267 (1984)).

108. Denis McQuail, *The Mass Media and Privacy*, in *PRIVACY*, *supra* note 103, at 181.

109. RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 93 (1987); SAMAR, *supra* note 99, at 135.

110. *See* Thomas, *supra* note 46, at 1440.

111. Lubor C. Velecky, *The Concept of Privacy*, in *PRIVACY*, *supra* note 103, at 18-19.

112. William A. Parent, *Recent Work on the Concept of Privacy*, 20 AM. PHILOSOPHICAL Q. 341, 345-46 (1983).

113. WESTIN, *supra* note 100, at 18.

114. Parent defines personal information as facts that most persons choose not to reveal to society at large, regardless of how the information would be received if known. This recognizes that a fact or situation need not be shameful to be private; all that is required is that the individual seeking privacy chooses not to disclose it. *See generally* Parent, *supra* note 112.

the worth of a state of privacy<sup>115</sup> before considering its adversarial nature. Second, it injects a new and essential element into understanding privacy—"confidentiality"—recognizing that a fact need not lose its private nature merely because it is known by more than one person. Third, it affirms that not only might information be private although known by more than one, but that the term "private" also applies to the *choice* to make the information known, and to whom. Timing becomes integral.<sup>116</sup>

So viewing privacy strengthens bonds between privacy and self-determination, dignity, and autonomy. Attention shifts from the nature and aggregate effect of the information disclosed, the status of the person about whom it is known, the status of the entity to which it is revealed, and the location of the compilation, to the wishes of and effects upon the person about whom the information is revealed. This recognizes that the essence of privacy lies in individualism and choice.

Quite apart from privacy's inception in and furtherance of liberalism,<sup>117</sup> it is critical to Western culture as "an important functional requirement for the effective operation of social structure."<sup>118</sup> Loss of privacy equals loss of dignity. Privacy mediates between the individual and the impossibility and pressures of conforming to conflicting social norms.<sup>119</sup> Sociologist Erving Goffman emphasizes the importance of individual control over the flow of personal information to self-esteem.<sup>120</sup> As communities are comprised of parts, loss of privacy felt by any segment weakens the whole. That debility becomes immediate when, as here, society provides the means of privacy violation and, under the guise of the rule of law, refuses to administer correction upon its encroachment. Privacy is apparently deemed at least moderately essential, given the existing, though chaotic, legal privacy framework. Less apparent is how much weight the law is willing to accord this framework, given the ease with which challenges to its infringement can be trivialized or defeated through invoking "more

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115. Personal information encompasses isolation and loneliness (negative connotations); intimacy, solitude and confidentiality (positive connotations), and anonymity (neutral connotations).

116. On the interrelationship between privacy, self-disclosure, and positive identity, see Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. HOMOSEXUALITY 47 (1982).

117. As used here, liberalism refers to the protection of political and civil liberties based on belief in progress, the essential goodness of humanity, and individual autonomy.

118. Post, *supra* note 107, at 969.

119. See HIXSON, *supra* note 99, at 93; SAMAR, *supra* note 109, at 135. In fact, Merton further suggests that without privacy, schizophrenia would become the rule. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 429 (1968).

120. GOFFMAN, *STIGMA*, *supra* note 32, at 99-129.



weighty" goals. As Catherine MacKinnon notes, the costs of freedom of expression, such as loss of privacy, reputation, or well-being, are brushed aside as mere externalities.<sup>121</sup> And as J. Skelley Wright cautioned, "[j]ust as society as a whole is benefited by each individual being knowledgeable, intelligent, and even sensitive and understanding, so too society has a great stake in protecting each individual's reputation and privacy."<sup>122</sup>

Matters of sexuality are inherently private. "Whenever it is considered that relations and acts should be intimate ones—sexual life provides obvious examples but there are others—then these relations and acts must also be private. Public intimacy is a nonsense."<sup>123</sup> Applied to outing, this assertion drives two points: First, whether an orientation or a preference, the information that someone is homosexual is properly within the realm of privacy as a "sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest[.]"<sup>124</sup> Second, and more pressing, is selective information disclosure. Regarding inherently private information, persons should choose to whom and when a piece of information is made public. The crucial component of privacy is thus less *what* people reveal but *whether and how*.<sup>125</sup> Outing is the antithesis of self-definition.

As law defines a legal invasion of privacy as occurring when A violates a right of B and when society deems that infringement worthy of protection, the goals of the First Amendment and the more general values of free speech should be identified and weighed against privacy, autonomy, and dignity.

## 2. Community Values and Goals

*Congress shall make no law . . . abridging the freedom of speech, or of the press[.]*<sup>126</sup>

The rhetorical power of free speech is immense. The United States learned the pre-colonial lessons of restricted speech and institutionalized its

121. CATHARINE MACKINNON, *ONLY WORDS* 11, 76-77 (1993).

122. J. Skelley Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 634 (1968).

123. Christopher G.A. Bryant, *Privacy, Privatization and Self-Determination in PRIVACY*, *supra* note 103, at 59. *See also* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (stating that "sexual relations . . . are normally entirely private matters.").

124. JOHN STUART MILL, *ON LIBERTY* 71 (Penguin ed., 1988).

125. *See, e.g.*, Bryant, *supra* note 123, at 68; Ingham, *supra* note 103, at 38-39.

126. U.S. CONST. amend. I.

reverence for broader rights in the First Amendment. Symbolically integrated with the triumph of democracy, “[i]t is, by far, the commonly conceived touchstone of individual liberty.”<sup>127</sup> The underlying principle at issue is the unrestricted discussion of public affairs: “There can be no doubt that this was in a general way what freedom of speech meant to the framers of the Constitution.”<sup>128</sup> Nevertheless, determining a more specific philosophical scope of the First Amendment proves difficult, and little explication can be drawn from official documents regarding its meaning.

Three general theories emerge:

1. *Speaker fulfillment*—The Kantian view that absolute free speech protects the speaker’s self-fulfillment and expression and allows for the maximum identification essential to individual autonomy and dignity.<sup>129</sup>
2. *Self-governance*—The political theory that the peoples’ reserved rights support and necessitate free and absolute expression and discussion of governmental affairs to give “every voting member of the body politic the fullest possible participation in the understanding of these problems with which the citizens of a self-governing society must deal.”<sup>130</sup>

127. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 934 (1986).

128. ZECHARIAH CHAFFEE, FREE SPEECH IN THE UNITED STATES 19 (1941). This approach is important if one views the application of constitutional provisions to require strict adherence to the founders’ intent. Original intent prevents judges from superimposing personal views on the Constitution. A problem with this approach is that actual and strict reliance on the founders’ intent ignores the dynamism of the Constitution and its provisions. See PAUL BREST, PROCESS OF CONSTITUTIONAL LAW DECISIONMAKING ch. 2 (1975). Brest presents a still-life of society by “freezing the constitution in a conservative time, when not many disenfranchised groups had a voice,” and “overlook[ing] a history of psychological and sociological insight into the nature of the human condition.” See generally Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980). See also SAMAR, *supra* note 99, at 9.

The opposite approach recognizes that the law or Constitution will not always provide a perfect fit with a specific case, leaving it to the court to do so. See RONALD DWORKIN, LAW’S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE 48-57 (1985). Some require the fit to be a neutral principle, while others acknowledge the political and personal nature of judicial craftsmanship to recognize that moral judgments may direct a given result. Whichever approach is taken, it is crucial to recognize that often these theories are no more than tools to procure a certain end, often to make it appear pre-determined. “Court decisions that might be questionable or controversial are frequently offered as merely interpretations of the law. Judicial . . . conservatives in particular, make much of this claim.” SAMAR, *supra* note 99, at 3.

129. THOMAS I. EMERSON, THE SYSTEM OF SELF-EXPRESSION 6 (1970).

130. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 19 (1948). “The First Amendment does not protect a ‘freedom to speak.’ It protects the freedoms of those activities of thought and communication by which we ‘govern.’” *Id.* This view gained popularity with the Court. As one scholar writes:

3. *Enrichment*—The view that free speech need not directly relate to self-governance, but rather, embraces the varieties of philosophical, literary, scientific, religious, and cultural speech that enrich the individual and the community.<sup>131</sup>

The difficulty of precisely calculating the speech interests protected by the First Amendment impedes progress in meaningfully weighing them against personal rights to determine the utility of outing. Instead of dogmatically asserting “free speech” to foreclose legal redress of outing, the goals of the First Amendment and the inherent values of free speech should be explicitly tested against the invasion of outing to determine whether the truism is justified.

### 3. *Weighing Goals, Balancing Concerns*

How does a court allocate the relative importance of the First Amendment against competing rights? Should “free speech” *always* prevail; should it prevail over competing concerns of equal or lesser value; or should it give way to any countervailing concern of sufficient importance?

The first, absolutist view attracts few proponents beyond Justices Black and Douglas<sup>132</sup> and is disproved by an array of doctrines that exemplify the court’s willingness to shift the First Amendment calculus when competing rights are implicated: fighting words,<sup>133</sup> incitement to violence,<sup>134</sup> symbolic speech,<sup>135</sup> commercial speech,<sup>136</sup> obscenity and

The special position that the First Amendment is granted in our system is a recognition of the paramount importance of the free exchange of ideas to self government. Freedom of speech and press provisions of the First Amendment are designed to remove barriers that interfere with the exchange of information citizens need to make intelligent decisions when choosing public officials and shaping policy.

RICHARD E. LABUNSKI, *LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING* 3 (1987).

131. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 256-57.

132. Justice Black stated,

“[N]o law . . . abridging” [means] *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on freedom of speech and press by putting these freedoms wholly “beyond the reach” of federal power to abridge . . . Consequently, I do not believe that any federal agencies, including Congress and this Court, have power or authority to subordinate speech and press to what they think are “more important interests.”

*Smith v. California*, 361 U.S. 147, 157-59 (1959). *See also* *Konigsberg v. State Bar of California*, 366 U.S. 39, 56 (1961) (Black, J., dissenting) (questioning majority’s failure to apply petitioner’s First Amendment protections to California State Bar Examiners).

133. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

134. *See* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

135. *See* *Street v. New York*, 394 U.S. 576 (1969).

pornography;<sup>137</sup> defamation;<sup>138</sup> and invasion of privacy.<sup>139</sup> These divergent doctrines require the court to “balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression.”<sup>140</sup> In 1937, Justice Cardozo wrote that First Amendment liberties are on a “different plane of social and moral values.”<sup>141</sup> His observation fails to answer whether the balance should be tipped toward the First Amendment irrespective of the merits of competing values.<sup>142</sup>

A concrete example of the immediate and attenuated effects of outing enables balancing its costs and benefits. Consider the implications that flow from asserting “Chris is gay.”

1. Chris experiences non-platonic love or sexual desire for a member of the same sex.
2. Chris is inclined to act on those feelings and to engage in sexual activity with a member of the same sex.
3. Chris is deviant, immoral, or perverted, because sexual activity with a member of the same sex is abnormal.<sup>143</sup>
4. Sexual activity with a member of the same sex is against the law, thus Chris is a criminal, a sodomite, or subversive.<sup>144</sup>
5. Chris is a fornicator, adulterer, or a reprobate, because, by necessity, sexual activity with a member of the same sex occurs outside of a

136. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

137. See *Miller v. California*, 413 U.S. 15 (1973).

138. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

139. See *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975).

140. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 817, 912 (1963) (criticizing the balancing test as lacking the necessary structure for its utility).

141. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

142. Perhaps so, if the First Amendment occupies a “preferred position.” LABUNSKI, *supra* note 131, at 43. See also *Murdoch v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

143. See Bob Bernick, Jr., *Hate-Crime Bill Opponents Lash Out at Homosexuality During Capitol Hill Debate*, *DESERT NEWS* (Salt Lake City), Jan. 29, 1992, at B12.

Statutory characterizations of sodomy illustrate these views by referring to it as a crime “against nature” or “public morals and decency” or a “lewd,” “unnatural,” “perverted,” “deviate,” or “lascivious” act. See *infra* note 164 and accompanying text.

144. See, e.g. Cleaver, *supra* note 15, at 181 (citation omitted) (quoting a former Republican floor leader of the Senate as stating “you can’t hardly separate homosexuals from subversives. Mind you, I don’t say every homosexual is a subversive, and I don’t say every subversive is a homosexual. But a man of low morality is a menace in the government, whatever he is, and they are all tied up together.”). See generally Kogan, *supra* note 51 (discussing the uproar over Utah’s attempt to include gay men and lesbians in its Hate Crime Bill).

- marital union.
6. Same-sex activity transmits HIV and causes AIDS. Thus Chris is an instrument of disease or death.
  7. If Chris is a man, he is more likely to be a murderer and is probably a pedophile.<sup>145</sup>
  8. Chris chooses to be gay. Sin is a choice. Thus, Chris is a moral weakling and a sinner.<sup>146</sup>
  9. Chris is "other," the enemy.<sup>147</sup>
  10. Chris must have good ABC skills and poor XYZ skills.<sup>148</sup>
  11. Chris probably holds ABC views on ABC issues.<sup>149</sup>

145. Many of these views are perpetuated by far right religious extremists. For example, a pamphlet distributed by a Canadian Christian women's organization asserts that "the homosexual seeks sex in the young age group. As he ages, when he begins to lose his attractiveness, he resorts to buying sex . . . [giving rise to] a subculture or [sic] prostitution of boys and younger men in inner cities[.] Many homosexuals, because they cannot procreate, must recruit—often the young." HERMAN, *supra* note 71, at 87-89. Herman also recounts egregious statements made in a manual for Christian activists in the United States: "Out of all the mass murders in the U.S. over the past 17 years, homosexuals killed at least 68% of the victims, were implicated in at least 41% of the sets of crimes, committed 70% of the 10 worst murder sets, and were involved in five of the eight murder sets perpetrated by two or more people." *Id.* at 88 (quoting BRAD HAYTON, *THE HOMOSEXUAL AGENDA: CHANGING YOUR COMMUNITY AND NATION 15* (*n.d.*) (citing the Institute for the Scientific Investigation of Sexuality, a conservative christian research facility)).

146. This view is pervasive on all levels. For example, a recent letter to the editor of a college newspaper invoked Leviticus 18:22 and Romans 1:26-27 to argue the "sin," and thus chosen conduct, of homosexuality. *YourViews*, OKLA. DAILY, Oct. 27, 1994, at B2. *See generally* Kogan, *supra* note 51, at 239-41 (discussing the rhetorical advantage gained by describing homosexuality as "chosen" behavior and noting the theological components of the argument).

147. As Representative Ted Weiss, Chairman of the House Administration Subcommittee on Human Resources and Intergovernmental Relations, averred in 1992, "[w]ith the cold war over, a new attack on the entertainment industry is now afoot, which seeks to define once again what is American and what is un-American. . . . And from the sound of what I am hearing, gay men and lesbians have become America's new Communists." 138 CONG. REC. E1869-02 (daily ed. June 17, 1992) (statement of Rep. Ted Weiss). *See also* Cleaver, *supra* note 15, at 171.

148. Gay men and lesbians are pigeonholed into probable skills and professions. In 1980, Midge Decter wrote that,

homosexuals have [probably not] established much of a presence in basic industry or government service or in such classic professions as doctoring or lawyering, but then for anyone acquainted with them as a group the thought suggests itself that few of them have ever made much effort in these directions.

Midge Decter, *The Boys on the Beach*, COMMENTARY, Sept. 1980, at 40. *See also* WOODS, *supra* note 8, at 6 (noting stereotype that gay men traditionally inhabit "creative" fields and avoid conservative ones like insurance, banking, and utilities).

149. According to one allegedly homophobic gay man, homosexual persons are commonly perceived as partisan and incapable of neutral reasoning on sexual issues. GROSS, *supra* note 22, at 17 (citing EDWARD SAGARIN, CORRECTIONS: PROBLEMS OF PUNISHMENT AND REHABILITATION 11-12 (1973)). To be out means that one can "no longer be quoted and cited as scholars in whatever their areas of specialization, protected by the mantle of objectivity, for their vested interest would place their work

12. If "out" due to *outing*, Chris is a traitor, hypocrite, and coward, and should be ashamed.
13. As Chris likes members of my sex, I can use Chris to get ahead or worry about Chris being attracted to or "converting" me.
14. As Chris does not like members of my sex, I can't use Chris to get ahead and need not worry about Chris's attraction to me.
15. If I associate with Chris, people might think I am gay.
16. Maybe I should not associate with Chris, a deviant, criminal, reprobate, and instrument of death.<sup>150</sup>
17. Maybe I should not hire Chris, a deviant/criminal/reprobate/instrument of death.
18. Chris is gay. I hate "fags and dykes" and therefore hate Chris, and might or might not choose to act on this belief.

Even if fleetingly, the statement "Chris is gay" summons most of the foregoing propositions and presumably many more.<sup>151</sup> Positive results can flow from revealing same-sex orientation,<sup>152</sup> but the risk of tangible harm increases when someone else makes the revelation.

Suppose Chris has been outed by a magazine with a large readership. The effect of the revelation grows exponentially as the number of primary and secondary information recipients increases. Chris's sexual orientation has become a very public fact, causing feelings of alienation, violation, and betrayal. Chris may lose interpersonal relationships or employment. Chris faces personal danger. Chris has been stripped of the right to determine to whom and when to disclose personal information, losing dignity and autonomy in the process. Moreover, whether in limited or public form, Chris suffers an invasion of privacy that does not appear to be offset by any community benefit.<sup>153</sup> Instead of rejoicing in plurality and diversity,

under a shadow." *Id.*

150. As one statistician argues, homosexuals are disproportionately responsible for serial killings, child molestation, and other heinous crimes; one is 15 times more likely to be killed by a homosexual than by a heterosexual during a sexual murder spree; homosexuals have committed the most sexual conspiracy murders; half of all sex murderers are homosexuals; homosexuals have perpetrated between one-third and one-half of all child molestations; homosexual teachers have committed one-fourth to four-fifths of all pupil molestations; homosexuals are 10 to 20 times more likely to molest children than heterosexuals. Mark Pietrzyk, *Queer Science*, NEW REPUBLIC, Oct. 3, 1994, at 10, 11.

151. The implications attenuate when one moves from "facts" about Chris (arguably, implications 1 & 2) to "opinions" about Chris (implications 3 & 12) to ruminations on the dynamic between self and Chris (implications 13 & 18).

152. For example, Chris might experience heightened self- and group-identity, pride, accomplishment, relief, and the ability to divert energy and attention to endeavors other than masquerade.

153. In a limited revelation (gossip), Chris might be unaware of being the subject of speculation. Law cannot regulate gossip meaningfully; though Chris suffers harm, the proper remedy is discretion

differences are underscored. Instead of affirming autonomy in moral choice, the mainstream is emphasized as the norm and anything else as deviant. Individuality becomes the scapegoat of collectivism at the expense of privacy.

Defenders of outing contend that homosexuality should be treated no differently than heterosexuality. They argue that there is no difference between revealing (1) that Male Politician had sex with Female aboard the boat versus (2) Male Politician had sex with Male aboard the same boat. The loss of privacy and autonomy is, the defenders contend, no more egregious in the latter instance than in the former. While the reasoning initially appears pristine and the point acceded, the syllogism is flawed.

Of the inferences to be drawn from the foregoing list, Situation One suggests one fact only: Politician acted on sexual desire with a member of the opposite sex. No one can categorically state that Politician "must have" or even "probably" engaged in "deviant" or criminal activity; that Politician is an "adulterer" or "fornicator" (to be sure, it is not clear that Politician and Female are *not* married, as in the latter instance). One would have little or no reason to speculate on Politician's exposure to AIDS as a result of the liaison. The remaining inferences listed peculiarly attend Situation Two. For instance, it is unlikely that Politician would lose custody of his children or that anyone would refuse to associate with Politician for fear that someone might think that he or she too was heterosexual. The reaction to the information differs viscerally. Thomas Boswell eloquently addresses the point:

[T]he normal person is not "heterosexual" in the same sense that a gay person is "homosexual"; the former may or may not engage in heterosexual activity from time to time, but hardly any information about his or her character, behavior, lifestyle or interest is inferable from this act. "Homosexual," on the other hand, is understood to be the most important single fact about a gay person, and implies a great deal beyond occasional sexual behavior about the person to whom the term is applied.<sup>154</sup>

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and prudence on Chris's part regarding to whom to initially reveal the information. If Chris suffers discrimination, yet has no knowledge of the revelation, the damage is internalized. See Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual v. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1007 (1991).

154. BOSWELL, CHRISTIANITY, *supra* note 54, at 219. For example, arguing against including sexual orientation in state hate crime legislation, one representative fumed: "Why should we pass laws protecting someone who is breaking the law? Is it a lesser offense to assault me than a sexually oriented person?" Kogan, *supra* note 51, at 217 (citing Cherrill Crosby, *Utah Committee Fails to Reach Accord on Including Gays in Hate-Crime Bill*, SALT LAKE TRIB., Oct. 17, 1991, at B2). The speaker's misuse

*a) Speaker fulfillment*

Outers are motivated by a desire to heighten sensitivity to gay-related issues, increase awareness of gay rights, provide positive role models, and expose the hypocrisy of powerful gay men or lesbians.<sup>155</sup> These goals initially appear valid, but weighing them against the personal and societal cost of outing assumes the "Speaker fulfillment" standard—to protect the speaker's autonomy and dignity—in that the outer may determine what he or she wants to accomplish and through what means.

Generally, legal redress for outing victims might inhibit the self-expression of those seeking to publish that a specific person is gay or lesbian. If driven by malicious intent, such self-expression should not be protected by law in any event. If the speaker's motivation is to force the reconsideration of gay-sensitive issues, that goal can be met through discussing homosexuality, AIDS, discrimination, legal reform, and hypocrisy in the abstract. All things equal, it seems ridiculous to assert that the outer's fulfillment in lurid reporting tactics supersedes the outed's fulfillment in living a life that does not impinge on anyone else's autonomy.

While the desire to create role models is laudable, pressure upon it reveals four major flaws. First, it is doubtful that providing a role model is *ever* proper justification for invading privacy. This rationale supplants

of "sexual orientation" as a synonym for "homosexual" speaks tellingly about how gay persons are defined by sexuality. *See generally* RICHARD A. ISAY, *BEING HOMOSEXUAL: GAY MEN AND THEIR DEVELOPMENT* 82 (1992) (discussing psychoanalytic theories of homosexuality to assert that it is constitutional (nature over nurture) in origin and eschewing correlation of homosexuality with deviance and perversion).

155. The progenitor of outing and features editor of the former publication *Outweek*, Michelangelo Signorile, seizes upon "exposure of hypocrisy" as the keystone of his justification. A few years ago, Signorile vehemently denounced a supposedly gay Hollywood mogul for promoting allegedly homophobic stars:

This is a self-hating man of power and privilege who . . . spends his day literally making millions and then pumping those millions into homophobes like Guns N' Roses and Andrew Dice Clay so he can net even more millions while they spew venom on his own people. . . .  
YOU PIG. WE DEMAND YOU IMMEDIATELY STAND UP FOR YOURSELF AND THIS  
COMMUNITY AND DENOUNCE AND DROP GUNS N' ROSES.

"Outing:" *Comes Out of the Closet and Into the Press*, *supra* note 21, at 20. Signorile continued by exhorting the reader to call and harass the individual. *Id.* It appears, however, that Signorile now takes a more moderate approach to outing, as his recent book advises self-identified gay men or lesbians come out "at your own speed and when you know it's safe." Deb Price, *The King of Outing Now Has a Softer, Gentler Message*, *DET. NEWS*, July 29, 1995, at C4 (citing MICHELANGELO SIGNORILE, *OUTING YOURSELF: HOW TO COME OUT AS LESBIAN OR GAY TO YOUR FAMILY, FRIENDS, AND COWORKERS* (1995)).



collective utilitarian interests for the value in individual autonomy, an unjustifiable result in a nation that values heterogeneity and where "the chance of unrestricted collectivism and groupism presents a greater danger than unconfined individualism."<sup>156</sup>

Second, one who must be dragged from the closet might lack the level of moral courage required of a truly effective role model. Outers seem to envision a magical transformation from shame and desire for privacy to pride and desire for publicity and advocacy once the information is known. The scenario is unlikely.

Third, while the provision of a role model to gay youth is also aimed at the heterosexual to destroy popular stereotypes, whether visible counter-examples to stereotypes can undermine them is arguable.<sup>157</sup> A study by Deborah David and Robert Brannon argues that stereotypes are not individually constructed but rather socially transmitted.<sup>158</sup> For this reason, Joseph Harry and William DeVall argue that role models offered to affirm homosexuality and counteract negative stereotyping would be dismissed as exceptions to the stereotype.<sup>159</sup> Worse, if the assertion that secrecy equals dishonesty is true, then exposing "closet-bound hypocrites" only strengthens the belief that gay or lesbian people are duplicitous, sneaky, conspiratorial infiltrators.

Fourth, outing is counter-intuitive. An outed person in power might lose that power, neutralizing the rational (although private) perspective of sexuality that he or she could bring to bear on society and potentially replacing it with a less enlightened voice.

*b) The public's right to know*

Outing unquestionably indulges the public's access to information. Except for the rare case, however, it is unfathomable how revealing a specific person's orientation enriches the philosophical, literary, scientific, religious, or cultural understanding of the audience.<sup>160</sup> Protecting this

156. DAVID RIESMAN, *INDIVIDUALISM RECONSIDERED* (1954).

157. Gregory Lehne, *Homophobia Among Men*, in *THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLES* 66, 77-78 (Deborah David and Robert Brannon eds., 1976).

158. *Id.*

159. JOSEPH HARRY & WILLIAM B. DEVALL, *THE SOCIAL ORGANIZATION OF GAY MALES* 21 (1978).

160. Nevertheless, journalists commonly use this argument to support their publication decisions. Remarking on a recent outing of a publishing figure, Richard Johnson of the London tabloid, *The Mail*, asserted that "[his] premise[] was that it was out already." Armstrong, *supra* note 7, at E1. A senior managing editor of a publishing company in California has couched the publication decision as having

broad right to know need not embrace trivial or low-value revelations.<sup>161</sup> The courts employ a myriad of balancing tests and could weigh the worth of the specific information disclosed against a broader public right. Granted, public status involves an element of constructive waiver; one theoretically assumes the risk of disclosure when seeking fame or notoriety and enjoys better access to the press to respond to the revelation. Activists argue that by virtue of status, many outed persons forsake all rights to privacy. But it need not follow that choosing acting or professional football, for example, entails forsaking all private, personal information. Society might ultimately lose a more precious commodity when diverse women and men shy away from public service or promotion to avoid excoriation when private matters inflame public curiosity.

*c) Promote self-governance*

Under this First Amendment theory, the speech occasioned by an outing would be protected if it were information necessary to casting an effective vote. This approach limits protection to political speech, under which an outing plaintiff could maintain a cause of action upon showing the non-relevance of his or her sexual orientation to self-governance. The easiest scenario is where the plaintiff lacks political or official status, but the relevance of the information remains speculative even where the plaintiff seeks or holds public office.

The correlation between sexual orientation and the ability to serve a constituency is difficult to discern. The first argument made is that the candidate's potential for criminal activity (sodomy) shows disrespect for law. This assertion of "relevance" might mask a less benign motive for knowing the information. Prosecution of homosexual activity is ordinarily triggered by undercover agents.<sup>162</sup> If consensual but criminal sexual conduct is truly relevant, perhaps undercover sex officers should regularly marshal evidence on the conduct of any candidate, heterosexual, homosexual, transsexual, or bisexual.<sup>163</sup> Focus on the criminality of sodomy hides

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already been made—"By the time we got to it, it was a question of whether to prevent our readers from knowing what had already been known." Eleanor Randolph, *The Media, at Odds Over "Outing" of Gays*, WASH. POST, Jul. 13, 1990, at C1. Some news executives have gone so far as to state that when information is already widely known, not publishing or talking about it is a form of censorship. *Id.*

161. See generally SUNSTEIN, *supra* note 95 (arguing, *inter alia*, that Anglo-American defamation jurisprudence protects unworthy parties and interests).

162. See Law, *supra* note 19, at 189 n.8.

163. Sodomy is defined as: 1) anal or oral copulation with a member of the opposite sex; 2) copulation with a member of the same sex; 3) bestiality. THE RANDOM HOUSE DICTIONARY OF THE

behind legality to conceal a more likely preoccupation with morality. Recognition of the real concern confronts its relevance and avoids renvoiesque forays into legislated sexuality.

The second argument is that a gay man or lesbian is particularly susceptible to blackmail or poses special security risks.<sup>164</sup> To the extent that this argument has merit, any risk involved is easily neutralized by removing the stigma attached to homosexuality. The argument also ignores that other private information which poses similar risks does not merit public disclosure.

Finally, outers profess to reveal the hypocrisy of gay men and women in positions of power. This connection initially commands consideration even from opponents of outing. A significant character flaw is revealed, and lack of sympathy for the victim vanquishes moral dilemmas over invading privacy.

Nevertheless, this justification presupposes two potentially invalid assumptions. Presuming that the outers are even correct in asserting someone's orientation, one wonders whether there is such a thing as a "gay viewpoint." While abstract generalization may be made regarding the tendency of a group member to sympathize with in-group concerns, it is absurd to attribute to an individual a pre-packaged set of opinions merely because that individual is gay. One's views should no more be determined by sexual orientation than by being Caucasian or agnostic or underweight or female.<sup>165</sup> This insidious form of stereotyping demonstrates decided

ENGLISH LANGUAGE 1813 (2d ed. 1987). A typical state statute provides: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another[.]" GA. CODE ANN. § 16-6-2(a) (1984). Other state statutes proscribe similar conduct. Missouri and Montana even prohibit same-sex contact between the hand and genitals. MO. REV. STAT. § 566.060 (1986); MONT. CODE. ANN. § 45-5-505 (1987). Read literally, the last two statutes prohibit self-stimulation.

More recent statistics from the Kinsey Institute indicate that well over 85% of all adults at some time have engaged in sexual behaviors that are defined as criminal. 2 THE KINSEY INSTITUTE SERIES, HOMOSEXUALITY/HETEROSEXUALITY (David P. McWhirter et al. eds., 1990). Another survey confirmed that of couples surveyed, more than 90% had engaged in oral sex. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 236 (1984).

164. Gross notes that popular literature of the 1950s and 1960s entrenched this theme in the minds of the populace. GROSS, *supra* note 22, at 26. See, e.g., ALLAN DRURY, ADVISE AND CONSENT (1961) (telling story of U.S. senator who commits suicide after political enemies threaten to expose homosexual episode); GORE VIDAL, THE BEST MAN: A PLAY ABOUT POLITICS (1960) (telling story of leading contender for the Democratic presidential nomination who is forced out of the race by similar threat).

165. One feminist writer addresses this point when she notes: "When I hear statements like 'women are the natural enemies of war,' I am convinced that we are promoting a simplistic view of woman's psyche, of our political reality[.] One can be a strong advocate of women's liberation and be

insensitivity to individualism, lessened in no way by the "I can criticize my sister" syndrome.<sup>166</sup>

Second, what is orientation hypocrisy and at what level of conduct should it be penalized? Hypocrisy is a broad term which can encompass a range of activity: merely keeping same-sex orientation a secret;<sup>167</sup> actively asserting heterosexuality; failing to vote for or affirmatively and publicly support pro-gay legislation; actively opposing similar legislation.<sup>168</sup> The (non)actor whose conduct contravenes the mythical "gay viewpoint" need not necessarily be driven by "hypocrisy," but is equally likely to act through privacy, self-preservation, cowardice, or merely a different belief. A smoker who supports legislation restricting cigarette sales to minors is no more a hypocrite than a non-smoker who does so. A woman who votes against equal rights legislation is no more a hypocrite than a man who does so. To assert that she or he must be a hypocrite anathematizes individuality and accords insufficient weight to the myriad reasons that impel behavior or decision making. Further, the stated motives of the outer must be considered against the unstated ones. "[Undoubtedly,] the emotional pain of the closet is also accompanied by considerable social privilege, and that this is going to engender anger and resentment."<sup>169</sup>

Consider the politician with a near perfect voting record on gay rights issues. How far must she or he stray from the "party line" before being

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pro-imperialist." A CERTAIN TERROR, *supra* note 13, at 165-166.

166. Consider the equally troublesome assertion of a "black viewpoint" and the ensuing riposte from black leaders. *See, e.g.*, STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1990); SHELBY STEELE, THE CONTENT OF OUR CHARACTER (1990).

167. As one author asserts, "[t]o be 'in the closet' is to misrepresent one's sexuality to others, to encourage (or at least permit) them to draw a conclusion that one knows is false." WOODS, *supra* note 8, at 26.

168. Larry Gross extensively discusses political sexual orientation hypocrisy in defending some outings. For example, he cites as a "clear cut case" the outing of the head of the National Conservative Political Action Committee (NCPAC), who solicited funds for "viciously antigay candidates and causes," targeted House and Senate liberals for defeat "partly because of their tolerance of homosexuality," and who asserted that "our nation's moral fiber is being weakened by the growing homosexual movement." GROSS, *supra* note 22, at 1, 28 (citations omitted). An Oregon senator was outed by members of the AIDS Coalition to Unleash Power (ACT UP) after he cast a vote they considered anti-gay. *Id.* at 38. An Illinois governor was outed by Chicago ACT UP members after he supported legislation allowing hospitals to test patients for HIV without their consent. *Id.* A right-wing lawyer and one-time McCarthy aide who supported anti-gay causes was outed posthumously. *Id.* at 28. A former Republican congressman was outed for supporting "anti-gay" causes. *Id.* A former gubernatorial candidate who used his public position to ridicule gay rights claims as "bizarre" and who "refused as a candidate to meet with gay groups" was outed. *Id.* (citations omitted).

169. *See* GROSS, *supra* note 22, at 25 (citing Michael Bronski, *Outing: The Power of the Closet*, GAY COMMUNITY NEWS, Apr. 23, 1991, at 12).

termed a hypocrite? It seems that the potential for blackmail actually increases where politicians are gently reminded to toe a certain line or risk exposure for their orientation. At bottom, being gay is irrelevant. Even if it were relevant, relevance does not equal determinacy, a distinction often obscured in the outing context.<sup>170</sup>

*d) Valid discussion of human affairs*

Outing clearly fosters debate over and discussion of legitimate issues. Following *Bowers v. Hardwick*,<sup>171</sup> only 29% of those surveyed reported having gay or lesbian friends or acquaintances.<sup>172</sup> Outing increased the numbers, a positive given how knowing a lesbian or gay man often transforms negative attitudes toward homosexuality in general. But nothing suggests that outing itself is responsible for this shift any more than AIDS or the secondary discourse that outing precipitated. The issue parallels the debate over identifying a rape victim. Actual names do not add to the quality of the discussion. Assuming *arguendo* they did, incremental benefit is offset by the pain suffered by the individual and the diversion of attention from the issue of rape to more titillating concerns of who does what with whom and when.<sup>173</sup>

Protecting free speech and privacy are not mutually exclusive pursuits. Both interests coexist, though perhaps not to the degree necessary to meaningfully respond to outing. There is always risk in cabining the range of information upon which one can freely speak. Familiar slippery slope arguments evoke images of rampant censorship of and control over the content of discussion. But all balancing approaches are themselves slippery

170. In a nonpolitical context, is it traitorous or hypocritical to enlist, knowing that the government views homosexuality as incompatible with military service? Is it traitorous or hypocritical to "reap the benefits" of playing heterosexual roles within the entertainment industry? Although Signorile would so assert, the argument seems riddled with subversive bias. Activists probably would not revile a heterosexual actor who "hoodwinked" the public by assuming homosexual roles. The problem is of supply and demand, generated and perpetuated by institutions; it is neither the fault nor the responsibility of individuals. Assuming *arguendo* that orientation hypocrisy even exists, it is unclear how it renders its holder deserving of the harm that outing causes.

171. 478 U.S. 186 (1986) (holding that the Fourteenth Amendment does not confer a fundamental right to engage in acts of sodomy).

172. See Law, *supra* note 19, at 194 & n.34 (citing *Ferment in the Bedroom*, NEWSWEEK, Aug. 8, 1983, at 38).

173. A ready example comes to mind. While attending an open-forum panel discussion of the merits and demerits of outing at Yale in the fall of 1991, legitimate discussion of the issues was continuously interrupted by impromptu staccato outings by Michelangelo Signorile. Issues were obscured as people became increasingly preoccupied with the naming of names. Yale Symposium, *supra* note 8

slopes that the courts choose to characterize as capable of equilibrium.

Because speech is already heavily restricted, "freedom of speech" is a non sequitur, which does not seem to lessen the perception that it is something that every citizen deserves and enjoys. Weighing free speech and privacy in the outing context would not entail censorship or prior restraint any more than existing doctrine. Were one to "out" someone, the results would be similar to defamation. The offending statement would not be censored; the speaker merely would bear the risk that the outing victim would sue. This seems a fair bargain. Concern over whether curbing outing necessitates loss of speech rights implicitly ranks free speech above privacy. While the thought of censorship gone mad is distressing, it is unclear that total loss of privacy stimulates less concern. Moreover, protecting privacy ultimately protects free speech, though the converse may not be true.

The goals of outing are better effectuated through other means. In its divisiveness, outing weakens the community rather than strengthens it. Outers offer up the victim as a "sacrificial lamb" to portray themselves as purifying redeemers, able to solve the problems of discrimination. But the victim is of the same group as the perpetrator or redeemer, which in the public eye reinforces negative stereotypes about homosexual persons and paints them as either cowardly or as willing to subordinate personal agendas to the privacy of others. The movement lacks the purity of method that characterized the civil rights protests of the 1960s.<sup>174</sup> The result is an image of the outers (and thus, gay men and lesbians) as tantrum-throwing, intellectually dishonest egotists. The proper response to discrimination and AIDS, the crises of our age, exists in advocacy, education, and affirmation rather than in emotional blackmail and terror. As John Stuart Mill theorized:

[T]he only purpose for which power can be exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear *because it will be better for him to do so, because it will make him happier, because, in the opinion of others,*

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174. Gay liberation is commonly viewed as commencing on June 27, 1969, when patrons of the Stonewall Bar in New York City responded to harassment by shouts, thrown bottles, and stones. While this was a violent act, it was a response to violence and provided a group identity at a time when doing so was necessary to the cause.

*to do so would be wise, or even right.*<sup>175</sup>

### III. THE CURRENT LEGAL FRAMEWORK

Notwithstanding the visceral sense of injustice provoked when sexual orientation is publicly and forcefully revealed,<sup>176</sup> the legal tools commonly employed to vindicate such harm—defamation, invasion of privacy, and infliction of emotional distress—prove impotent in the face of the revelation. Structurally flawed, these “dignitary torts” fail to remedy the harm caused by outing by asking the wrong questions. Outing illuminates the double bind of homosexuality and reinforces it through the power of law.

#### A. Defamation

##### 1. Current Doctrine and Analysis

Defamation actions are designed to protect reputational interests while encouraging robust discussion of public affairs. A prima facie case requires proof of (1) defamatory language; (2) of or concerning the plaintiff; (3) negligent or intentional publication; and (4) damage to the plaintiff’s reputation.<sup>177</sup> Truth is an affirmative defense.<sup>178</sup> A victim of outing pursuing a defamation claim faces monumental doctrinal opposition, as the epistemological construction of the tort renders it incompatible with the issues presented by such disclosure.

The single requirement that the statement be defamatory comprehends three concepts: fact, falsity, and injury to reputation, all of which impede recovery. The significance of the dichotomy of truth and falsity arises in two distinct contexts. First, as truth is a defense, a defamatory utterance must be false by definition. Second, under the Supreme Court’s decision in

175. JOHN STUART MILL, *On Liberty*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 95-96 (Everyman’s Library ed. 1951) (1865).

176. For example, a Canadian paper recently posed a series of hypothetical questions to its readers, concentrating on assorted issues confronting the media today. When asked whether the paper should publish that a summer sports camp director was gay, 80% of the readers and 83% of the newspaper staff supported protecting the individual’s privacy. *You Were the Editor*, GAZETTE (MONTREAL), Aug. 25, 1991, at A4. This response, of course, must be read in the context of the fact that different communities have different conceptions of privacy, liberty, and community mores.

177. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984).

178. RESTATEMENT OF TORTS §§ 558, 613 (1938).

*New York Times v. Sullivan*,<sup>179</sup> a plaintiff who is a public official or figure or is involved in a matter of public concern must prove actual malice, or the defendant's knowledge of falsity or reckless disregard for the truth.<sup>180</sup> The paradigm outing case, where the victim "is homosexual,"<sup>181</sup> would normally not fit within this matrix; defamation cases flowing from outing are immediately divided by half, if not more. But delving into the construction of the truth/falsity dichotomy presents provocative issues.

The either/or nature of truth and falsity invites a startlingly simplistic view of a complex world by suggesting that every defamatory statement is one or the other and by implication, that labels suggest "facts."<sup>182</sup> Regardless of the combinations of burdens and elements that complicate defamation law, the end result is functionally the same. Someone—whether judge, jury, defendant, or plaintiff—must arbitrarily decide who constitutes "a homosexual," a word not capable of facile and superficial use.<sup>183</sup> This circular approach confuses conduct with status or orientation and obstructs most outing plaintiffs from recourse in defamation.

Many sexual histories are possible: plaintiff's same-sex encounter during adolescence; numerous sexual experiences with both men and women; a loving relationship with a person of the same sex. What if plaintiff wonders about or desires a homosexual experience, but has never been involved in one? What if plaintiff is committed to a same-sex partner with whom no

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179. 376 U.S. 254 (1964).

180. In *New York Times v. Sullivan*, the Supreme Court recognized the central role of the First Amendment in a free society and encouraged debate on the official conduct of public officials by requiring public official plaintiffs to prove actual malice—knowledge of falsity or reckless disregard for the truth. *Id.* Justice Brennan refined this heightened proof when he stated that it would apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

In the companion case of *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967), *New York Times* protection was extended to plaintiffs achieving "public figure" status through positive action placing them at the center of an important public interest. Finally, *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974), applied the strictures of *New York Times* to matters of "public concern," where negligent conduct is actionable only if resulting in actual injury. To sustain presumed and punitive damages, the plaintiff must demonstrate actual malice. *Id.* at 348-50. *Accord Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

181. This assumes that the word is a fact capable of definition as "true." See *infra* notes 183-91 and accompanying text.

182. This is so notwithstanding *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which holds opinions actionable when containing an independently verifiable fact.

183. Insensitivity increases where "homosexual" is used as a noun (thus defining "other") rather than as an adjective (thus describing humans).



sexual activity occurs? Does the label "homosexual" describe an orientation, a preference, an activity, or a lifestyle? More importantly, who decides upon whom the label is placed?<sup>184</sup> The questions degenerate to semantics.<sup>185</sup> Dr. D.J. West notes the ambiguity inherent in the label *homosexual*: "The attempt to categorize all humanity into two mutually exclusive and contrasting groups of homosexuals and heterosexuals, a form of 'them' and 'us,' besides being ethnically and politically dubious, produces misleading oversimplifications."<sup>186</sup>

Many people who engage or have engaged in homosexual activity would not self-define as "homosexual."<sup>187</sup> Many who have never done so might.

184 Traditional constitutional theory endorsed blanket protection for statements of opinion through interpretation of *dicta* derived from *New York Times*:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

*Gertz*, 418 U.S. at 339-340. See also *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (holding publication of defamatory statements in a syndicated column is protected by the First Amendment), *cert. denied*, 471 U.S. 1127 (1985). After sustaining defamation defendants for well over a decade, this privilege seemed extinguished in 1990, when the Supreme Court held that no constitutional opinion privilege existed: "We are not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich*, 497 U.S. at 21 (Rehnquist, C.J.). Tellingly, then-Justice Rehnquist had earlier commented that "[i]t is apparent . . . that lower courts have seized upon the word 'opinion' to solve with a meat axe a very subtle and difficult question." *Ollman*, 471 U.S. at 1129.

The *Milkovich* case, which replaces the "fact/opinion" distinction with "fact/non-fact," suggests that a statement is actionable only if it contains a provably false statement of fact. *Milkovich*, 497 U.S. at 20. Arguing that sexual orientation is not "a fact" is troubling if *Milkovich* is read literally. Nevertheless, asserting that one is homosexual does contain independently ascertainable and "provably false factual connotations" (that he or she engages in the criminal act of sodomy, for example) and thus, appears actionable.

185. Dr. West posits that homosexuality is fluid and is often misapplied or mistakenly deemed applicable to situations where the person had: (1) a fleeting feeling or attraction for a member of the opposite sex; (2) felt an inclination to act; (3) was going through a stage; (4) had changed preferences; (5) had preferences inconsistent with active sexual behavior; or (6) was ambivalent toward the sex of the partner. D.J. WEST, *HOMOSEXUALITY RE-EXAMINED I* (1977).

186. *Id.* at 1.

187. A CERTAIN TERROR, *supra* note 13, at 134. Prison life provides a ready example, where "men can be respected if they [rape] other men, but not if they are themselves [raped]." Prison rapes are often perpetrated by men who identify as heterosexual. "One hole substitutes for another in this scene, for sex is in either case an expression of domination for the masculine mystique." *Id.* This idea also emerges through commercialized sex. Some men, particularly adolescents and those who engage in sexual activity with other men for money, do not identify as gay. COMSTOCK, *supra* note 38, app. D at 163-65 (*Hustlers and Anti-Gay Violence*) (citing Martin Hoffman & Albert J. Reiss, Jr., *The Social Integration of Queers and Peers*, in *THE PROBLEM OF HOMOSEXUALITY IN MODERN SOCIETY* 252-55, 259 (Hendrik M. Ruitenbeck ed., 1963) (explaining that sociological determinants can redefine

A recent study conducted by the Harvard School of Public Health and the Center for Health Policy Studies reinforces this point. The study estimates that nearly one-fifth of Americans report either homosexual behavior or homosexual attraction since age fifteen, and asserts that "sexual orientation isn't just a yes-no, heterosexual-homosexual" question.<sup>188</sup> It is absurd to expect a court of law to determine whether someone is "homosexual" when much more informed institutions, and often the individuals involved, hold neither a clear understanding of homosexuality nor a definitive answer to offer.<sup>189</sup> In addition, the invasiveness of outing and the danger to which it exposes the plaintiff suggest that concealing or choosing to "lie" about sexual orientation by pursuing defamation is less preposterous than it at first might seem: privacy and dishonesty are closely correlated.<sup>190</sup>

Flowing from the insensitive requirement of characterizing homosexuality as fact is its unrealistic (dis)proof. Suppose the plaintiff must prove that the statement is false. Traditional indicators such as marriage or children do not necessarily disprove the allegation. Worse, a plaintiff not so situated is penalized. To understand sexual orientation, it is critical to comprehend that the plaintiff might have engaged in same-sex activity and yet not self-

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expectations and definitions of "normal" in the context of homosexuality)). See also Thomas S. Weinberg, *On 'Doing' and 'Being' Gay: Sexual Behavior and Homosexual Male Self-Identity*, J. HOMOSEXUALITY 143-56 (1978); Joel D. Hencken, *Conceptualizations of Homosexual Behavior Which Preclude Homosexual Self-Labeling*, J. HOMOSEXUALITY 53-64 (1985).

188. Randall L. Sell et al., *The Prevalence of Homosexual Behavior and Attraction in the United States, the United Kingdom and France: Results of National Population-Based Samples*, 24 ARCHIVES SEXUAL BEHAV. 235 (1995). The study's authors say that their results are more reliable than those published by Alfred J. Kinsey in 1948 and 1953, as the latter were obtained primarily from Midwestern college students during the 1940s. *Id.* at 236 (discussing ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) (estimating 37% of respondents had some homosexual content) and ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) (estimating 28% of respondents had some homosexual response)).

189. Note the debate over "causes" of homosexuality. One hypothesis is that homosexuality is a third sex, determined by innate physical conditions. The opposing view emphasizes cultural indoctrination and the pliability of sexual instinct. Psychoanalysts lean toward infancy experiences, while social learning behavioralists focus more on the behavior and experience of adolescence. See WEST, *supra* note 186, at 7; See generally Law, *supra* note 19, at 205 n.93 (detailing the work and differing views of S. Rado, Freud, Irving Bieber, Charles Socarides, E. Bergler, Bromberg, C. Tripp, Ricketts, and Mey-Bahlburg). See also HAVELOCK ELLIS & JOHN A. SYMONDS, *SEXUAL INVERSION* (1975); MALE & FEMALE HOMOSEXUALITY: PSYCHOLOGICAL APPROACHES (Louis Diamond ed., 1987); CHARLES W. SOCARIDES, *HOMOSEXUALITY* (1978).

190. See GEORG SIMMEL, *THE SOCIOLOGY OF GEORG SIMMEL* 313 (Kurt H. Wolff ed., trans., 1950). In a notorious example, Oscar Wilde sued the Marquis of Queensberry for stating that Wilde was homosexual. Despite the statement's "truth," Wilde pursued the action and even lied to his own attorneys. WEST, *supra* note 186, at 131.

identify as homosexual.<sup>191</sup> Such a plaintiff might be unable to prove this fact to the fact-finder, allowing the defendant to escape liability.<sup>192</sup>

Where a plaintiff's case falls beyond the strictures of *New York Times*,<sup>193</sup> the defendant may raise substantial truth as an affirmative defense. The basis for ruminations on sexual orientation are often assailable: a shadowy insinuation, a sly comment, presence at a lesbian or gay bar, friendship with a "renowned homosexual," sympathy for gay or lesbian causes, one or more same-sex encounters.<sup>194</sup> Whether it should or not, basing assertions of homosexuality on any one or more of these factors discourages a pro-active conscience and intimate associations,<sup>195</sup> two values as worthy of protection as unlimited freedom of speech. Moreover, regardless of who must prove truth or falsity, fear of a public ferreting out of personal sexual experiences might dissuade potential plaintiffs from pursuing defamation. When the court pries so deeply into personal activity, it blithely traipses into the same moral void that outers have entered.

The more politically charged obstacle to a defamation suit for outing is that the statement must lessen plaintiff's reputation. Opinions diverge over whether reputation is a dynamic relationship between individual and community<sup>196</sup> or whether it is more personal, like "property," its intact

191. Of course, this idea is not viable if the publication refers to a specific *act*, which most outings do not.

192. *Philadelphia Newspapers, Inc., v. Hepps*, 475 U.S. 767 (1986). The justices have indicated that some cases will be incorrectly disposed of regardless of which party bears the burden of proof, and have deemed that the constitutional scales should be tipped in favor of protecting free speech. *Id.* at 776-77.

193. 376 U.S. 254 (1964). *See supra* note 181 and accompanying text.

194. The casual level at which such assertions are made is common. In an episode of Ronald Reagan, Jr.'s talk show, the subject was outing, and one guest pointed a finger at Reagan and stated that he knew a number of men who had slept with him at Yale. Verne Gay, *Heeere's Ronnie*, *NEWSDAY*, Sept. 22, 1991, at 18. Michael Petrelis, the leader of Queer Nation D.C., candidly admits that he had no proof of the homosexuality of a victim he outed. Mira Friedlander, *Being Pulled Out of the Closet*, *TORONTO STAR*, Sept. 3, 1991, at B1. And when Michelangelo Signorile outed a Pentagon official in the *Advocate*,

[m]ost of the people Signorile quoted had only hearsay knowledge. Their main "evidence" was that the official had supposedly been a regular customer in years gone by at a predominantly gay Washington bar. The few sources who claimed first hand knowledge about him were generally permitted to remain anonymous. Even some unnamed sources knew nothing themselves but were merely quoting still more obscure acquaintances. In one anecdote an unidentified man said an apparent one night stand, picked up in a bar, told him of having "dated" the official.

William A. Henry III, *To "Out" or Not to "Out,"* *TIME*, Aug. 19, 1991, at 17.

195. Barbara Moretti, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 *CARDOZO L. REV.* 857 (1993).

196. *See, e.g.*, RICHARD POSNER, *CARDOZO: A STUDY IN REPUTATION* 58-74 (1990).

nature determined solely by the plaintiff.<sup>197</sup> Harvard Law School Professor Alan Dershowitz has said that: "No court is going to say that calling someone gay is legally defamatory, because to say that is to buy into the notion that being gay is somehow bad. On the other hand, you and I know that being exposed as gay can be harmful to a person."<sup>198</sup> A case brought by a former professional football player nicely demonstrates the practical implications of these conflicting views for the outing plaintiff.

In *Alzado v. Globe International, Inc.*, one-time football great Lyle Alzado sued for libel after the Globe published that he was secretly gay.<sup>199</sup> Defendant demurred that a false imputation of homosexuality was "no more defamatory [than] to state falsely that one is . . . black when he is white, French when he is Italian, Episcopalian when he is Jewish or a Democrat when he is Republican."<sup>200</sup> In support, defendant argued the state's legalization of adult consensual sodomy and its protection of sexual orientation under a state civil rights statute had removed the stigma associated with such an imputation,<sup>201</sup> and asserted that upholding Alzado's defamation action would be tantamount to judicial enforcement of prejudice and contrary to public policy.<sup>202</sup>

This theory irresponsibly evades critical distinctions between law and community. On a temporal continuum, one is usually more or less progressive than the other. Indeed, rarely, if ever, are public policy and personal morality synchronous. A state's refusal to criminalize certain conduct in no way proves that the community embraces it.

Judicial decisions in a political context often rely on acceptance and are not necessarily driven by popular ideals.<sup>203</sup> It is one thing for legislatures to repress discrimination, but quite another for a court to refuse actionable

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197. See Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 696-708 (1986). See generally Jon E. Grant, Note, "Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Courts Categorical Jurisprudence, 77 CORNELL L. REV. 103, 108 (1991).

198. Pat H. Broeske & John M. Wilson, *Outing Targets Hollywood*, L.A. TIMES, July 22, 1990, at 6.

199. Milt Policzer, *Novel Defense: No Stigma = No Libel*, NAT'L L.J., Sept. 9, 1991, at 1.

200. *Id.* at 5. One might then question just what defendant sought to gain by asserting Alzado's homosexuality by lurid headlines: "Macho Newlywed Lyle Alzado is Dying . . . Male Hookers say NFL Hunk is Secretly Gay." *Id.*

201. *Id.* (citing CAL. CIV. CODE § 45 and *Hubert v. Williams*, 184 Cal. Rptr. 161 (Cal. App. Dep't Super. Ct. 1982) (homosexual persons within Unruh Act protection)).

202. *Id.*

203. See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 263-64 (1986).

claims by ignoring social realities. Most Americans disapprove of homosexual conduct.<sup>204</sup> To a substantial segment of society, the assertion of homosexuality injures reputation and generates disassociation; whether it "ought" to, in the minds of "right-thinking people," is entirely another matter. The day when falsely stating that someone is gay or lesbian leaves their reputation intact has not yet arrived. The determination of whether reputation has been damaged is better answered through fact than wishful fiction.

It is hypocritical for courts to suddenly maneuver to moral high ground by suggesting that an orientation is not defamatory when it may cause one to lose a friend, a job, a child, or a life, while asserting that it is reason enough to administer these sanctions.<sup>205</sup> Most telling are the cases that negatively characterize homosexual activity as beyond the pale and heinous, "the very mention of which is a disgrace to human nature."<sup>206</sup> The petitioner's brief in *Bowers v. Hardwick* exemplifies this kind of approach: "[H]omosexual sodomy is anathema of the basic unities of our society—marriage and the family. To decriminalize or artificially withdraw *the public's expression of its disdain for this conduct* does not uplift sodomy, but rather demotes these sacred institutions to merely alternative lifestyles."<sup>207</sup>

Archetypically, an outing victim is someone who would make a good role model, be exposed as a powerful hypocrite, or draw national attention to gay rights or AIDS; in other words, a public official or figure. Absent a stellar showing of falsity, defamatory meaning, and actual malice, attempts to hurdle the barriers erected by constitutional doctrine will prove

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204. In 1974, 70% believed that sexual relations between members of the same sex were wrong; Kenneth L. Nyberg & Jon P. Alston, *Analysis of Public Attitudes Toward Homosexual Behavior*, 2 J. HOMOSEXUALITY 99, 106 (1976-77). The statistics had changed little by 1992, when one study showed that only 38% of the persons polled felt that homosexuality "should be considered an acceptable alternative lifestyle." Hugick, *supra* note 70, at 6.

205. See, e.g., *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981) (finding that the children of the lesbian mother would "suffer from the slings and arrows of a disapproving society" if they lived with her); *Dailey v. Dailey*, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (agreeing with psychologist who expressed that the practice of homosexuality is not socially acceptable, is a learned practice, and is damaging to the proper development of a child). See generally notes 53-66 and accompanying text.

In states that criminalize sodomy, the plaintiff may assert slander *per se* through the allegation of a crime "involving moral turpitude" without proving injury to reputation. And *Schomer v. Smidt*, 170 Cal Rptr. 662 (Cal. Ct. App. 1980), a case that strains credulity, suggests that a female victim of outing would enjoy presumed damages under the *per se* slander exception of imputing unchaste behavior to a woman.

206. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

207. Brief for Petitioner at 37-38, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140).

futile.<sup>208</sup>

## 2. *Reconstructing the Tort*

The defamation action can only apply to outing through substantial reconceptualization of its elements *and* sexual orientation in general. First, not every statement or publication need be a fact;<sup>209</sup> an assertion of "homosexuality" is such a non-fact. Second, "non-facts" may be actionable. Third, because non-facts such as sexual orientation elude reasoned characterization and proof, labeling them as either "true" or "false" is artificial and futile and promotes an "us" versus "them" mentality that corrupts community. No independent criteria exists to definitively answer whether someone is homosexual, heterosexual, or bisexual. Sexual orientation is too complicated to be subjected to a belittling and overly simplistic determination of truth. The court should recognize that in the end, the plaintiff is really the only person who can determine the applicability of the label itself. Thus, a determination of truth or falsity should depend on plaintiff's characterization of that information. If plaintiff deems it to be false, she or he would still have to establish the remaining elements: publication, reputational damage, culpability, and harm.

A less immoderate solution entails reworking burdens of proof in cases involving actionable non-facts. The plaintiff would have more success in defamation where the defendant must prove truth as an affirmative defense<sup>210</sup> and where substantiation for the publication is closely scrutinized. Rumor should be insufficient; even the occasional same-sex liaison should not necessarily define the statement as legally true. The only evidence that should suffice is that plaintiff publicly or privately identified her or himself as lesbian or gay within a time frame recent to the relevant publication. In cases requiring plaintiff to prove actual malice (and thus falsity), the court could either (a) shift the burden of rebutting actual malice to the defendant or (b) allow the plaintiff to set forth minimal information to meet a burden of production. Although marriage or children does not prove sexual orientation (not much can), it does provide leeway for courts

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208. Of course, the outing plaintiff who can prove the falsity of the allegation (or outspend the defendant) may prevail on a defamation claim. In *Selleck v. Globe Int'l*, 212 Cal. Rptr. 838 (Cal. Ct. App. 1985), a well-known actor's father sued the *Globe* for publishing that he was gay. The *Globe* retracted its story, settling out of court. *Occasional*, WASH. POST, Aug. 6, 1991, at E3. Had the case gone to trial, it would have illuminated the nature of the proof required to establish falsity.

209. To some extent, the court recognized this in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

210. RESTATEMENT OF TORTS §§ 558, 613 (1938).

to shift the burden of proof after a minimal initial showing of falsity. Restructuring defamation to acknowledge the amorphous and imprecise fact/non-fact dichotomy should recognize that where the "fact" is neither true or false, the plaintiff should be relieved of this burden.

Placing these burdens on defendants is more equitable as it forces defendants to internalize the cost of the defamation suit. This is a reasonable result because the defendant has arguably economically profited from the assertion already and theoretically is better equipped to demonstrate its truth than the plaintiff, who often will be forced to prove a negative proposition. Though once fearing potential failure in proving the truth of a statement, the press and defendants in general are emboldened in making broad assertions where the plaintiff now carries that burden.<sup>211</sup> These reforms would force defendants to appraise more judiciously the substance of their publications, not necessarily chilling free speech but rather elevating it. And the plaintiff who *would* self-identify as gay would not bring the action at all.

The second area for reconstruction of defamation commands tightening its actual malice categories and relaxing its rigid conception of privacy. A pair of Supreme Court decisions demonstrate the ease with which the conduct of public officials or figures is tied to their status.

In *Garrison v. Louisiana*,<sup>212</sup> defendant criticized the judicial conduct of a criminal court.<sup>213</sup> Plaintiff sued, maintaining that the comment attacked personal integrity rather than official conduct.<sup>214</sup> The court held otherwise:

[C]riticism of the manner in which a public official performs his duties will tend to affect his private, as well as public, reputation. . . . [A]nything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.<sup>215</sup>

Criticism of an official's *public* performance may well affect private reputation, a permissible result according to the Court. But the question is more portentous in transposition: what of *private* action that might affect

211. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). As Professor Rodney Smolla relates, defendants have overcome an initial reticence in asserting the defense of truth to escape defamation liability. RODNEY SMOLLA, *THE LAW OF DEFAMATION* §§ 5.13[3] (1990).

212. 379 U.S. 64 (1964).

213. *Id.* at 65.

214. *Id.* at 64.

215. *Id.* at 77 (emphasis added).

public reputation?

*Monitor Patriot Company v. Roy*<sup>216</sup> suggests an answer. Plaintiff, a candidate for the U.S. Senate, sued for libel after being characterized by the local newspaper as a former bootlegger.<sup>217</sup> Willing to paint official conduct broadly, especially for political candidates, the Court applied *New York Times* protection by defining official conduct as "anything which might touch on an official's fitness for office."<sup>218</sup> The paradoxical result of these fine distinctions is that the press might have wider latitude to discuss the private affairs of public people than it has to discuss the public affairs of private people.<sup>219</sup>

Public figures are similarly broadly treated. With *Curtis Publishing Co. v. Butts*<sup>220</sup> and *Associated Press v. Walker*,<sup>221</sup> the Supreme Court opened the door for expansive, uninhibited comment on movie or television stars, business-world luminaries, professional athletes, politicians,<sup>222</sup> and a host of other individuals surrounded by a greater degree of attention or notoriety. These cases are a boon to the outer as people in these professions are often the very ones they seek to expose. Under these standards, if an outing plaintiff enjoys public status, publishing that person's sexual orientation falls within the confines of *New York Times* protection. Nevertheless, the Court did preserve room for protecting private, non-relevant information when it adumbrated that "whether there remains some exiguous area of defamation against which [a public official] may have full recourse is a question we need not decide in this case."<sup>223</sup> Outing presents such a case. And the court stratifies the public figure category into "general" and "limited purpose" public figures. Broader incursions are allowed into the life of the former; the latter are deemed public figures only with respect to the particular controversy at issue. The court should more critically examine the nexus between private and public life<sup>224</sup> and thus limit *New York Times* protection to defendants who actually deserve it.

216. 401 U.S. 265 (1971).

217. *Id.*

218. *Id.* at 273.

219. See LABUNSKI, *supra* note 130, at 83, 240.

220. 388 U.S. 130 (1967).

221. 389 U.S. 28 (1967).

222. See SHELDON W. HALPERN, THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND "MORAL RIGHTS": CASES AND MATERIALS ON PROTECTION OF PERSONALITY INTERESTS 299 (1988).

223. *Monitor v. Roy*, 401 U.S. 265, 275 (1971).

224. Notably, *Monitor* criticized the private/public distinction as "syllogistic manipulation . . . of little utility in resolving questions of First Amendment protection." *Id.* at 273. This is ironic given its permeation throughout First Amendment and tort jurisprudence.



Last, courts must scrutinize more carefully whether a matter is "of public concern," taking heed to reasonably, responsibly, and sympathetically determine the value of the offending speech to the news-seeking public. Mere prurience, of course, should never suffice.

Adopting the second line of reform neither alters existing rights nor unduly curtails the free and robust discussion of ideas. True speech, the initial concern of the First Amendment, remains fully protected. This reworking of the defamation tort permits maximum protection of individual reputational, political, self-governance, and free speech rights and elevates the nature and level of public discourse in the process.

## B. *False Light*

### 1. *Doctrine and Analysis*

In 1890, Samuel Warren and Louis Brandeis fashioned a legal right to privacy to protect against unreasonable interference with solitude.<sup>225</sup> William Prosser established four prongs of this right,<sup>226</sup> of which two, false light and public disclosure of private facts, pertain to outing.<sup>227</sup> These rights

225. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The article "is perhaps the most famous and certainly the most influential law review article ever written." Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203 (1954). For further discussion of the article and its impact, see Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U.L. REV. 703 (1990).

226. WILLIAM B. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804-14 (4th ed. 1971); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

227. The other prongs are commercial appropriation and intrusion. Commercial appropriation is met by establishing unauthorized use of one's picture or name for commercial advantage. The action is closer to an economic, quasi-copyright infringement harm than a dignitary one. See generally RESTATEMENT (SECOND) OF TORTS § 652B (1977). See, e.g., *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (holding the likeness of an identifiable race car established sufficient grounds for an appropriation action); *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984) (supporting an appropriation action by Jacqueline Kennedy Onassis against a fashion designer's use of a look-alike in a print advertisement).

Intrusion occurs when the defendant offensively and unreasonably pries or intrudes on the seclusion of the plaintiff. RESTATEMENT (SECOND) OF TORTS, § 652D (1977). While some instances might arise where this theory would work for an outing plaintiff, its application is usually limited to actual physical intrusion and is therefore a quasi-trespass tort. See, e.g., *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (unauthorized photography); *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971) (hidden camera, surreptitious surveillance, and microphone); *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), cert. denied, 395 U.S. 947 (1969) (breaking and entering); *Florida Publ. Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), cert. denied, 431 U.S. 930 (1977) (trespass).

are well-recognized under state statutory and common law.<sup>228</sup>

The essence of a false light claim is the deliberate falsification or fictionalization of factual events or circumstances represented to be true.<sup>229</sup> The plaintiff must prove that: (1) the false light in which she or he was placed would be highly offensive to a reasonable person, and (2) the defendant either knowingly or recklessly disregarded the falsity of the publicized matter and the false light into which the plaintiff would be placed.<sup>230</sup> False light parallels defamation, and identical conduct might give rise to an action on either theory.<sup>231</sup> Nevertheless, the causes of action are asymmetrical, and their distinctions instill initial optimism for victims of outing.

First, the action protects distinct interests. False light involves injuries to emotions and mental suffering, while defamation involves injury to reputation.<sup>232</sup> The publication is actionable if it attributes to the plaintiff positions not held or actions not taken, *irrespective of whether the attribution is "defamatory" in its ordinary sense*. Second, false light requires that the light in which the defendant is placed be highly offensive to a reasonable person,<sup>233</sup> rather than "injurious to reputation" as required in defamation.<sup>234</sup> Third, the fact must be subject to broader "publicity" than a defamatory utterance.<sup>235</sup> Fourth, actual malice must be proved when the published matter is in the public interest.

The difficulty an outing victim faces in defamation proceedings

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228. Moretti, *supra* note 196, app. at 899 (listing 36 jurisdictions that appear to recognize the private-facts facet of the right to privacy tort).

229. Falwell v. Flynt, 797 F.2d 1270, 1278 (4th Cir. 1986), *cert. granted* 480 U.S. 935 (1987). RESTATEMENT (SECOND) OF TORTS § 652E (1977).

230. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

231. See, e.g., Afro-American Publ. Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966).

232. Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 87 (W. Va. 1984). Professor Smolla criticizes this distinction as elusive and unsatisfactory, noting that defamation law has always served an interest in compensation for injured feelings, and taking issue with a tort's concentration on the victim's injury over actionable conduct. SMOLLA, *supra* note 211, at §§ 10.02[2][a], at 10-8.

233. See Battaglia v. Adams, 164 So.2d 195 (Fla. 1964). Robert Sack warns of the danger in discussing private facts cases under the aegis of defining "offensive" in the false light arena. "In the 'private facts' context, 'offensive' refers to the personal nature of the facts and the embarrassment that disclosure may be expected to cause, while 'offensive' in the 'false light' context probably means false and offensively injurious to feelings. They are related but not identical." ROBERT D. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 395 (1994).

234. Professor Smolla notes how the two false light claims that have reached the Supreme Court illuminate how a non-defamatory statement might still be offensive. SMOLLA, *supra* note 211, at § 10.02[2][d] (citing Cantrell v. Forest City Pub. Co., 419 U.S. 245 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967)).

235. See Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70 (W. Va. 1983).

foreshadows a similarly exacting standard in false light actions. "Truth" and its attendant difficulties interpose a parallel barrier. Still, the false light tort presents greater political and legal potential for success than its defamation counterpart.<sup>236</sup>

Suppose Politician A threatens to force Politician B "out of the closet." Neither B, nor apparently anyone else would characterize him as gay. B has two initial legal options: defamation or false light. The considerations of each vary. B might proceed on a false light theory as the slight against homosexuality is less grave in this context. The implied assertion of B's action would not then be that he was disparaged or that his reputation was ruined through questioning his orientation, but merely that A attributed to him actions or viewpoints not held, regardless of B's personal convictions. Although it would seem that B was alleging the "offensiveness" of the resultant false light, seemingly innocuous publications (such as identifying plaintiff as a political candidate) have met this standard.<sup>237</sup> B could assure that it was the mischaracterization itself and not its content that he found offensive.

As another example, assume that a local newspaper's headline reads "B Frequents the Black Cat," a well-known lesbian and gay bar.<sup>238</sup> A number of impediments could prevent B's success on a defamation claim.<sup>239</sup> Whether a false light claim would suffer the same fate is less clear. Four situations are possible: (1) B frequents the bar and is gay; (2) B does not frequent the bar and is gay; (3) B frequents the bar and is not gay; (4) B does not frequent the bar and is not gay. In Situation One, B lacks both a defamation and a false light claim; in Situation Four, B could probably bring either. Situations Two and Three are less easily dismissed.

As applied to Situation Three, the headline appears non-defamatory on its face. To proceed on a defamation claim, B would have to prove by inducement the extrinsic fact that the Black Cat was a renowned lesbian/gay bar, and by innuendo that when read and understood in context,

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236. False light has been invoked successfully in seemingly reputation-neutral cases where defendant: characterized the plaintiff's relationship as shallow and sexually driven, *Gill v. Curtis Pub. Co.*, 239 P.2d 630 (Cal. 1952); used plaintiff's picture to illustrate a story on child abandonment, *Prystach v. Best Medium Pub. Co.*, 254 A.2d 872 (Conn. 1969); used plaintiff's name on a telegram to a state governor, *Hinesh v. Meier & Frank Co.*, 113 P.2d 438 (Or. 1941); or even merely identified the plaintiff as a political candidate, *Battaglia v. Adams*, 164 So.2d 195 (Fla. 1964).

237. See SACK, *supra* note 233, at 396.

238. Recall that outing someone need not be done directly. For example, outings commonly occur in the obituary pages.

239. See *supra* notes 177-208 and accompanying text.

defendant suggested he was gay.<sup>240</sup> Defendant's assertion of substantial truth could fail, as its evidence must generally conform in particularity with the defamatory implication itself.<sup>241</sup> The problem is that while the Supreme Court has never suggested that defamation by implication is a tenuous basis for defamation liability, state courts appear to deny recovery.<sup>242</sup> The false light claim presents fewer obstacles.

Perhaps Situation Two, presenting a standard outing case, exposes most aptly the friction between false light and defamation. Were B to assert defamation, he would probably lose. If B has been to the bar, he cannot base a defamation claim on the fact that he does not "frequent" the bar. Although plaintiffs can sue when the underlying thrust of the statement is true but its technicalities are not, courts will scrutinize whether the statement itself is actually defamatory and whether the "substantial truth" of the statement is verifiable.<sup>243</sup> As Professor Smolla posits, the inquiry underlying each doctrinal challenge is essentially the same: Whether the reader would think differently of the plaintiff if the literal truth had been communicated.<sup>244</sup> In the present scenario, the technical inaccuracy of B's visits seem to damage her no more or less under an incremental harm theory than if the actual statement "B has been to the Black Cat and is gay" were to appear in the newspaper.<sup>245</sup>

Again, B might enjoy greater success on a false light theory by avoiding troublesome innuendo and substantial truth defenses. So at least in theory, whether B is gay should not really matter. What *does* matter is whether the notion that B frequents the Black Cat "misrepresents the plaintiff's character or behavior,"<sup>246</sup> or contains a "vague[ly] objection[able] . . . tone

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240. See RESTATEMENT (SECOND) OF TORTS § 563 cmt. b (1977).

241. See KEETON ET AL., *supra* note 177, § 116, at 841. A related concept of substantial truth brings to mind the debate over at which point one becomes a homosexual. Does attending a gay bar determine sexuality? A crude analogy can be drawn to the words of the Restatement: "[A] charge that a woman is a prostitute is not made true by the committing of a single act of unchastity." RESTATEMENT (SECOND) OF TORTS § 581A, cmt. c (1977).

242. See SMOLLA, *supra* note 211, § 4.05(3) (citing *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981) and *Mihalik v. Duprey*, 417 N.E.2d 1238, (Mass. Ct. App. 1981), as evidence of the state court trend in denying recovery where a statement is literally true but permits a defamatory insinuation).

243. See *id.* § 5.12, at 5-23. For further discussion of the substantial truth doctrine, see KEETON ET AL., *supra* note 177, § 116, at 841 (5th ed. 1984).

244. SMOLLA, *supra* note 211, § 5.12.

245. The theory behind "incremental harm" is that where the plaintiff already has a certain reputation, no further damage to it can ensue. SMOLLA, *supra* note 211, §§ 10.02[5] to 10.16. See, e.g., *Masson v. The New Yorker Magazine, Inc.*, 501 U.S. 808 (1991).

246. *Meerpol v. Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974).

or slant or balance."<sup>247</sup> Therefore, if B can establish that although he does identify as homosexual, he is not the stereotypical type that defendant's statement portrays, he may recover under the false light branch of invasion of privacy.

The less stringent requirements for false light offer a potential recovery theory for outing plaintiffs. It appears to "provide compensation for most statements that might also be defamatory while avoiding some of the strictures and absurdities that encrust the law of defamation."<sup>248</sup> But the small spot of hope that false light offers is illusory. Courts seem reluctant to give it full force, relegating it to second-class status as a failed defamation claim.<sup>249</sup>

## 2. Restructuring the Tort

Generally, the issues discussed in the defamation context parallel those raised here. The false light tort focuses less on one's standing or reputation in the community, which considers values from the outside-in, and more on one's standing or reputation to oneself, which considers values from the inside-out. As the stigma attached to homosexuality wanes, the false light tort could be an intermediate measure between an action for defamation and no action at all, which is the ultimate goal.

### C. Public Disclosure of Private Facts

#### 1. Current Doctrine and Analysis

A strikingly prescient portion of *The Right to Privacy*<sup>250</sup> captures one's initial sense that the public disclosure of private facts would prove legally potent for an outing plaintiff: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that

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247. SMOLLA, *supra* note 211, § 10-14.2 Though inaccurate and insubstantial details preclude recovery the very nebulous nature of what constitutes a "false light" would seem to remove the power that these defenses have in their defamation parallel.

248. SACK, *supra* note 233, at 401. As Professor Sack suggests, this may be due to greater plaintiff familiarity with defamation law or an attempt to sidestep a jurisdiction's possibly higher fault requirements under *Hill. Id.*

249. In at least one state, the plaintiff is required to choose between defamation and false light. *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1962) (*en banc*). Another jurisdiction has completely rejected the claim as too severe an encroachment on free speech. *Renwick v. News & Observer Publ. Co.*, 312 S.E.2d 405 (1984), *cert. denied*, 469 U.S. 858 (1986).

250. Warren & Brandeis, *supra* note 225.

'what is whispered in the closet shall be proclaimed from the rooftops.'<sup>251</sup>

This tort clearly attempts to "regulate the publicizing of private life"<sup>252</sup> by imposing liability on one who publishes<sup>253</sup> private facts that (a) would be highly offensive to a reasonable person, and (b) are not of legitimate public concern.<sup>254</sup> While the actionability of publishing one's homosexual orientation seems indisputable, legal, definitional, constitutional, and sociological impediments vitiate this initial optimism.

As in the defamation context, law forces consideration of and places premium importance on the wrong questions. The first and most mischievous stumbling block frustrating a private facts plaintiff is that the published information must be private.<sup>255</sup> The assumption that sexual orientation passes this first requirement to recovery is sound, because although there is no "private information" litmus test, the *Restatement (Second) of Torts* so describes sexual relations.<sup>256</sup> Nevertheless, the indeterminacy of the "public versus private" distinction generates simplistic behavioral categorizations; what might seem private becomes public for purposes of this tort.

Privacy is elastic, susceptible of differing interpretations in different contexts.

[W]e cannot determine whether the information . . . concerns "private" facts simply by examining the content of the information; we must instead have some notion of the circumstances surrounding the revelation of that information. The same information can be viewed as "private" with respect to some kinds of communications, but not with respect to others.<sup>257</sup>

If the inherent privacy elements of selective disclosure and self-determination are conceded, what is private to one should retain that nature irrespective of its dissemination to a select individual or group. For

251. *Id.* at 195.

252. Post, *supra* note 107, at 978 (citing Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 333 (1966)).

253. The disclosure required to sustain a private facts case is greater than that demanded in a defamation case. This is a crucial distinction in non-media cases. See, e.g., *Hendry v. Conner*, 226 N.W.2d 921 (Minn. 1975).

254. RESTATEMENT (SECOND) OF TORTS §§ 652D (1977).

255. See, e.g., *Kapellas v. Kofman* 459 P.2d 912 (Cal. 1969); *Coverstone v. Davics*, 239 P.2d 876 (Cal. 1952).

256. For an example of how one's private sexual affairs might merit protection, see *Garner v. Triangle Pub.*, 97 F. Supp. 546 (S.D.N.Y. 1951).

257. Post, *supra* note 107, at 980.

example, few would quarrel that divulging information to a priest or a spouse would render the disclosed fact any less private, although known by two persons rather than one. The law clearly recognizes shared, post-disclosure privacy in some contexts,<sup>258</sup> but seems less willing to concede this latent recognition for purposes of this tort, where the court is called upon to ask:

whether the facts in question are already known in the community; whether the facts are on the public record; and, in related matters, whether the facts are of general interest, and therefore not to be treated as private; and whether the plaintiff has in any sense waived his right of privacy by consenting to dissemination of the information or disseminating it himself.<sup>259</sup>

*Sipple v. The Chronicle Publishing Co.*<sup>260</sup> elucidates this notion.

On September 22, 1975, Sara Jane Moore was attempting to assassinate President Gerald Ford when Oliver Sipple, a bystander, struck her arm as she was about to fire a gun.<sup>261</sup> Sipple was lauded for his action. *The San Francisco Chronicle* thereafter published an article strongly intimating that Sipple was gay.<sup>262</sup> A number of newspapers subsequently ran the arti-

258. The court recognizes that context might change a private fact to a public one, and vice-versa. Evidentiary rules protect certain confidences. Testimonial privileges permit one to refuse to disclose and prohibit others from disclosing confidential information in judicial proceedings. While Federal Rule of Evidence 501 does not mandate such privilege, the law may enforce the following privileges: attorney-client, physician-patient, husband-wife and spousal immunity, clergy-penitent, and professional journalist. Rules of ethics further bar an attorney from disclosing confidential information, with limited exceptions. Relevant to the present inquiry, an important factor as to whether the disclosed fact is "private" may be the existence of a confidential relationship. See SMOLLA, *supra* note 211, § 10.04[1]b, at 10-23 (citing *Horne v. Patten*, 287 So. 2d 824 (Ala. 1973) (doctor-patient); *Doe v. Roe*, 400 N.Y.S.2d 668 (N.Y. Sup. Ct. 1977) (psychiatrist-patient)). Further, an actionable fact loses its private status after the plaintiff's death or assignment, again, contextual focus. This thwarts recovery in situations like the recent posthumous outing of a publishing tycoon and a movie star.

259. SACK, *supra* note 233, at 406. Lubecky has noted that "confidentiality is typically desired precisely where people do not act in their private capacities and wish to protect the interest of somebody." Lubert C. Velecky, *The Concept of Privacy*, in PRIVACY, *supra* note 103, at 19. See also RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

260. 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

261. *Id.*

262. In pertinent part, the article read:

One of the heroes of the day, Oliver "Bill" Sipple, the ex-Marine who grabbed Sara Jane Moore's arm just as her gun was fired and thereby may have saved the President's life, was the center of midnight attention at the Red Lantern, a Golden Gate Ave. bar he favors. The Reverend Ray Brashers, head of Helping Hands, and gay politico, Harvey Milk, who claims to be among Sipple's close friends, describe themselves as "proud—maybe this will help break the stereotype." Sipple is among the workers in Milk's campaign for Supervisor.

*Id.* at 667 (citing Herb Caen, S.F. CHRON., Sept. 24, 1975).

cle.<sup>263</sup> A few articles questioned Ford's failure to promptly thank Sipple and suggested that this reticence was due to Sipple's orientation.<sup>264</sup>

Sipple sued the *San Francisco Chronicle* and other defendants for invasion of privacy,<sup>265</sup> predicating his claim on the publication of private facts. The California Supreme Court upheld the lower court's grant of summary judgment against Sipple.<sup>266</sup> Crucial to the court's determination was that the published fact was not private:

[S]ince appellant's sexual orientation was already in the public domain and since the articles in question did no more than to give further publicity to matters which the appellant left open to the eye of the public, a vital element of the tort was missing rendering it vulnerable to summary disposal.<sup>267</sup>

While basically comporting with established private facts doctrine, the *Sipple* court engages in unsatisfying rhetorical maneuvering. It suggests that because he frequented gay and lesbian establishments and became friendly with "notorious" gays like Harvey Milk, Sipple left his right to privacy regarding his homosexuality at the bedroom door.<sup>268</sup> Although Sipple may have left his sexuality more exposed than most plaintiffs pursuing a private facts action, the court cannot be saying that we lose all rights to privacy by our associations and activities. To do so creates an impermissible dichotomy between constitutional law and tort law, as associational rights are central to constitutional free speech and privacy.<sup>269</sup> Taken to a logical conclusion, the idea of relinquishing privacy rights based on with whom or where one associates with others leads the common citizen into an Orwellian nightmare. For example, an appointment at an abortion clinic

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263. *Id.* at 666, 669.

264. *Id.* at 666, 670.

265. Once information is public, there is no liability for further publication. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). For this reason, some of the claims against "mere" republishers were dismissed.

266. 201 Cal. Rptr. 665, 669.

267. The case continues by discussing whether the publication was newsworthy, and ultimately answers in the affirmative. *Id.* at 669-71. For extended discussion of that particular point, see *infra* notes 277-86 and accompanying text.

268. While it might seem that patronizing a gay bar is a very public act, it is not necessarily always so viewed. To many lesbians and gay men, it is a quite private arena, a place of safety and discretion. See, e.g., Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1567-72 (1993); McGoldrick, *supra* note 69, at 226.

269. The marriage union is relatively inviolate; people may associate with whom they want as a part of their freedom of association. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (upholding protective order prohibiting paper from publishing list of cult members obtained through compulsory discovery in the course of defending a libel suit).



neither warrants nor justifies the publication that an abortion was procured.<sup>270</sup>

A cynic might assert that the *Sipple* court made a value choice by imposing its views of what deserves privacy protection, refusing to impose sanctions on the encroaching party, and thus reinforcing mainstream morality.<sup>271</sup> A less misanthropic response would submit that the high transaction costs of case-by-case privacy determinations (*i.e.*, what reasonable expectations of privacy did the individual hold) make that approach inefficient.<sup>272</sup> Either conception devalues privacy and human dignity, which involve expectations and self-regarding actions. Society profits little from sterile application of the word "privacy." Doing so is insensitive to the modulations of morality that construct life as a choice-making endeavor.

The second barrier to success on a private facts claim presents an appealing, if not doctrinally pure, escape valve for the defendant: The disclosure must be highly offensive to a reasonable person of ordinary sensibilities.<sup>273</sup> Through a contradictory twist of logic, one could argue that neither homosexuality nor its disclosure outrages average notions of decency. In *Bowers v. Hardwick*,<sup>274</sup> the court refused to extend constitutional privacy to adult consensual sexual activity, highlighting its "unnatural" nature.<sup>275</sup> The argument is reversed if the practice becomes "too natural" to warrant court-imposed sanction on its publication. Cruelly, gay men and lesbians wishing privacy are stripped of it in both constitutional law and tort law, by opposite sides of the same coin. It is enticing to say that homosexuality is not or should not be considered shocking, but reality

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270. One could argue that these hypotheticals do not warrant comparison to outing as a confidential relationship is involved, but this legal status is between the particular individuals involved in the relationship. Third parties are not bound by confidentiality to keep the information private.

271. One wonders whether the court's ruling would have been the same had the information disclosed been something that a heterosexual "mind-frame" would deem private, such as particular sexual activity.

272. See Post, *supra* note 107 (arguing that the drafters of the Restatement might have concluded that the subtle sociological concepts inherent in the privacy tort might have rendered close definitions of public/private dissemination as "beyond the capacity of courts.").

273. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976); *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940); *Forsher v. Bugliosi*, 608 P.2d 716 (Cal. 1980).

274. 478 U.S. 186 (1986).

275. *Id.* at 196-97 (Burger, C.J., concurring).

dictates truth.<sup>276</sup>

Like common law defamation, the private facts tort is infused with a constitutional dimension. If the publication is of legitimate public interest or is newsworthy, it will be privileged,<sup>277</sup> a condition conferred on the basis of the topic itself or the status of the person about whom it is made. In *Gertz v. Robert Welch, Inc.*,<sup>278</sup> the "public interest" standard in defamation actions was criticized as an ill-conceived invitation to *ad hoc* judiciaries and was quickly overturned<sup>279</sup> Although the privacy tort enjoys no such retreat from the public interest standard, identical concerns apply. In fact, a statement can be offensive to ordinary sensibilities and still be in the "public interest," precluding recovery. What is newsworthy, often a matter of community mores, is

not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, the privilege extends to information concerning *interesting phases of human activity* and embraces all issues about which information is needed or appropriate so that the individuals may cope with the exigencies of their period.<sup>280</sup>

The frightening proposition is that the media becomes the arbiter of "public interest."<sup>281</sup> In a society and age that suffers morbid preoccupation with

276. A comparison can be drawn to the debate over affirmative action. Its opponents argue that "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other human beings by race." William Van Alstyne, *Rights of Passage, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979). By contrast, advocates of affirmative action assert that getting beyond racism first requires taking it into account. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1328 (1986) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978)). Analogizing to gay-sensitive issues, we are not yet "beyond" the notion of homosexuality as deviant, covert, and shameful, and should first take it into account.

277. *See, e.g.*, *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Wagner v. Fawcett Pub.*, 307 F.2d 409 (7th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963); *Neff v. Time, Inc.*, 406 F. Supp. 858, 861 (W.D. Pa. 1976). *See also* Dianne Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren & Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 300 (1983).

278. 418 U.S. 323 (1974) (holding that a publisher of defamatory falsehoods about a nonpublic figure may not claim *New York Times* protection).

279. *Id.*

280. *Campell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980), *quoted in* SMOLLA, *supra* note 211, at §§ 10.04[2][b][ii], at 10-33 (emphasis added).

281. *See, e.g.*, LARRY J. SABATO, *FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS* (1991); John Leo, *Gossipmongering's Nasty Bite*, U.S. NEWS & WORLD REP., Apr. 29, 1991, at 20 (commenting on the public's fascination with the scurrilous and noting that "press scruples are irrelevant now because the tone for the media juggernaut is set by those who have none").

the sexual activity of its constituents, "of interest to the public" should not be tantamount to "of public interest" or no one would be safe from the prurient delving of modern Philistines.<sup>282</sup>

This all suggests that a public official or figure has virtually no right of privacy if the facts remotely relate to public life.<sup>283</sup> Courts view such individuals "as having only extremely attenuated claims to information preserves[.] [I]t is profoundly unlikely that courts will intervene to decide what information may or may not be disclosed about a public official or candidate."<sup>284</sup> According to the Meiklejohn theory of self-governance,<sup>285</sup> the amount of information that may be publicized about an individual exceeds the amount of information needed to effectively order political affairs.<sup>286</sup>

Human nature also hinders avenging outing through this tort. A private

282. Unlike in the defamation context, the press can bootstrap itself into the public interest exception under the private facts branch. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). To be fair, courts generally require a nexus between the plaintiff and the matter reportedly in the public interests to protect the dissemination. See *Gilbert v. Medical Economic*, 665 F.2d 305 (10th Cir. 1981). This requirement, however, is liberally conceived and applied.

Permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. [I]t may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case of one who has not become a public figure, would be regarded as an invasion of his purely private life.

RESTATEMENT (SECOND) OF TORTS §§ 652D cmt. h (1977).

Newspaper columns on outing claim to engage in responsible journalism. For example, one newspaper article mentioned the orientation of a Pentagon spokesperson. Its author threw crumbs to responsibility by clarifying that he: a) was merely re-reporting what had already been revealed; and b) recognized the ethical considerations of outing. This swipe at respectability falls short of the mark. The column was a scant single paragraph, suggesting that its sole intent was to relay allegation and nothing more. A more telling flaw is the conspiratorial wink with which the author opened his piece: "Did you know that [] the Pentagon's spokesman during the recent Desert Storm War, is gay?" Mark Tremblay, *Magazines*, CALGARY HERALD, Aug. 4, 1991, available in LEXIS, News Library, ARCNEWS File.

283. See, e.g., *Sidis v. F-R Pub. Corp.*, 113 F.2d 806 (2d Cir.), cert. denied, 311 U.S. 771 (1940) (former child prodigy).

284. Post, *supra* note 107, at n.180 (citations omitted).

285. See *supra* note 131.

286. The ultimate disposition of a recent case should prove instructive on how courts view the "offensiveness" of the disclosure that someone is gay. In *Greenwood v. Taft*, No. C-940066, 1995 WL 540221 (Ohio Ct. App. Sept. 13, 1995), an attorney instituted an invasion of privacy action against his employer for revealing his sexual orientation. Plaintiff listed his male partner as the beneficiary of his insurance and pension benefits. Staff members of his employer shared that information with persons who had no need to know of the information. *Id.* at \*5. The appellate court reversed the trial court's dismissal of plaintiff's case, holding that "[w]e decline to hold as a matter of law that no facts could exist, either under the Restatement definition of publicity or under an expanded interpretation, which would demonstrate a ground for recovery under the disclosure tort." *Id.* at \*7.

facts plaintiff implicitly admits the truth of the published facts. Presumably, one who objects to seeing life's intricacies splayed across a newspaper would not relish increasing attention to that fact, its disclosure, or the truth thereof through adjudication.<sup>287</sup> Plaintiff faces a no-win triple bind: ignore the revelation; deny it and expose sexual activity to a microscopic lens in the defamation context; admit it but subject sexual activity to no less demeaning scrutiny in the privacy realm.

A successful private facts plaintiff perpetuates the characterization of homosexuality as secret and objectionable, leaving the plaintiff vulnerable to another form of degradation, this time self-imposed. The plaintiff must essentially convince the court of the shameful nature of that person's very existence and characterize the disclosure as "offensive." This exposes the plaintiff to assorted psychological problems in addition to the dignitary harm suffered by the disclosure. The plaintiff is made to feel like a traitor to the homosexual "community" as well as to her or himself.

## 2. *Revitalizing the Tort*

Relatively minor internal reform could modify the private facts tort and render it more sensitive to the disclosures that it claims to protect. Within the outing context, this first requires the recognition that "privacy," or a private fact, embraces much more than pure secrecy; the privacy of one is more like solitude. Shared privacy can and should be recognized by the court as deserving protection. A contrary view actually perpetuates the closet as the proper milieu for lesbians and gay men. The major component of privacy should not solely entail the nature of information revealed but also the timing and circumstance of its disclosure. Thus, the revelation of information that is integral to self-definition or that could endanger the person about which it is revealed should be actionable.

Second, requiring the disclosure to offend a reasonable person of ordinary sensibilities is problematic now and might pose increased

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287. As Professor Kalven states, "the victims on whose behalf the privacy tort remedy was designed will not in the real world elect to use it and . . . those who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation." Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROBS. 326, 338 (1966).

The man who feels outraged by publicity will[,] . . . to stop or punish it, have to expose himself to a great deal more publicity. [To] bring his persecutors to justice, he will have to go through a process which will result in an exposure of his private affairs tenfold greater than that originally made by the offending article.

Kramer, *supra* note 225, at 722 n. 126 (quoting Edwin L. Godkin, *The Right to Privacy*, 51 NATION 496 (1890)).

difficulty to an outing plaintiff as tolerance or actual acceptance of homosexuality grows. Viewing privacy this way again focuses too much on the content of the publication as opposed to the publication itself. It should matter less whether the content of the revelation offends sensibilities than whether its stark disclosure, absent the approval or permission of the proprietor of that information, is offensive. The human body is not offensive; most find it beautiful. Nevertheless, the publication of one's nude picture without consent could be actionable under a private facts tort.<sup>288</sup> Assuming *arguendo* that a court determines informational content to be the proper focus of this tort, exposing homosexuality still causes harm.

Third, what is "of legitimate public interest" has been characterized as a "community mores" test. This is particularly troublesome, because, unlike in defamation, the tort has not backed away from defining the existence of "public interest" as the trigger for the newsworthy defense.<sup>289</sup> One scholar has even suggested that by definition, anything in the news fits the description.<sup>290</sup> The public interest or newsworthiness tests should not entitle the media to print any and all information. To so hold would render the private facts tort meaningless—a result that the court could not have intended when the First Amendment crept into the private facts action.

The private facts cases that have reached the Supreme Court, *Cox Broadcasting Corp. v. Cohn*<sup>291</sup> and more recently, *Florida Star v. B.J.F.*,<sup>292</sup> preserve the possibility of recovery for outing, notwithstanding competing free speech concerns. While both cases appear to unwaveringly protect First Amendment principles by limiting the denial of access to and publication of official documents,<sup>293</sup> *Florida Star* reiterated the tension

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288. See, e.g., *Faloon v. Hustler Magazine*, 799 F.2d 1000 (5th Cir. 1986) (ruling publication of nude picture of mother and children not actionable as previous initial dissemination); *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525 (E.D. Pa. 1982) (nude bath photo of model with forged consent); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964) (photo of woman with dress blown over waist).

289. Unlike defamation, the court has not specifically restricted the ability of the media to bootstrap itself into the defense. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

290. Kalven, *supra* note 252, at 336 (1966).

291. 420 U.S. 469 (1975) (holding that the First Amendment prohibited suit for invasion of privacy for publishing the name of a rape victim, as no tort liability can ensue for the public dissemination of true information derived from official and public court records).

292. 491 U.S. 524 (1989) (holding that, in suit for publishing the name of a rape victim, the publication of true and lawfully obtained (although not public record) information may not be proscribed unless statute is narrowly tailored to protect a state interest of the highest order, which state did not meet).

293. See, e.g., *Butterworth v. Smith*, 494 U.S. 624 (1990) (striking state statute permanently barring a grand jury witness from disclosing his or her own testimony); *Press-Enterprises Co. v. Superior Court*

between free press and personal privacy and carefully refrained from holding that "truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the states may protect the individual from intrusion by the press[.]"<sup>294</sup> It is difficult to conceive of a more legitimate privacy interest than protecting a rape victim from further degradation and possible danger. The ease with which newsworthiness can be found supports a conclusion that recovery for publishing another's sexual orientation would not be any better received. Nevertheless, the material published in these cases was always either lawfully obtained or a matter of public record, leaving to speculation whether this protection remains if a publisher "taints" his information by garnering it through bribery, intrusion, or other egregious means.

While Oliver Sipple might have already forsaken a right to the privacy of his orientation, his case should not determine future ones. Defamation protects against the dissemination of false information; the privacy tort is supposed to protect against the dissemination of true but intrinsically personal information. Clearly, the torts are not identical, and the court should not abjure its responsibility by imposing the elaborate jurisprudence of the First Amendment equally on both.

#### *D. Intentional Infliction of Emotional Distress*

The final potential recovery theory for an outing plaintiff is intentional infliction of emotional distress, a tort conceived to prevent intentional harm to personality by violating rules of civility.<sup>295</sup> The *Restatement (Second) of Torts*, makes liable those "who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another[.]"<sup>296</sup> Given the potentially drastic consequences of publicly revealing

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of California, Riverside County, 464 U.S. 501 (1984) (finding error to close voir dire proceedings in a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking state statute barring press from trials where the defendant is accused of raping a minor); *Smith v. Daily Mail Publ. Co.* 443 U.S. 97 (1979) (striking a state law criminalizing the publication of the name of a child defendant in a criminal proceeding); *Landmark Comm. Inc. v. Virginia*, 435 U.S. 829 (1978) (protecting the defendant from criminal punishment for publishing true confidential proceedings of a judicial inquiry board, as criticism of public officials "lies near the core of the First Amendment.").

294. 491 U.S. at 541.

295. Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 616 (1990).

296. RESTATEMENT (SECOND) OF TORTS § 46 (1977). This conduct has also been characterized as "so shocking and outrageous as to exceed all reasonable bounds of decency." See *Callarama v. Associates Dist. Corp.*, 69 Misc. 2d 287 (N.Y. Sup. Ct. 1972); "extraordinarily vindictive," *Flamm v. Van Nierop*, 56 Misc. 2d 1059 (N.Y. Sup. Ct. 1968); or "atrocious and intolerable in a civilized

another's homosexual orientation, outing does seem "utterly intolerable in a civilized community."<sup>297</sup> Thus, in theory, it is actionable.<sup>298</sup> But this formulation is paradoxical in itself, as "rules of civility" are dynamic, interactive, and community-focused, and thus objective. The focus of this tort should be subjective and intent-motivated. In practice, problems arise upon consideration of the elements of the tort, the low level of success that this action meets in court,<sup>299</sup> and the plaintiff's status.

First, courts limit liability for this tort to situations where the defendant's outrageous conduct transcends all bounds of decency. This presumably renders the approach difficult for the outing plaintiff, who seeks to vindicate mere words.<sup>300</sup> As the law celebrates the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open and may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"<sup>301</sup> it is unlikely that name-calling alone would rise to the level of outrageousness required of this tort.

This argument neatly disposes of the issue yet entirely ignores that words hurt and command incredible power to invoke tangible action and force. Depending on the particular enemy of the age, mere name-calling can incite substantial violence to a plaintiff's emotional, economic, or physical well-being. Within a hostile setting, revealing that a particular person is gay is often treated as license to harm, particularly given the anti-homosexual messages with which citizens are besieged.<sup>302</sup> Just as in the privacy medium, this element will prove problematic when society becomes more

society," *MBM Corp. Inc. v. Counce*, 596 S.W.2d 681 (Ark. 1980). One court has noted that this tort is equivalent to the tort of outrage. *See, e.g., Tandy Corp. v. Bone*, 678 S.W.2d 312 (Ark. 1984).

297. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1977).

298. *Id.*

299. This is so in practice, notwithstanding the gradual increased receptivity that has greeted the tort since its inception, and the broader observation that the emotional distress tort should enjoy increased viability in the future, especially in the First Amendment context. *See SMOLLA, supra* note 211, at § 11.01[3].

300. SACK, *supra* note 233, at 475.

301. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

302. For example, publishing that "B is a drunken, incestuous lout who first enjoyed sex while in an outhouse with his mother" would certainly damage B's reputation with a substantial part of the community and would probably harm B's mental well-being. However, it is unlikely that B would be in danger of much more than scorn or contempt from his community. By contrast, publishing that "B is homosexual," whether "true" or not, would damage B's reputation with a substantial part of the community, would probably harm B's mental well-being by being defined by others, and could very well result in B's death. For discussion of self- and other-inflicted violence against gay men and lesbians, see *supra* notes 36-53 and accompanying text.

accepting of alternate sexual orientations, as what is "outrageous" derives content from community norms.

Second, while required for all torts, causation and actual damages are especially emphasized within the emotional distress actions. Although it is unnecessary to prove physical injuries to recover, nominal damages will not suffice. Severe emotional distress must ordinarily be sustained,<sup>303</sup> catching many tort plaintiffs between Scylla and Charybdis. If the plaintiff keeps his or her same-sex orientation private due to intense shame or fear of reprisal, its revelation will likely cause the level of emotional harm required to state a cause of action. The harm might then go unredressed, as the plaintiff presumably wishes to call no further attention to the issue and might feel that the ensuing emotional distress was deserved. Conversely, if the plaintiff keeps the same information personal through a desire for privacy unaccompanied by shame or guilt, any emotional distress attending the revelation would probably be limited to loss of dignity, privacy, or self-definition. The harm may be no less real, but private facts jurisprudence intimates that this type of harm, absent the other elements required to sustain private facts recovery, would not be enough.

Once again, familiar constitutional doctrine thwarts redress through an emotional distress action, at least in the public speech arena. A public figure or official plaintiff who would be barred on First Amendment grounds from a defamation recovery may not rework a failed defamation claim as an infliction theory to escape media protection.<sup>304</sup> The court divines that to permit such alternative approaches would adulterate the free speech rights protected by the First Amendment. Further, the philosophy of this tort conveys the court's determination that within "political and social discourse," characterizing a statement as "outrageous" is unprincipled, subjective, and thus, constitutionally inappropriate.<sup>305</sup>

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303. *But see* Post, *supra* note 295, at 633 (arguing that the element of "severe" emotional distress is satisfied by a plaintiff's "simple recitation that he has been upset.").

304. *See* Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) ("[I]t would serve no useful purpose to treat separately the 'false light' cause of action nor the 'outrageous conduct' doctrine sought to be injected into the trial, as the same First Amendment considerations must be applied."); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Professor Smolla posits, however, that "[n]othing in the First Amendment, for example, necessarily dictates a rule that a defamation claim failure dictates a failure on the emotional distress claim." Rodney A. Smolla, *Emotional Distress and the First Amendment: An Analysis of Hustler v. Falwell*, 20 ARIZ. ST. L.J. 423 (1988).

305. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52-53 (1988), *rev'g Falwell v. Flynt*, 797 F.2d 1270 (4th Cir. 1986). The court evades whether its other characterizations in the dignitary torts, including what is private versus what is public, is any less subjective.



An arresting example of these doctrines figures in *Hustler Magazine v. Falwell*.<sup>306</sup> Hustler printed an ad parody depicting the Reverend Jerry Falwell as having first experienced sex with his mother in a Virginia outhouse.<sup>307</sup> Falwell sued Hustler on a number of grounds, including intentional infliction of emotional distress.<sup>308</sup> Although Falwell succeeded on this claim at trial and on appeal,<sup>309</sup> the Supreme Court unanimously reversed.<sup>310</sup> Chief Justice Rehnquist's opinion constructed the question as involving First Amendment limits on a state's authority to award damages supported by an emotional distress theory.<sup>311</sup> He concluded:

[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether it was true.<sup>312</sup>

Thus, if the outing victim is a public figure or official, the victim is barred from recovery when the information is "true," involves a matter of public concern, causes no injury beyond emotional distress, and occasions no tort beyond infliction of emotional distress.<sup>313</sup> When the plaintiff suffers an injury other than emotional distress or a tort other than intentional infliction of emotional distress exists, the plaintiff *might* recover if (1) the conduct is reckless or intentional regarding the risk of the non-emotional distress, or (2) the defendant commits a tort other than intentional infliction of emotional distress, and the conduct is intentional or reckless regarding the legal interest that the tort protects.

If the speech does not involve a matter of public concern or if the outing victim is a private figure but the issue is of public concern, the above analysis applies, except that the *New York Times* actual malice standard becomes mere negligence. If the speech does not involve an issue of public concern, the common law will govern recovery.<sup>314</sup>

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306. 485 U.S. 46 (1988).

307. *Id.* at 47.

308. *Id.* at 46.

309. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986).

310. 485 U.S. 46.

311. *Id.* at 50.

312. *Id.* at 56.

313. *Id.*

314. SMOLLA, *supra* note 211, at 11-22 & 11-23 (positing and elaborating on this framework and remarking on the applicability of other First Amendment restraints on the tort, including the opinion

## 2. *Redirecting the Inquiry*

It is difficult to prove that the mere publication of words is sufficient to cause the level of personal harm required to sustain intentional infliction of emotional distress. However, although that can be the effect of outing: Oliver Sipple died in 1985, a victim of ostracism, alcoholism, and suicidal depression.<sup>315</sup> A friend found him dead, alone in his room.<sup>316</sup>

Mr. Sipple's case is not shocking. The revelation of his orientation was arguably incidental to the assassination attempt on then-President Ford. The report did not aim to harm, embarrass, or intimidate Mr. Sipple in any way. Not so with some militant factions that support outing. They purposely and intentionally seek to disrupt lives, especially when the motive for the event is to expose hypocrisy. Their response? A cavalier shrug and a flip statement: "It does not hurt anyone. She is still making tons of money playing tennis. He is still reaping in the big bucks as a star. Why are you so worried about these millionaires anyway?"<sup>317</sup>

Once again, the First Amendment plays a key role in infliction cases. A plaintiff who would be barred on First Amendment grounds from proceeding in defamation cannot bring an action based on the same conduct under this tort. Nevertheless, the torts compensate different injuries and punish different conduct, which should recast the analysis under First Amendment principles.

In the defamation context, the defendant's state of mind matters little beyond knowledge of falsity or reckless disregard for the truth, or what she or he knew and when. Within the private facts tort, the defendant's intent does not matter at all. Treating intentional infliction of emotional distress the same as these other torts leaves no room for publications that stem from original actual malice: mean-spirited desire and ill will toward the plaintiff. Why let this type of defendant slip through when she or he already escapes liability under the other torts? Why not let public figures and officials have equal access to the action when they are already barred from redressing a neutrally driven offense? The defendant should enjoy less protection where bad motive impels the speech.

By allowing an outing plaintiff this vehicle for redress, the law would

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privilege).

315. Dan Morain, *Sorrow Trailed a Veteran Who Saved A President and Then Was Cast in an Unwanted Spotlight*, L.A. TIMES, Feb. 13, 1989, § 5, at 6.

316. *Id.*

317. See Yale Symposium, *supra* note 8.

treat outing similarly to civil disobedience. The speech would not be censored nor subject to prior restraint, except to the extent that its publisher would self-censor. But the permitted speech itself would remain free, entitling the speaker to fulfillment and the audience to informational access. An outer not motivated by any ill-will would escape liability.

#### IV. FASHIONING AN APPROPRIATE RESPONSE

Defamation, invasion of privacy, and intentional infliction of emotional distress protect individual dignity and preserve common rules of civility that, when breached, endanger social interaction. With outing, social interaction is severely threatened, as it is doubtful that community can even exist without the retreat of privacy and its analog, intimacy. When filtered through the First Amendment, the dignitary torts fall short of their purpose through broad and clumsy categories that ineffectually respond to the harms that outing occasions. The legal framework reduces relevant inquiries to broad and ambiguous classifications: Is sexual orientation a fact or an opinion? Is the plaintiff or the matter disseminated public or private? Is the information true or false? While judicially manageable categories might dispose of easy cases, the harder ones, where answers to binary questions are more elusive, suffer the loss.

The assorted views of the scope and weight assigned to the First Amendment impede objectively balancing the rights that compete within outing, and scales are not calibrated finely enough to assist in determining whether the court should protect outing speech under a given ideological principle. The lip service paid to the balancing approach proves irrelevant more often than not because, in practice, free speech usually trumps all else.<sup>318</sup>

That such harm to dignity can be remedied by only the most cloistered of victims suffering the most egregious invasions of privacy is astonishing until one remembers the group with whom outing deals: gay men and lesbians who have been and remain subjected to imposed and internal inconsistencies throughout history. The frustration with which an outing plaintiff is met in the courts is systemic—law imitates life and vice versa. Nevertheless, space exists for a shift in the privacy/free speech paradigm to provide real protection to the solid value of privacy. As Gerald Dworkin notes:

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318. For thoughtful discussions of this principle, see STANLEY FISH, *supra* note 95; CATHARINE MACKINNON, *ONLY WORDS* (1993).

Lawyers are concerned not only with principles but also with problems . . . if there are gaps in the law these can be identified[.] There are three questions that the lawyer must ask: first, what is the meaning of privacy; secondly, to what extent is this concept already protected by law, and thirdly, if such protection is not adequate, what kind of law reform is required?<sup>319</sup>

Attempts to redraw the lines in specific legal arenas might allow a plaintiff to vindicate an outing, but the issue suggests that the court more seriously consider its present technology of justice to determine whether instead of construing the same lines a little differently solely for the outing issue, it should repaint them entirely. The court has already demonstrated its commitment to the legal protection of privacy, within the Constitution and its penumbras.<sup>320</sup> At some level, society must decide whether the privilege to do as one wishes without impairing the rights of others should supersede competing concerns, including the First Amendment, or be subordinate to them.

Conversely, outing might be a phenomenon that in most cases should not be legally enjoined, as doing so would muddle the quarter-century of constitutional analysis with which the Supreme Court has infused common law torts. This does not mean that legal or social reform cannot address the problems that outing creates. If law functions more prescriptively than descriptively, the ultimate solution is to legalize sodomy and same-sex marriage: Other legal biases imposed due to orientation would become non-existent and people would have less to lose, and would thus gain, when orientation was revealed. And when society no longer condemns the activity or the status, there would be no need for a legal action to redress its revelation through defamation, privacy, or any other tort.

The response to outing could also emanate from ethics. The good that has come of the outing debate in provoking discussion of sexual orientation and ethics is salutary but does not justify the real harm inflicted on the real people or their families. Publications could pledge to more carefully consider what, why, and how they publish information that is either essential to a person's self-identity or potentially damaging if revealed. Publications committed to radical activism or the mighty dollar might be disinclined to accept such self-imposed restraint, shifting part of the burden to society.

Society must scrutinize its attitudes towards homosexuality, and admit

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319. Gerald Dworkin, *Privacy and the Law*, in *PRIVACY*, *supra* note 103.

320. *See supra* note 101.

that sexual orientation is a single facet of a complex life, to embrace the enrichment caused by breaking down the institutional walls that separate and divide. Only then will there be nothing to gain by outing, and no money to be made by outing, no problems to redress by outing. Only then will outing lose its sting, refocusing us on more important issues, such as AIDS.

## V. CONCLUSION

Outing disillusionions. It reveals the conflict that ingrained institutions force upon human lives. Heterosexuality is equated with normality, morality, the right to publicity as to orientation, and the right to privacy as to sexual conduct and sexual information. Homosexuality is equated with deviance, immorality, and no right to be open as to orientation (epitomized by "Don't Ask, Don't Tell" policies), yet no right to be private about sexual conduct, information, or orientation. In essence, heterosexuality is equated with truth and homosexuality with lies.

Casting the central issue in privacy terms risks perpetuating the myth that gays better keep their sexuality hidden so as not to offend, shock, dismay, or insult the rest of us,<sup>321</sup> but privacy as a keystone of liberalism far exceeds informational content to include autonomy, decisions, dignity, and, most important for the outing plaintiff, control over one's own perceived identity. As a legal concept, privacy appears to be the best method through which to institutionalize these ideas. If this epistemological approach is flawed, it needs a substitute before meaningful discussion can ensue. Metaphorically, privacy should not imply a gag shoved in your mouth by some third person. It implies, rather, a personal choice to cover one's own mouth, at least partially, should that choice be made at all.

Outing is conflict-ridden. It rends ingrained ideas about sexuality and cuts across as well as into ideological reserves. We sense that gay men and lesbians are oppressed, but we want to keep that problem "over there," thus reinforcing the self/other distinction. We oppress homosexual persons ourselves, but are dismayed that oppression can come from within an "other" group as well as without. This makes "them" more like "us;" this makes "us" uncomfortable. Outing confronts us all, when we least expect or desire it. Outing forces us to actually see things, and once seen, view

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321. See RICHARD D. MOHR, *GAY IDEAS, OUTING & OTHER CONTROVERSIES* (1992) (marshalling a strong defense in support of outing).

them differently.<sup>322</sup> Professor Kendall Thomas describes the heterosexual commitment to ignorance about gay life:

The cloak of secrecy drawn around gay and lesbian lives in turn allows heterosexuals to maintain “the epistemological privilege of unknowing.” It is precisely the “ignorance effect” that provides an ideological anchor for the oppression of gays and lesbians, which the secrecy of the ‘closet’ has historically aimed to mitigate.<sup>323</sup>

Outing is unsettling. It strikes dissonant chords and is revolting yet fascinating. “Liberals” find themselves simultaneously pulled in two traditionally progressive directions—free speech and privacy. While we recognize the salutary effects of outing, we might shudder at the prospect of reducing discrimination tomorrow by forcing living victims to suffer it today.

In failing to provide a means by which a victim of outing can vindicate his or her pain, current law fails to protect rights and values that our society cherishes. The existing legal structure, especially the private facts action, could sustain relatively minor reform to allow law and society to work within and through a community of people rather than outside of and against a subset of individuals. Allowing legal redress of outing, although a small method by comparison to the desired goal, is a step in the direction to which this directive challenges us to move. Perhaps then we can begin the herculean task of truly respecting difference, privacy, individualism, and the many benefits that those values confer.

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322. As Professor Law articulates,

Lesbians and gay men pose a formidable threat to the classic gender script. They deny the inevitability of heterosexuality. They do not fit. Such persons, particularly if they are comfortable with their sexuality and reasonably content and successful in their work and family life, invite heterosexual people to explore whether their own sexual orientation is innate, “freely chosen,” or simply the socially comfortable course of least resistance.

Law, *supra* note 19, at 210.

323. Thomas, *supra* note 46, at 1455-56 (quoting EVE K. SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 5 (1990)).