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Forced out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"

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COMMENTS

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The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?¹

I. INTRODUCTION

The battle between the public's right to information² and the individual's right to privacy³ is as old as the First Amendment itself. Judges for centuries have struggled to balance the right of the individual to be free from unwarranted intrusion into his private life⁴ against the media's need to "serve the public interest in news."⁵ The task has

1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 218 (1890).

2. Whether the public has a constitutional "right to know" under the First Amendment is a matter of some debate. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975).

3. For an excellent discussion of the origins of the common law right to privacy, see Warren & Brandeis, *supra* note 1.

4. *Id.* at 195.

5. *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967) (quoting Harry J. Kalven, Jr., *Privacy in*

not always been easy. Champions of free speech have accused privacy-oriented judges of eroding the spirit, as well as the letter, of the First Amendment.⁶ Conversely, those who favor a broader notion of privacy maintain that "the right to privacy is necessary for the autonomy of individuals, even at the cost of some flawed decisions on the part of ignorant others."⁷ The paradoxical and often inconsistent attitudes many Americans hold regarding the government's role in regulating the free expression of its citizens exacerbates this situation.⁸ While most Americans agree that "debate on public issues should be uninhibited [and] robust,"⁹ the majority also believes that the individual must have some space that is off limits to others if our society is to be "a fit [place] in which people will gladly live."¹⁰

Nowhere has this attempt to "harmonize individual rights and community interests"¹¹ been more heated than in the homosexual community. Largely because of Biblical injunctions surrounding sod-

Tort Law—Were Warren and Brandeis Wrong?, 31 LAW & CONTEMP. PROBS. 326, 335-36 (1966).

6. See, e.g., Alan M. Dershowitz, *Should Rape Victims Be Named?*, MIAMI HERALD, Apr. 21, 1991, at C1.

7. KIM L. SCHEPPELE, LEGAL SECRETS 182 (1988); see also Susan Estrich, *Should Rape Victims Be Named?*, MIAMI HERALD, Apr. 21, 1991, at C1.

8. In a survey of 1,500 Americans conducted by the Thomas Jefferson Center for the Protection of Free Expression, 90% of those surveyed said they felt the government has no right to tell people what to do or say, while only 65% of that same group felt that the press should be allowed to print whatever it chooses. Shrona Foreman, *Survey Finds Confusion About Free Expression*, MIAMI HERALD, Sept. 16, 1990, at 12A. Responses to a recent *Miami Herald* survey on the subject of whether to print the names of clients of an alleged prostitute revealed similar tension. One reader wrote: "If you publish the names of these men . . . you also expose their mothers, fathers, and children and, yes, indeed, their entire families." Another reader said: "One doesn't have to be college educated to realize that too many of our business and political leaders and citizens are hypocrites. . . . [I]t is the duty of the news media . . . to expose *all* who deceive us, for if you don't, who will?" Doug Clifton, *I Asked For Your Thoughts. You Gave Them*, MIAMI HERALD, Sept. 8, 1991, at 4C. Not all countries, however, agree with the assumption that the private lives of public figures are fair game for media coverage. In France, the private lives of public figures are considered personal affairs. See Sharon Waxman, *Interview Linking Actor to Rape Angers French*, MIAMI HERALD, April 2, 1991, at 3A.

9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1963).

10. SCHEPPELE, *supra* note 7, at 182. A recent survey of editors and news directors reported a 45% increase in reader concern with the media's effect on personal privacy in the last five years. SOCIETY OF PROFESSIONAL JOURNALISTS, *PRIVACY AND THE PRESS: HOW THEY CO-EXIST* 1 (1990). Surprisingly, the media appears sympathetic to the public's position. Journalists today are more likely to place an individual's right to privacy above the public's right to know, especially when it comes to reporting crimes. *Id.* at 3. Some newspapers, in fact, have even begun surveying their readers to determine whether information about the private lives of individuals is "newsworthy." See Doug Clifton, *Should We Print Names of Accused Prostitute's Clients?*, MIAMI HERALD, Sept. 1, 1991, at 4C.

11. *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967).

omy,¹² and society's general reticence toward matters concerning sexuality,¹³ most homosexuals have chosen to keep their sexual orientation private.¹⁴ Those gay people who have made their sexual orientation known have paid a price, often sacrificing their careers,¹⁵ their families,¹⁶ and even their lives¹⁷ in the process.

In the face of Acquired Immune Deficiency Syndrome ("AIDS") and changing attitudes toward homosexuality, however, the so-called "conspiracy of silence" appears to be ending. A number of prominent public figures recently have come forward and announced their homosexuality in the media,¹⁸ and several gay rights groups, in unrelated

12. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 38 (1980). The specific passage, cited in *Leviticus* 18:22, reads: "Thou shalt not lie with mankind, as with womankind; it is abomination."

13. FOUCAULT, *supra* note 12, at 3. In a somewhat alarming report released recently by the Kinsey Institute, 55% of Americans surveyed were unable to answer questions which tested basic sexual knowledge. Roughly one-quarter knew that the typical American first has intercourse at age 16 to 17; about the same number correctly estimated that 30-40% of married men have had an extramarital affair. Respondents unanimously reported dissatisfaction with their ability to communicate honestly and openly about sexual matters to their mates. Don Oldenburg, *Sexually Confused? Well, So Are Some Experts . . .*, WASH. POST, Oct. 12, 1990, at B5.

14. In an interview with the Senate Judiciary Committee in August, 1986, Jeffrey W. Levi, Executive Director of the National Gay and Lesbian Task Force, estimated that his organization had about 10,000 members. Yet in research conducted by Alfred Kinsey and his colleagues at the Institute for Sex research between 1938 and 1963, the Institute found that roughly one in three men and one in five women have had at least some overtly homosexual experience between their teen years and middle age. Twenty-one percent of white, college-educated men and seven percent of white, college-educated women reported having had sex with two or more persons of their own gender, or having had gay sex six or more times. MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s* 13-14 (1989).

15. For a general discussion of the problems gays experience being "out" on the job, see DON CLARK, *THE NEW LOVING SOMEONE GAY* 132-41 (1987). For more specific discussions of problems related to particular professions, see ROCK HUDSON & SARA DAVIDSON, *ROCK HUDSON: HIS STORY* (1986) (actors and entertainers); DAVID KOPAY & PERRY D. YOUNG, *THE DAVID KOPAY STORY* (1977) (professional athletes); Lynn Miller, *The Legal Closet*, *STUDENT LAW.*, Feb. 1988, at 13 (gay lawyers and law students); Thomas A. Stewart, *Gay in Corporate America*, *FORTUNE*, Dec. 16, 1991, at 43 (business executives).

16. See CLARK, *supra* note 15, at 134.

17. See generally RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK* (1982) (chronicling the assassination of San Francisco City Supervisor Harvey Milk).

18. Among those in public positions who have come out in the last five years are former professional baseball umpire Dave Pallone, David Colker, *Secret Behind the Mask: A Former Umpire Discusses One of His Life's Tough Calls: Being Gay and in Pro Baseball*, L.A. TIMES, June 22, 1990, at E1; Hollywood mogul David Geffen, Jennet Conant, *Doesn't David Geffen Know the Eighties Are Over?*, GENTLEMEN'S Q., Mar. 1991, at 239; two United States congressmen, Mitchell Zuckoff, *Frank Tells Gay Alliance That 'Outing' is Wrong*, BOSTON GLOBE, June 16, 1990, at 29; television star Dick Sargent, *TV Star's Revelation Shocks Hollywood*, MIAMI HERALD, at C1; and world-class bodybuilder Bob Paris, Lonnie Teper, *Bob Paris: Be True to Yourself*, IRONMAN, July 1989, at 87.

actions, have attempted to expose, or "out," politicians and public figures who lead double lives.¹⁹ Even among members of the heterosexual community, the notion that what a person does in bed is his own business²⁰—once the unwritten rule among homosexuals—is no longer considered self-evident.

This Comment examines the ethical and legal issues raised by the movement to "out" closeted gay people. Specifically, the Comment focuses on the question of what interest, if any, the public has in a person's sexual orientation, and under what circumstances, if any, that interest outweighs the individual's right "to be let alone."²¹ Part II examines the changes in social and political attitudes toward homosexuality that have taken place in the United States²² within the last twenty years, and how those changes have influenced the legal and ethical debate concerning the outing of closeted homosexuals. Part III discusses the arguments made by those on both sides of the outing debate, paying special attention to the ethical considerations raised by both groups. Part IV raises the question whether there is such a thing as a "private fact," and if so, whether sexual orientation is one. Part IV also attempts to draw distinctions between the outing of public and private figures to see under what circumstances, if any, courts ought to recognize a common law right to privacy with regard to sexual orientation. The Comment concludes by asking whether moral principles exist that make outing an ethically indefensible political strategy.

19. Most of the politicians outed by groups such as the AIDS Coalition to Unleash Power ("ACT-UP") have taken political positions inimical to gay rights and AIDS legislation. Kim I. Mills, *Gays Crying Gay*, WASH. JOURNALISM REV., Oct. 1990, at 24 (discussing outing of Republican Senator Mark Hatfield). However, many prominent celebrities and public figures have been outed by gay magazines and tabloids as well. *These Stars Are Gay*, GLOBE, Nov. 20, 1990, at 6; see also Felicity Barringer, *On 25th Year, NOW Reasserts Its Role as Outsider*, N.Y. TIMES, Jan. 12, 1992, at 11 (discussing National Organization for Women ("NOW") President Patricia Ireland's relationship with her female "companion"); Guy Trebay, *Show and Tell*, VILLAGE VOICE, Mar. 12, 1991, at 16 (discussing outing of actress Jodie Foster); .

20. *Readers React to Column on Gay Rights*, MIAMI HERALD, Sept. 1, 1990, at B1 (quoting unsigned author of letter to columnist Charles Whited).

21. Warren & Brandeis, *supra* note 1, at 195.

22. Although "outing" is not a uniquely American phenomena, for purposes of this Comment, discussion of attitudes toward homosexuality and outing will be confined to the United States. For discussions of outings in other countries, see Nick Cohen, "Outing" Group to Name MPs as Homosexual, INDEPENDENT, July 29, 1991, at 1 (England); *Bones of Contention*, DAILY TELEGRAPH, Aug. 19, 1991, at 14 (Germany).

II. OUTING, SEXUALITY, AND PRIVACY: A SOCIOLOGICAL OVERVIEW

A. *The Origins of Outing*

In its most widely used sense, outing refers to the revealing of the homosexuality of closeted celebrities and public officials.²³ The term is derived from the phrase "coming out of the closet," which has come to signify the act of publicly acknowledging one's homosexuality.²⁴ In actuality, however, the term has been expanded to include limited public figures and private actors.²⁵

Recent outings differ from those in earlier years in two significant respects. First, unlike prior public disclosures of a person's sexual orientation, recent outings originate in the gay community.²⁶ Additionally, whereas early disclosures were motivated almost exclusively by a desire to embarrass, degrade, or humiliate homosexuals,²⁷ outings within the gay community are normally designed to promote positive images of gay people.²⁸

Members of the gay community offer a number of reasons to justify outing fellow gays. While some gay rights groups cite exposing

23. Pat H. Broeske & John M. Wilson, *Outing Target Hollywood*, L.A. TIMES, July 22, 1990, at 6. Although people have been forced out of the closet for centuries, only within the last four years has outing become recognized as a social movement by the media. When used in this Comment, the term "outing" refers to any situation in which one person discloses the sexual orientation of another against his will to a third party or parties.

24. Jack Rosenthal, *On Language*, N.Y. TIMES, Aug. 5, 1990, § 6 (Magazine), at 16. The first "official" outing occurred in March 1989, when Michelangelo Signorile, a columnist for *OutWeek*, a gay news magazine, authored a posthumous column entitled "The Secret Gay Life of Malcolm Forbes." Broeske & Wilson, *supra* note 23, at 6. In the article, Signorile revealed that Forbes had led a clandestine homosexual life for many years. *Id.*

25. See Cliff O'Neill, *Lesbian Reporter Fired After Campaign by Radio Preacher Seeks Damages in Discrimination, Invasion of Privacy Suit*, WEEKLY NEWS, Dec. 12, 1990, at 13 (citing reporter's anger at radio broadcaster for "outing" her); see also *In re Kowalski*, 1991 WL 263225 (Minn. Ct. App.) (disputing trial court's suggestion that lesbian's statement to the media and her lover's family that the two were lesbians could give rise to the level of an actionable tort); Victoria Slind-Flor, *Gays out of the Closet: Whose Decision Is It?*, MIAMI REV., May 9, 1990, at 13 (discussing former U.S. Rep. Jon Hinson's being outed after he was arrested in 1981 for having sex in men's bathroom of Longworth House Office Building in 1978).

26. Broeske & Wilson, *supra* note 23, at 6. Among the groups that have actively endorsed outing are ACT-UP and Queer Nation, a coalition of radical gays and lesbians. Mills, *supra* note 19, at 23; QUEER NATION, IN YOUR FACE 2 (n.d.).

27. Fox Butterfield, *The Uproar at Dartmouth: How a Conservative Weekly Inflamed a Campus*, N.Y. TIMES, Oct. 7, 1990, at 15 (citing publication in 1981 by *Dartmouth Review* of list of members of school's Gay Students Association); see also *Logan v. Sears Roebuck & Co.*, 466 So. 2d 121 (Ala. 1985) (announcing to co-worker that plaintiff was "queer as a three dollar bill").

28. QUEER NATION, *supra* note 26, at 2 (describing outing of diver Greg Louganis).

hypocrisy as the primary motivation for outing,²⁹ others point to the need to "neturaliz[e] the enemy gay-basher."³⁰ Still others point to the gay community's need to provide role models for gay youngsters,³¹ and the refusal of government officials to fund treatment programs adequately for people with AIDS.³² Opinion is even more divided over the question whether outing is morally defensible. Those in the gay community who view outing as a political tool to combat AIDS and homophobia see their action as an affirmative political duty arising out of an obligation to fellow gay men and women. Outing for them is not simply a choice between competing alternatives, but an ethical imperative, akin to a religious conviction.³³ Others, primarily those in the media, view the question as a matter of situational morality, requiring a case-by-case analysis of the particular circumstances, rather than a per se rule.³⁴ Still others argue that the right to privacy with respect to matters of sexuality is absolute, and that exposing someone's sexual orientation is morally wrong, regardless of the circumstances.³⁵

B. *Homosexuality and Privacy: Social Attitudes*

To understand why the debate over outing has aroused so much controversy, it is helpful to understand something about American attitudes toward homosexuality. Until the late 1960s, the majority of homosexuals chose to keep their sexual lives private in order to avoid the negative consequences of publicly announcing their sexual orientation.³⁶ Most of society viewed homosexuality as abnormal,³⁷ an

29. Broeske & Wilson, *supra* note 23, at 6; see also Michelangelo Signorile, *The Outing of Assistant Secretary of Defense Pete Williams*, *ADVOCATE*, Aug. 27, 1991, at 34 (discussing Williams' role in supporting military policy that deems homosexuality "incompatible" with military service).

30. *Id.*

31. Marsha King, *Concerned About Privacy as Well as Hypocrisy, Gays and Lesbians Debate the Practice of "Outing"—How Far Out?*, *SEATTLE TIMES*, June 22, 1990, at C1.

32. Broeske & Wilson, *supra* note 23, at 6. Not all gays, however, believe in the outers' alleged political motivation. "I think a lot of the political reasons [gay leaders] cite [for outing] are so much bull," said one gay actor who has helped in AIDS funding and education efforts. *Id.*

33. Randy Shilts, *Is "Outing" Gays Ethical?*, *N.Y. TIMES*, Apr. 12, 1990, at A11.

34. See Mills, *supra* note 19, at 23-24.

35. *Id.*

36. There were, of course, some notable exceptions to this rule, among them the English poet W.H. Auden, playwright Joe Orton, and the novelist Oscar Wilde. For a more comprehensive list of famous figures who were acknowledged homosexuals, see Valerie Richardson, *Historical Gays May Come out of Closet to Grace School Texts*, *WASH. TIMES*, Aug. 10, 1990, at A1.

37. See KIRK & MADSEN, *supra* note 14, at 31. The linkage of homosexuality to general mental illness can be traced to the work of early sexologists and psychologists, who believed

attitude reinforced by the presence of sodomy laws³⁸ and widespread social and religious disapprobation.³⁹

The emergence of a more liberal political climate during the 1960s and 70s, however, prompted attitudes toward homosexuality to change. Gays launched civil rights campaigns in major metropolitan areas throughout the nation and demanded "not just tolerance, but total acceptance."⁴⁰ Homosexuality was no longer considered simply a question about with whom one slept, but about equal rights to housing, health care, and employment.⁴¹ Attitudes toward gays also underwent a transformation within the professions during this period. The American Psychiatric Association shifted its focus away from trying to make gay people heterosexual to helping them become more comfortable with their sexuality.⁴² The roots of homosexual neuroses were viewed not so much as the result of a person being homosexual as the product of society's hostility toward homosexuality.

that homosexuality was "inherited as an equivalent of neurosis or psychosis." *Id.* at 33-34. Sigmund Freud regarded homosexuality as an inhibition of "normal" psychosexual development, KENNETH LEWES, *THE PSYCHOANALYTIC THEORY OF MALE HOMOSEXUALITY* 30 (1988), and until very recently, homosexuality was the least mentionable subject in English-speaking culture, John Boswell, *Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities*, 1 *YALE J. L. & HUMAN.* 205, 226-27 (1989).

38. KIRK & MADSEN, *supra* note 14, at 65. Twenty-six states and the District of Columbia have abolished sodomy statutes. Of the remaining 24, four proscribe homosexual sodomy, while the others proscribe both homosexual and heterosexual sodomy. *Id.* However, the Supreme Court has held that homosexuals have no constitutional right to engage in consensual homosexual sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

39. CLARK, *supra* note 15, at 90. The situation has improved dramatically within the last ten years. *The Washington Blade*, a gay newspaper serving Washington, D.C., lists more than 50 social and political organizations, including college alumni associations and support groups for people with HIV-related illnesses. Nevertheless, institutional prejudice still persists. Most churches are willing to receive the financial and participatory support of gay congregants, but insist that they are sinners who are ineligible for leadership as priests, clergymen, or policymakers. CLARK, *supra* note 15, at 90. Similarly, although many colleges now "permit" gay unions to meet on campus, there is little, if any, official support and sanction. *Id.* at 90.

40. The modern gay movement, as it is known, is usually regarded as beginning with the street demonstrations in Greenwich Village at the end of June 1969, after the police raided the Stonewall Bar. The anniversary of that raid, and the resulting activity, is celebrated internationally as Gay Pride Day. DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA* 113 (1982).

41. See RICHARD MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* (1988).

42. CLARK, *supra* note 15, at 87. The American Psychiatric Association officially withdrew homosexuality from its list of emotional disorders in 1973. KIRK & MADSEN, *supra* note 14, at 32. Two years later, the American Psychological Association recommended "removing the stigma of mental illness that has long been associated with homosexual orientation." *Id.* at 32-33. Similar steps recognizing homosexuality as a normal variation of human sexuality have also been taken by the American Bar Association, Ellen Simon, *YLD Voices Support for Gay and Lesbian Lawyers*, BARRISTER, Winter 1991-1992, at 33, and a number of major corporations. Stewart, *supra* note 15, at 42.

These changes signaled a shift in the way in which many Americans viewed homosexuals. People who for decades had regarded homosexuality as something "voluntary and deliberate"⁴³ began to question whether being a homosexual was less a matter of preference than orientation.⁴⁴ Within the gay community, organizational strategies emphasizing self-acceptance and empowerment replaced those that promoted victimization.⁴⁵ The more gays achieved political acceptability, the more homosexuality became not simply a question of gay rights, but of human rights, germane to all minorities.⁴⁶

Two other social changes that occurred in the 1980s caused sexual orientation to take on an increasingly public face. The first, the AIDS crisis, was responsible for pushing gays out of the closet and into the halls of Congress, where politicians were forced to grapple with questions of life and death.⁴⁷ At the same time that AIDS activists grew more vocal about the government's indifference to people with AIDS, Americans became increasingly preoccupied with the personal morality of government officials and politicians. Voters who formerly tolerated the dalliances and private indiscretions of presidents and senators⁴⁸ suddenly demanded that politicians be held

43. CLARK, *supra* note 15, at 87; *see also* Kirk & Madsen, *supra* note 14, at 31 (quoting Midge Decter, *The Boys on the Beach*, COMMENTARY (1980) (calling homosexuality "a casual option among options")).

44. Boswell, *supra* note 37, at 219. For a discussion of whether homosexuality is a chosen lifestyle or an inborn trait, *see* Charles Hecker, *Broward Bias Vote Tests Public Idea of Homosexuals*, MIAMI HERALD, Sept. 2, 1990, at 1C; *see also* MOHR, *supra* note 41, at 39; *Size of Cell Group in Brain Linked to Homosexuality*, MIAMI HERALD, Aug. 20, 1991, at A1 (finding the part of the male brain governing sexual urges to be smaller in homosexuals than in heterosexuals).

45. An excellent example of this is Kirk and Madsen's scheme for a "Madison Avenue" media campaign, featuring public service ads promoting positive images of gay people in mainstream situations. KIRK & MADSEN, *supra* note 14, at 217-45; *see also* Tom Finkel, *Politics and Power*, NEW TIMES, Aug. 14-20, 1991, at 17 (discussing strategies by gay rights political action committee for mobilizing gays and lesbians and combatting anti-gay violence).

46. *See* Hecker, *supra* note 44, at C1.

47. For a comprehensive discussion of the government's response to the AIDS crisis, *see* RANDY SHILTS, *AND THE BAND PLAYED ON* (1987).

48. The media's willingness to gratify the public's curiosity about the private lives of public officials and celebrities is a relatively recent phenomena. HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK & TIME* 245 (1979). John F. Kennedy, for instance, was notorious for having extra-marital affairs, yet aside from a report that a woman he was allegedly involved with was linked to organized crime, the press refused to publish anything about his infidelities. When *Time* magazine eventually did publish a story on Kennedy's liaisons in 1976, the piece generated more letters to the magazine than any other single story, an overwhelming majority of which were critical of the magazine's decision to publish the article. *Id.* Similar unwritten rules also governed the press' refusal to publish information about the sexual affairs and homosexuality of celebrities. *See* HUDSON & DAVIDSON, *supra* note 15, at 12.

accountable for their personal morality.⁴⁹ For opponents of homosexuality, this meant that politicians who led "immoral lives" by engaging in homosexual conduct should be exposed. For homosexuals, it meant that politicians who conducted their personal lives one way and voted another not only ran the risk of exposure, but also deserved to have their actions subjected to searing public scrutiny.⁵⁰

III. THE ETHICS OF OUTING

It is in this context, primarily as a response by the gay community to the AIDS crisis, that outing first emerged as a political strategy. Advocates of outing justify their actions on both moral and utilitarian grounds. Outers argue that forcing gay people out of the closet is beneficial because it purges the gay community of self-hatred and homophobia. Studies of gay youths indicate that gays tend to "internalize negative . . . images"⁵¹ of themselves and often engage in self-destructive behavior as a result of the negative messages they receive from society.⁵² Forcing the media to disclose the sexual orientation of a prominent person not only causes homosexuality to be discussed as a fact, without judgment, but also proves that "your sexual feelings don't make you an automatic loser."⁵³

49. See Richard Cohen, *It's Nobody's Business but Our Own*, WASH. POST, July 2, 1991, at A19 (supporting the media's decision to report on Senator Charles Robb's involvement with a former Miss Virginia). Adultery, drug use, and cheating all caused politicians to lose positions of public trust during the 1980s. Marjorie Williams, *Feeding Frenzy: How Attack Journalism Has Transformed American Politics*, WASH. MONTHLY, Sept. 1991, at 39. Recent political developments, however, suggest that the media's attempts to expose the private indiscretions of public figures may be backfiring. Adam Pertman, *Clinton Sounds Comeback Theme; Vows to Keep Fighting Across the Country*, BOSTON GLOBE, Feb. 19, 1992, at 13 (discussing Arkansas Governor Bill Clinton's second-place finish in the New Hampshire presidential primary, despite allegations of marital infidelity).

50. "There is little question that a gay U.S. senator who wraps himself in the cloth of a fundamentalist sect that excoriates homosexuals [and] who votes against or refrains from taking positions on gay rights legislation . . . meets the requirement of his homosexuality being 'germane.'" *Letter to the Editor*, WASH. POST, July 28, 1990, at A17.

51. GILBERT HERDT, *GAY AND LESBIAN YOUTH* 40 (1989).

52. Nearly one in every four lesbians and one in every five gay men who responded to a 1970 survey had attempted to kill themselves at least once during their lives. Well over half of those attempting suicide for the first time did so because of the unhappiness they felt about homosexuality and the problems they experienced trying to fit into a hostile world. KIRK & MADSEN, *supra* note 14, at 60. Between 20-35% of gay youths have attempted suicide at least once in their life, HERDT, *supra* note 51, at 31, a figure confirmed in a recent study conducted at the University of Minnesota and the University of Washington, Nick Bartolomeo, *New Study Finds High Gay Teen Suicide Rate*, WASH. BLADE, June 14, 1991, at 1. Many gay men also report difficulty forming intimate relationships with other people as a result of social reprobation, Charles Silverstein, *The Doctor is Out*, OUTWEEK, June 27, 1990, at 62, and the absence of role modeling. Peter Lion, *Sex and The Single Guy: Gay Dating, Never an Easy Game to Play, Is More Complicated than Ever*, THE ADVOCATE, April 10, 1990, at 46.

53. Michael Musto, *La Dolce Musto*, VILLAGE VOICE, Apr. 16, 1991, at 44. The

Outing also benefits gays because it helps combat the false myths and stereotypes many heterosexuals have about gay people.⁵⁴ Whereas racial and ethnic minorities can distinguish themselves by their skin color, language, and other physical traits, most gay people remain invisible to the world unless they fit one of society's stereotypes.⁵⁵ Outing also can be defended on communitarian notions of social justice and responsibility. In the same way that government imposes certain obligations on its citizens by virtue of their membership in the political community,⁵⁶ "[o]uting presupposes that all [people] who engage in primarily homosexual conduct . . . owe a minimum obligation to gay society . . . to come out [of the closet]."⁵⁷ Such obligations arise even in the case of homosexuals who do not participate actively in gay life to the extent that they benefit from the political activism of their more outspoken counterparts.⁵⁸

Finally, outing provides young gay people with badly needed role models. The entertainment and sports worlds boast of virtually no publicly acknowledged homosexuals,⁵⁹ and when admired gay figures do come out of the closet, the public often shuns them, or denies their

argument that outing homosexuals helps destigmatize homosexuality has been applied by analogy in the debate over whether the media should be allowed to publish the names of rape victims. Professor Dershowitz, among others, argues that the policy of singling out rape victims for special treatment by the media helps foster sexist stereotypes and perpetuates the popular conception of rape victims as "damaged goods" who have "asked for it." Dershowitz, *supra* note 6, at C1.

54. Most antigay stereotypes revolve around alleged mistakes in an individual's gender identity (e.g., "lesbians are women who want to act like men") and the perception of gays as pervasive, sinister, conspiratorial, and corruptive. MOHR, *supra* note 41, at 22-23. The seven "hallowed public myths of homosexuality" cited by Kirk and Madsen, are: (1) gays are hardly worth thinking about; (2) gays are few in number; (3) gays are easy to spot; (4) homosexuality results from sin, insanity, or seduction; (5) homosexuals are kinky, loathsome sex addicts; (6) homosexuals are unproductive and untrustworthy members of society; and (7) homosexuals are suicidally unhappy. KIRK & MADSEN, *supra* note 14, at 61.

55. Indeed, many, including the Supreme Court, maintain that gays are not truly "discrete and insular minorities." Richardson, *supra* note 36, at A1. For more on the burden of being an invisible minority, see KIRK & MADSEN, *supra* note 14, at 73-97; and CLARK, *supra* note 15, at 92.

56. MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 180 (1982).

57. Gabriel Rotello, *Out of the Closet & Into the Fray: Should Gay Politicians and Celebrities Be Forced to "Come Out?"*, ON THE ISSUES, Fall 1990, at 23.

58. Broeske & Wilson, *supra* note 23, at 6 ("By not saying you're homosexual . . . you're a co-conspirator in gay oppression").

59. KIRK & MADSEN, *supra* note 14, at 11. The role model argument has been advanced by actors in two television shows that featured segments on outing, *L.A. Law* and *Gabriel's Fire*, as well as a number of publicly prominent gay celebrities. Terry Sweeney, an unabashedly gay cast member of NBC's *Saturday Night Live*, speaks for many gays when he says, "One little name [of a prominent gay person] would have made all the difference in the world to me." Broeske & Wilson, *supra* note 23, at 6.

homosexuality.⁶⁰ Since concealing a person's sexuality is "never merely a sin of omission, [but] requires active lying to cover up a gay person's sexuality,"⁶¹ refusing to discuss the sexual orientation of public figures is itself tantamount to the oppression of homosexuals.⁶²

Nevertheless, there are those in the gay community who believe that forcing someone to come out against his will is not only psychologically damaging to the outed individual, but also to the community at large. For most gay people, acknowledging their homosexuality is probably "one of the biggest events in [their lives]."⁶³ The decision can take months, sometimes years, and often involves the letting go of illusions about leading a "normal life."⁶⁴ Persons unwilling or unable to accept their homosexuality may suffer serious damage to their self-esteem if forced to come out before they are ready, and ultimately may retreat even further into the closet.⁶⁵

Even if outing someone could be argued to be psychologically beneficial, it is not without its social and professional hazards. The possibility of separation from family⁶⁶ and friends⁶⁷ is very real, as is

60. Broeske & Wilson, *supra* note 23, at 88. One closeted gay actor noted: "If the public knows you're gay, it has a whole different perception of you. . . . All you have to do is look at the movies Rock Hudson made, and ask yourself, would he have gotten to make those movies if the town and the country had known that he was gay? The answer is, of course not." *Id.* at 6, 88; see also DAVE PALLONE & ALAN STEINBERG, *BEHIND THE MASK: MY DOUBLE LIFE IN BASEBALL* (1990). The absence of role models has been linked to high rates of drug and alcohol abuse among homosexuals, as well as high incidences of teenage suicide. See HERDT, *supra* note 51, at 40.

61. Rotello, *supra* note 57, at 23. Rotello, in fact, suggests that what outing really involves is not "dragging someone out of the closet," but equalizing homosexuality and heterosexuality in the media. Gabriel Rotello, *Why I Oppose Outing*, *OUTWEEK*, May 29, 1991, at 10.

62. Eleanor Randolph, *The Media, At Odds Over "Outing" of Gays; Deciding Whether to Publish Names of Alleged Homosexuals*, *WASH. POST*, July 13, 1990, at C1; see also Musto, *supra* note 53, at 44.

63. King, *supra* note 31, at C1.

64. CLARK, *supra* note 15, at 98-99. Typically, closeted gay people find themselves having homosexual encounters and yet, at least initially, resisting quite strongly the identification of being a homosexual. Only with time, luck, and great personal effort does the person gradually, if ever, come to accept her sexual orientation as a given material condition of life. MOHR, *supra* note 41, at 40.

65. M. SCOTT PECK, *THE ROAD LESS TRAVELLED* 61 (1978). One publicly gay journalist expressed his feelings on the matter this way: "As a gay man myself, who has chosen his own time and place to come out, I realize how devastating it would be to be exposed when you're not ready." Mills, *supra* note 19, at 25.

66. CLARK, *supra* note 15, at 74. Anecdotes abound of gay men and women disowned by their families for disclosing their homosexuality. In the case of Oliver Sipple, the gay ex-marine who achieved notoriety after saving former President Gerald Ford from an assassin, see discussion *infra* part IV, the estrangement between Sipple and his father was so deep that when his mother died in 1979 Sipple was not welcome at the funeral in his father's presence. Dan Morain, *Sorrow Trailed a Veteran Who Sowed a President and Then Was Cast in an Unwanted Spotlight*, *L.A. TIMES*, Feb. 13, 1989, at E1.

67. CLARK, *supra* note 15, at 134.

the emotional trauma which often accompanies disclosure.⁶⁸ The association of gays with AIDS exacerbates the problem, particularly in fields where the perception of health-related risks is great.⁶⁹

On a more abstract level, forcing homosexuals out of the closet violates their right to personal autonomy.⁷⁰ For many homosexuals, being gay means the right to choose whom one loves, without interference from the outside world. Violating a person's autonomy is more than simply a taking of his right; it is a violation of the "inviolate personality"⁷¹ that defines who he is as a human being.⁷² Finally, outing can be objected to on the ground that it erodes the democratic process by trivializing speech. Because gossip "'obliterate[s] the vital distinction between what is private and what is public' and thereby trivializes all that is inward and inherently inexpressible,"⁷³ idle talk about a person's sexuality—absent a compelling political justification—is socially destructive.

IV. OUTING AND COMMON LAW PRIVACY

Given the stigma attached to homosexuality, it is not surprising that relatively few actions against outers have made their way through the legal system. Most of the cases that have been filed have been dismissed, either for failure to state a claim,⁷⁴ or in the case of defamation, for failure to prove the falsity of the allegations.⁷⁵

Those who have brought actions have relied on four principal

68. Broeske & Wilson, *supra* note 23, at 90. One Hollywood manager who lost her longtime partner to an AIDS-related disease believes that "this whole [outing thing] is going to culminate in someone being so pained they'll commit suicide or do something equally desperate." *Id.*

69. Despite reassurances by the Surgeon General that AIDS does not discriminate, the belief that AIDS is a "gay" disease still persists. KIRK & MADSEN, *supra* note 14, at 25. Tabloids have made fortunes from articles with headlines such as "Gay Terror Group Vows: 'We're Going to Infect Everyone With AIDS'" and "Vengeful AIDS Victim Infects 50 Gays in 2 Weeks." *Id.* at 51. Numbers of people have responded by calling for mandatory HIV testing of health care workers. *Woman Set to Take Up Bergalis' AIDS Fight*, CHICAGO TRIB., Dec. 10, 1991, at 3.

70. SCHEPPELE, *supra* note 7, at 181.

71. Warren & Brandeis, *supra* note 1, at 205. Many gays also point to the communitarian values violated by forced disclosure—specifically, the severing of the bond that holds gay people together as a community.

72. C. Carr, *Why Outing Must Stop*, VILLAGE VOICE, Mar. 19, 1991, at 37.

73. SISSELA BOK, SECRETS 90 (1983) (quoting SOREN KIERKEGAARD, TWO AGES (1846)).

74. *See, e.g.*, Logan v. Sears, Roebuck & Co., 466 So. 2d 121, (Ala. 1985); Sipple v. Chronicle Pub. Co., 201 Cal. Rptr. 665 (Ct. App. 1984).

75. *See, e.g.*, Logan, 466 So. 2d at 123; *cf.* Dally v. Orange County Publications, 497 N.Y.S.2d 947 (App. Div. 1986) (deputy sheriff identified in personal ad as homosexual had no cause of action against newspaper, since he was unable to prove actual malice).

theories to recover: (1) defamation; (2) invasion of privacy; (3) tortious interference with business relations; and (4) violation of statutes and ordinances which prohibit discrimination on the basis of sexual orientation.⁷⁶ This Comment focuses on invasion of privacy.

A. *Invasion of Privacy*

The common law tort of invasion of privacy traces its origins to 1890, when Samuel Warren and Louis Brandeis published "The Right to Privacy"⁷⁷ in the *Harvard Law Review*. Since the publication of Warren and Brandeis' article, rights of privacy have been recognized in some form in every jurisdiction in the United States but Rhode Island.⁷⁸ Most follow Professor Prosser's four-part scheme, which allows recovery for intrusion upon solitude or seclusion, public disclosure of private facts, publicity that places another in a false light, or

76. Massachusetts, Wisconsin, and the District of Columbia are among the jurisdictions that prohibit discrimination on the basis of sexual orientation. The Massachusetts statute provides in part:

It shall be an unlawful practice: 1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, or ancestry of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

MASS. GEN. L. ANN. ch. 151B, § 4 (Supp. 1991); see also WIS. STAT. ANN. § 111.36 (1988); D.C. CODE ANN. § 1-2502 (1990).

77. Warren & Brandeis, *supra* note 1, at 193. In the article, the authors identify the contours of what they call the right "to be let alone." "[Those] matters which ought to be repressed," wrote Warren and Brandeis, are those which "concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office . . . or any public or quasi public position which he seeks or for which he is suggested." *Id.* at 216. The authors add that despite their role in society, "some things all men alike are entitled to keep from popular curiosity, whether in public life or not." *Id.*

Warren and Brandeis based their cause of action on a theory of "inviolate personality" rather than private property. To Warren, whose effort was partly a response to the media's meddling in his own affairs, gossip was particularly invidious because it appealed to "that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors." *Id.* at 196. Gossip was also dangerous because it distracted the public, "crowd[ing] the space available for matters of real interest to the community," and causing the "ignorant and thoughtless [to] mistake its relative importance." *Id.* In the authors' minds, plaintiffs whose privacy was invaded by the media suffered "far greater [intrusions] than could be inflicted by mere bodily injury." *Id.*

78. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 117, at 851 (5th ed. 1984). New York, Oklahoma, Utah, Virginia, Wisconsin, and Nebraska recognize only a limited right to privacy. *Id.*; see also *Kalian v. People Acting Through Community Effort, Inc.*, 408 A.2d 608 (R.I. 1979) (holding that the creation of an action for individual privacy is a matter properly for the legislature, not the courts).

appropriation of name or likeness for the actor's benefit.⁷⁹

Section 652D of the *Restatement (Second) of Torts* articulates the elements necessary to bring a cause of action for public disclosure of private facts:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.⁸⁰

The scope of the action is limited by the Supreme Court's decisions in two First Amendment cases that bar recovery for publicity of facts which are lawfully obtained⁸¹ or are a matter of public record.⁸²

B. *Is Sex a Private Fact?*

Much of the controversy surrounding the tort centers around the difficulty inherent in defining the term private facts.⁸³ In order for the

79. Prosser's formulation has been widely accepted by courts and adopted by the American Law Institute. See *Vassiliades v. Garfinckel's*, 492 A.2d 580, 587 (D.C. 1985).

80. Technically, the plaintiff need not allege the facts were of legitimate public concern, since lack of newsworthiness is not an element of the plaintiff's prima facie case. However, to survive a motion to dismiss, the plaintiff must allege that: 1) the defendant gave publicity to facts about the plaintiff; 2) the facts were private within the meaning of the tort; and 3) the publicity of the facts would be highly offensive to a reasonable person of ordinary sensibilities. See *id.*

81. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The Court in *Florida Star* confronted the question whether a newspaper could be held liable for publishing the name of a rape victim that was obtained from the press room of a county sheriff's department. Department police did not restrict access either to the press room or to its records. *Id.* at 526. The Court held that the plaintiff had no cause of action, since the facts published were both truthful and lawfully obtained by the newspaper. *Id.* at 541. The Court stopped short, however, of imposing an absolute bar on recovery for the publication of truthful facts which are lawfully obtained. Justice Marshall wrote for the majority:

Our holding today is limited. . . . We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order

Id.

82. *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). The plaintiff in *Cox Broadcasting*, the father of a 17-year-old rape victim, alleged that his privacy was invaded when a television station broadcast the name of his daughter. *Id.* at 474. The reporter responsible for the broadcast had obtained the information from the indictments which were made available in the courtroom. *Id.* at 472-74. The Court held that because the indictments were public records available for inspection, the plaintiff had no cause of action.

83. For a discussion of this problem, see Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 333-34 (1966).

tort of public disclosure of private facts to have any meaning, there must be facts that are "private" within the meaning of the tort. Yet to assert that facts exist that are by their very nature private begs the question of which facts and why.⁸⁴ Although the *Restatement* suggests that certain matters, such as those concerning sexual relations, are normally considered private,⁸⁵ it is unclear what differentiates these matters from other "public" facts.

There are several reasons why matters involving sexual relations ought to be considered private. First, unlike rituals governing modes of eating or dress, rituals protecting sexual privacy have existed across time⁸⁶ and culture.⁸⁷ Second, in contrast to activities that gain their meaning through exposure to other people, sex is intended to be "world excluding."⁸⁸ Perhaps most important, because sexual exploration is largely a process of self-discovery and self-definition,⁸⁹ people ought to be free to define themselves as they choose without the interference of others.⁹⁰

Yet labeling all matters concerning sex as private raises obvious definitional and sociological problems. Few today, for instance, would suppose that a conspicuously pregnant woman out in public has somehow violated the requirement of sexual privacy that society places over sexual performances, though most would make the simple inference that she has had sex.⁹¹ Nor would anyone consider the fact that thousands of women are raped every year to be a "private fact," although they might well consider the details of the rape or the vic-

84. The comment to the *Restatement* attempts to clarify the definition of private facts by negative and positive example. Facts which are a matter of public record, which the plaintiff leaves open to the public eye, and which have already been published are not considered private. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977). Conversely, those facts which a person "keeps entirely to himself or at most reveals only to his family or to close friends" are normally considered private. Sexual relations are ordinarily considered private matters, as are family quarrels, humiliating illnesses, personal letters, and certain parts of a person's past history. *Id.*

85. *Id.*

86. MOHR, *supra* note 41, at 95. Customs regarding eating in public, for instance, have radically liberalized within one generation of Americans, while illness, death, and perhaps birth are becoming increasingly private matters here. *Id.*

87. *Id.* The provision that women in some Muslim countries must wear veils to cover their faces in public is not only viewed as impractical, but sexist, by many Westerners. By contrast, sexual privacy is considered universally desirable, even though in some cultures privacy is sought in the wild rather than in the home. *Id.*

88. *Id.* at 100.

89. *Id.* at 106-14.

90. SCHEPPELE, *supra* note 7, at 181-82 (quoting Edward Bloustein). Without the ability to withhold some thoughts and inclinations from the scrutiny of others, Scheppele argues that a person would "merge with the mass." *Id.*

91. MOHR, *supra* note 41, at 98.

tim's identity private,⁹² particularly if they were members of the victim's family. In other words, whether sex is a private matter depends less on the fact that sex is involved, than on the context of the situation and the expectations of the parties.⁹³

In *Sipple v. Chronicle Publishing Co.*,⁹⁴ the Court of Appeal for the First District of California addressed the issue whether sexual orientation constituted a private fact within the meaning of the tort. The plaintiff in *Sipple*, a gay ex-Marine, was inadvertently thrust into the public limelight when he struck Sara Jane Moore in the arm as she attempted to assassinate President Gerald Ford.⁹⁵ Although it is unclear whether Sipple actually saved Ford's life, Sipple was considered a hero and achieved notoriety in a column in the *San Francisco Chronicle*.⁹⁶ The column, which alluded to Sipple's sexual orientation,⁹⁷ was later picked up by numerous out-of-state newspapers, which mentioned that he was gay.⁹⁸ Sipple sued the *Chronicle*, the columnist responsible for the statement, and the other newspapers for invasion of privacy.⁹⁹

The court of appeal found that although Sipple initially may have enjoyed an expectation of privacy in his sexual orientation, he forfeited any rights he may have had arising under that expectation by placing his sexual orientation in the public domain.¹⁰⁰ As support for

92. *Florida Star v. B.J.F.*, 491 U.S. 524, 545 (White, J., dissenting); see also David Zeman & Don Van Natta, Jr., *Tabloid's Ethics in Rape Story Questioned*, MIAMI HERALD, April 16, 1991, at 1 (discussing newspaper's decision to publish the name of the alleged rape victim in the William Kennedy Smith trial).

93. A contextual approach to evaluating privacy rights is by no means confined to matters concerning sexual privacy. Judge Wiseman of the United States District Court for the Middle District of Tennessee, writing about the activities of union organizers vis-à-vis their employers, noted, "An individual who enters a private meeting he has a legitimate right to expect that others will not eavesdrop on his meeting," but when he parks his car in a public place on the street he has "no right to expect that persons passing by on the street will not take note." *International Union v. Garner*, 601 F. Supp. 187, 191 (M.D. Tenn. 1985).

94. 201 Cal. Rptr. 665 (Ct. App. 1984).

95. *Id.* at 666.

96. *Id.*

97. 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 Rev. Ray Broshears, head of Helping Hands, and Gay Politico, Harvey Milk, who claim 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 [City] Supervisor."

Id.

98. *Id.*

99. *Id.* at 667.

100. *Id.* at 669.

this proposition, the court noted that Sipple had "spent a lot of time in 'Tenderloin' and 'Castro,' " [well-known gay sections of San Francisco], that he frequented gay bars "and other homosexual gatherings in San Francisco and other cities," that he marched in gay parades, and that his homosexual association and name had been reported in gay magazines.¹⁰¹ Since Sipple "did not make a secret"¹⁰² of his being a homosexual, the court reasoned it would be illogical for him to claim that publication of the fact violated his right to privacy.¹⁰³

The *Sipple* opinion is noteworthy because of the way in which the court dealt with the issue of private facts. Although the court held that Sipple had no cause of action because "the facts disclosed were not private,"¹⁰⁴ it did not hold that sexual orientation could never, under any circumstances, be deemed a private fact within the meaning of the tort. Rather, the court maintained that when a person's sexual orientation is held open to the public eye, it necessarily loses the essence of its "privateness."¹⁰⁵ Such a framework is consistent with the Supreme Court's holding in *Florida Star v. B.J.F.*,¹⁰⁶ which suggests that no fact, however private or embarrassing, would automatically be shielded from publication.¹⁰⁷

The *Sipple* court's opinion, however, fails to address the more difficult question of when sexual orientation should be considered a private fact. It is unclear from the test the court applies in *Sipple* whether all of the facts cited by the court collectively caused Sipple to forfeit his right of privacy, or if any one piece of evidence, by itself,

101. *Id.*

102. *Id.*

103. With regard to the other media defendants, the court held that no right of privacy attaches to a matter of general interest that already has been publicly released in a periodical or newspaper of local or regional circulation. *Id.*

104. *Id.* at 668.

105. The Ninth Circuit reached a similar conclusion in *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975). In *Virgil*, the plaintiff, a body surfer at one of the world's most dangerous sites for body surfing, sued *Sports Illustrated* for publishing an interview in which embarrassing facts about his past were revealed. *Id.* at 1123. Although the plaintiff originally consented to the interview, he withdrew his consent once he learned that the article would not be limited to his prominence as a surfer. *Id.* at 1124.

In determining whether the facts disclosed were private, the Ninth Circuit conducted a two-part inquiry. First, the court needed to ascertain whether the information was generally known, and second, whether the disclosure was made to the public at large. *Id.* at 1126. The court remanded the case to the district court to determine among other things, whether private facts respecting *Virgil* as a prominent member of the group engaged in body surfing were matters in which the public had a legitimate interest, and whether the identity of *Virgil* as the one to whom such facts applied was a matter in which the public had a legitimate interest. *Id.* at 1131.

106. 491 U.S. 524 (1989).

107. See *supra* note 81 and accompanying text.

was responsible for tipping the scales in favor of disclosure.¹⁰⁸ Another way of addressing this problem is to ask what would have happened if Sipple had been less public about his homosexuality. Suppose, for instance, Sipple had subscribed to several gay news magazines, but only infrequently visited gay bars. Would his sexual orientation still have been regarded as “public”? What about his “close friendship” with Harvey Milk, an openly gay politician?

Had Sipple participated in a gay pride parade, it is easy to see why he would have forfeited his right to privacy, at least within the confines of his neighborhood. After all, parades are intended as media events, designed to attract public attention. Those on display expect they will be seen by others, especially when, as in Sipple’s case, their purpose is to make a political statement.¹⁰⁹ Frequenting a gay bar, on the other hand, involves a qualitatively different level of public exposure. Although patrons of a bar normally could not be said to enjoy a reasonable expectation of privacy,¹¹⁰ for many homosexuals, gay establishments represent a refuge—often the sole refuge—from the heterosexual world.¹¹¹

Moreover, even if Sipple disclosed his homosexuality to his close friends and those in the gay community, it does not follow that he necessarily intended for his homosexuality to be disclosed in other areas of his life. “In a society in which multiple, often conflicting role performances are demanded of people,” many individuals choose to keep parts of themselves hidden from all but those with whom they

108. One author suggests that *Sipple* is of little help in determining whether future plaintiffs can maintain a cause of action for outing because “the facts . . . were so unfavorable to the plaintiff.” Ronald F. Wick, Note, *Out of the Closet and into the Headlines: “Outing” and the Private Facts Tort*, 80 GEO. L.J. 413, 421 (1991).

109. Indeed, to hold participation in a parade private would be incongruous, in light of the nature of the event.

110. See, e.g., *International Union v. Garner*, 601 F. Supp. 187, 191 (M.D. Tenn. 1985) (no legitimate expectation of privacy where persons passing by on the street may take note of activity). Wick, in fact, suggests that courts should adopt a Fourth Amendment approach to the question of privacy. Wick, *supra* note 108, at 428.

111. One of the primary reasons for the existence of exclusively gay establishments and publications, in fact, is to protect homosexuals from being identified by friends and family members as gay. Many homosexuals do not feel comfortable being seen with other homosexuals in public, or fear being victims of physical or verbal abuse. See Finkel, *supra* note 45, at 20. Moreover, the standards for behavior in exclusively gay establishments are different from those in places that cater to a mixed clientele. Behavior that might be considered perfectly acceptable in a gay bar—for example, holding hands with a same-sex partner—might well result, in another context, in jeers, and even physical violence. *Id.* Like members of a private club, most patrons of gay bars go with the expectation that their privacy will be protected. To assume otherwise would negate one of the primary reasons such establishments exist in the first place.

are most intimate.¹¹² A closeted homosexual might be willing to risk subscribing to a gay newsmagazine delivered to his home in a plain brown envelope (assuming the magazine's mailing list was kept confidential), but would probably not keep a picture of his lover on his desk at work, where the chances of someone seeing it are greater.¹¹³

Even within the confines of the gay community itself, a person might draw lines about behavior he felt to be "safe" and "unsafe" based on the probability of being exposed by others. Sipple, for instance, was willing to risk being seen by friends at a gay bar in San Francisco, while maintaining a cloak-and-dagger facade during visits to his parents' home in Detroit.¹¹⁴ As the California Supreme Court put it, the claim presented is not so much one of total secrecy, as it is "the right to define one's circle of intimacy [and to be able] to choose who shall see beneath the quotidian mask."¹¹⁵

Beyond the practical difficulties posed by forcing plaintiffs to shield their sexuality from the public, labeling sexual orientation private raises other problems. Although sex is regarded by most people as a private act, sexuality and gender necessarily derive their meaning from how we see ourselves in relation to the rest of the world.¹¹⁶ A woman who dresses in dainty clothes and plays up her attraction to men is considered coquettish only in relation to other, less flirtatious women. A person labeled sexually dominant earns the distinction only in relation to some other, less aggressive partner.

Characterizing sexual orientation as purely private also fails to take into account the experiential nature of sexuality. Although many gay men and lesbians know that they are gay without actually having sex,¹¹⁷ for many people sexual orientation evolves over time. People may at one time in their lives marry and have children, then later on change direction and explore homosexual relationships.¹¹⁸ Indeed, to

112. *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 37 (Cal. 1971). The facts that one would disclose to an employer or a co-worker, for instance, may not be the same as those one might reveal to a neighbor or a pastor.

113. Indeed, that same individual might not even subscribe to the magazine if it were delivered unveiled to his residence or directly to his workplace.

114. Morain, *supra* note 66, at E1.

115. *Briscoe*, 483 P.2d at 37.

116. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 7-23 (1982) (discussing how men and women form gender identities based on socially constructed roles). See also Jeb Rubinfeld, *The Right to Privacy*, 102 HARV. L. REV. 758 (1989) (arguing that there is no such thing as a truly "self-regarding" act, since there are always indirect, unintended effects that result from a person's conduct if "the causal sequence is carried far enough along").

117. CLARK, *supra* note 15, at 79. Many homosexuals claim to have known they were gay during their childhood, long before their first sexual experience. SHERE HITE, *THE HITE REPORT ON MALE SEXUALITY* 832-47 (1981).

118. *Id.* at 81. Alternatively, an equal number of individuals have explored homosexual

the extent that a person's sexual orientation is a product of exploration and experimentation—an assumption some psychologists believe to be true¹¹⁹—a person's sexual orientation can never be a purely private matter.

Even if it were possible to confine sexuality to the four walls of a person's bedroom, it is politically and socially naive to think that the relationships which grow out of that sexuality are capable of being kept purely private. Our clothes, our way of speaking, and our manner of interacting with others all make up our sexuality, and how we choose to express it. The manner in which two people hold themselves out to the public is often as much an indicator of how intimate their relationship is as the number of times a week they have sex together.¹²⁰ Although some people may genuinely believe that they “do not need any superfluous laws to safeguard [their sex lives] from anybody or anything,”¹²¹ the vast majority of society would likely find such a compartmentalization of life both unrealistic and undesirable.¹²²

Finally, characterizing sexuality as purely private hinders our ability to establish intimate, trusting relationships with others. Part of what makes people close to one another involves the sharing of information about one's relationships and life experience, including information about significant relationships.¹²³ True, people select what they choose to share, and with whom, and not all acts involving sexual expression ought to be publicly revealed. But to suggest that

relationships at one point in their lives, then gone on later to pursue heterosexual relationships. Neil R. Tuller, *Couples: The Hidden Segment of the Gay World*, in *GAY RELATIONSHIPS* 45 (John P. Dececco ed., 1988). Most studies of the gay community have concentrated almost exclusively on homosexuals vis-à-vis homosexual institutions, such as gay bars and baths. Gay couples are a less visible portion of the gay community and cannot always be found in the conventional meeting places of most homosexuals. *Id.*

119. See C.A. TRIPP, *THE HOMOSEXUAL MATRIX* 35 (1987) (noting that the correlation between what people do in their early sex-play and what sexual orientation they eventually adopt is “very uneven”); HITE, *supra* note 117, at 809 (discussing Kinsey's theory of a continuum of sexuality).

120. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 55 (N.Y. 1989) (life partner of deceased gay man deemed “family member” for purposes of rent control statute).

121. Charles Whited, *Readers React to Column on Gay Rights*, *MIAMI HERALD*, Sept. 1, 1990, at B1 (quoting anonymous letter writer).

122. Wick, *supra* note 108, at 427.

123. Marc A. Fajer, *Can Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Gay Men and Lesbians*, 46 *U. MIAMI L. REV.* 511 (1991); see also GILLIGAN, *supra* note 116, at 24-63 (differentiating between male and female styles of interacting); HARRIET G. LERNER, *THE DANCE OF ANGER* 119 (1985) (arguing that one of the ways women gain a clearer sense of themselves is by talking in depth with their mothers about their family history); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (drawing distinctions between way in which men and women use language to form relationships).

sexuality is something which can or ought to be kept completely private, like a diary locked away in a closet, is to distort the very notion of what it means to be a human being. When we cut off significant parts of ourselves—perhaps the most significant part of ourselves—we rob not only ourselves, but also others, of the opportunity to connect. Our lives lose their richness and meaning, and ultimately become substanceless.

The question whether sexual orientation is a private fact in the context of a privacy action, then, seems misplaced. When a person's sexual orientation sufficiently affects the lives of others so that it becomes "newsworthy," sex can no more be considered a "private fact" than hair color, or the kind of car one drives. When, however, a person's sexual orientation is of no legitimate concern to others, beyond a mere prurient interest, courts should consider sexual orientation to be a private fact.

C. *Is Outing Highly Offensive to a Reasonable Person of Ordinary Sensibilities?*

Assuming that in certain instances sexual orientation ought to be regarded by courts as a private fact, a more difficult and politically volatile question is whether the publication of a person's sexual orientation is highly offensive to the reasonable person of ordinary sensibilities.¹²⁴ To answer this question, a court must address two related questions: first, whether saying that the *publicity* of a person's homosexuality is highly offensive is the same thing as saying that *homosexuality* is highly offensive; and second, whether the harm suffered by gay people as a result of courts' labeling the publicity of homosexuality "highly offensive" is greater than the harm suffered by the victim of an outing. Much of the opposition to finding the publicity of a person's homosexuality highly offensive comes, not surprisingly, from within the gay community. Those who argue against taking such a position believe that language and ideas heavily influence culture and self-image, and that how people perceive homosexuals is tied directly to how they are treated by the media and other social institutions.¹²⁵

124. In *Logan*, the court took pains to point out the distinction between what would be offensive to the ordinary *homosexual* of reasonable sensibilities and ordinary people, regardless of their sexual orientation. *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 124 (Ala. 1985). *Logan* argued that the plaintiff's statement, "This guy is as queer as a three dollar bill," would be highly offensive to the ordinary person. The *Logan* court disagreed, however, concluding that while the ordinary gay person might find the epithet "queer" highly offensive when applied to homosexuals, it was not a term which the ordinary person would find highly offensive, particularly if he admitted, as *Logan* did, to being a homosexual. *Id.* at 123.

125. See, e.g., *Rotello*, *supra* note 61, at 10-11. Similar arguments have been made by leaders of the black community and other minority groups to explain the surge of inner-city

As long as the law continues to reinforce the notion that being homosexual is "bad" or "offensive," they maintain, gay people will continue to suffer institutional and psychological oppression.¹²⁶

There is no doubt that adopting such a position is moral, and that institutions do, in a profound way, shape our perceptions of ourselves. Indeed, many people who oppose outing are themselves active advocates of institutional reform. Nevertheless, believing that society shapes self-perception does not automatically translate into adopting politically naive positions. In relying on changes in language and the media to cure the problem of homophobia, institutional reformers place the burden to help combat bigotry where it rightly belongs—on institutions. But in doing so, they also deny the extent to which homophobia exists and the rate at which social change occurs.¹²⁷ Removing homosexuality from the legal system's list of "offensive" disclosures may send a message to gays that the legal system is on their side, but it also may make it easier for bigots to oppress gays and lesbians by taking away one of the few legal weapons gay people have at their disposal.¹²⁸

It is tempting to argue that because people are more aware of homosexuality today than they were twenty years ago they are less shocked by it. But the reality is that homophobia does exist in today's

violence and black-on-black crime. D. Marvin Jones, *Rioters Come to Give Verdict of Their Own*, MIAMI HERALD, May 3, 1992, at 6C.

126. The paradox of this position, of course, is that if taken to its logical extreme, it would deny gays any preferential treatment to make up for past discrimination. Cf. Dershowitz, *supra* note 6, at C1 (attacking media's policy of withholding names of rape victims from publication on grounds that it perpetuates harmful stereotypes).

127. See *infra* notes 129 & 131 and accompanying text.

128. A related question courts have had to contend with in this area is whether the imputation of homosexual behavior constitutes slander per se. In *Moricoli v. Schwartz*, 361 N.E.2d 74 (Ill. Ct. App. 1977), the court held that a manager's calling a nightclub singer a "fag" at a corporate meeting did not constitute slander per se. *Id.* at 75. The court cited the "changing temper of the times" and the fact that calling someone a homosexual did not necessarily import the commission of a crime as the basis for its decision. *Id.* at 76. Other jurisdictions, however, have taken a more pragmatic approach to the issue. See *Matherson v. Marchello*, 473 N.Y.S.2d 998, 1005 (App. Div. 1984) (stating that increasing number of homosexuals publicly expressing satisfaction and pride with their status fails to outweigh "the potential and probable harm of a false charge of homosexuality, in terms of social and economic impact"); see also *Mazart v. State*, 441 N.Y.S.2d 600 (Ct. Cl. 1981) (letter identifying students as members of "gay community" defamatory even though sodomy was no longer crime in New York). The contemporary tendency among most jurisdictions today is to shy away from recognizing the imputation of homosexuality as slander per se in part because it is no longer fashionable in political circles to be openly homophobic, but also because as the gay community becomes more visible and achieves greater political power, the stigma attached to homosexuality considerably diminishes. Cf. *Sipple v. Chronicle Pub. Co.*, 201 Cal. Rptr. 665, 670 (Ct. App. 1984) (statement that ex-marine in San Francisco was a homosexual was not highly offensive to a reasonable person of ordinary sensibilities).

society,¹²⁹ and that attending a gay rights rally is not regarded by the public in the same vein as "going camping in the woods, or giving a party at home for friends."¹³⁰ Those who feel differently should ask themselves how they would feel announcing to their co-workers over the water cooler at work that they spent the weekend in Key West with their lover attending a gay rights rally. Would the reasonable person of ordinary sensibilities feel uncomfortable revealing this information? Would the average co-worker feel uncomfortable receiving that information?

Furthermore, even if most people today are more aware of homosexuality than they were twenty years ago, that does not necessarily mean that they are more tolerant, or less offended by it.¹³¹ To deny the existence of prejudice because acknowledging it seems politically incorrect does a disservice to society and robs homosexuals of the very instrument of power many require to defend themselves.¹³²

129. See, e.g., Stewart, *supra* note 15, at 43; Vicki Quade, *The Struggle to Be a Gay Lawyer*, BARRISTER, Winter 1991-1992, at 29. In a recent survey of students at Harvard and Stanford University, 82% said they believed that homosexuality was an "inferior lifestyle." KIRK & MADSEN, *supra* note 14, at 59.

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

131. Fifty-two percent of respondents to a Roper Survey said they prefer not to work with gays, including 25% who "strongly object." Twenty-two percent believe it should be completely legal "to keep people out of jobs and housing if they are homosexuals." Thirty-five percent admit that they are "uncomfortable around gays," and 33% avoid places "where homosexuals may be present." Forty-nine percent say they have reason to believe that "AIDS is causing unfair discrimination against all homosexuals." KIRK & MADSEN, *supra* note 14, at 82. In Broward County, Florida, where an estimated 25% of the population is gay, a vote to adopt a human rights amendment which prohibited discrimination on the basis of sexual orientation failed by 60%. Steve Bousquet, *Broward Says No to Gay-Rights Protection*, MIAMI HERALD, Sept. 5, 1990, at A1.

132. Assuming a court did find the publication of a person's homosexuality to be highly offensive, it would still have to determine what standard of offensiveness to apply. It is tempting to argue that the question of offensiveness is one that ought properly to be couched in geographic terms, since it involves matters of cultural norms that vary from region to region. See Wick, *supra* note 108, at 425 (noting that the Supreme Court has defined "community mores" in the obscenity context as the mores of the local community for purposes of the newsworthiness defense). Under this standard, the proper inquiry would not be whether the publication would be offensive to a person of ordinary sensibilities, but rather whether the publication would be highly offensive, say, to a reasonable San Francisco resident of ordinary sensibilities.

In theory, such a test of reasonableness appears to be more equitable than a national standard since it takes into account regional differences in cultural attitudes and exposure. Certainly in a city such as San Francisco, where a sizeable minority of the population is homosexual and a number of homosexuals hold public office, the disclosure that someone is a homosexual would be less "shocking" than if it were made in a small town in Nebraska. But as the *Sipple* case points out, emotional distress cannot be confined to a specific geographic radius. In a highly mobile society such as ours, it is common for people to move and change careers several times within a decade—a reality likely to become even more pronounced as the economy becomes more global.

Even if it could be argued that an individual's reputation could be confined to a particular

To argue in favor of a cause of action for outing is not to say that homosexuality is highly offensive. Nor is it to deny the very real damage done to the self-esteem of gay people, both in the closet and out, each time courts reinforce the notion that the publicity of someone's homosexuality is any different from the publicity of their annual income, or where they spend their summer vacations. Rather, it is to acknowledge that society still is far from fully accepting homosexuality, and that until it does, gay people who choose to keep their sexual orientation private need protection from those who would use sexual orientation as a weapon to harm others.¹³³

D. *The "Newsworthiness" Privilege*

The plaintiff's ability to satisfy the elements of a cause of action for invasion of privacy, however, does not end the court's inquiry. Because the cause of action is subject to the newsworthiness privilege, it is also necessary to look at the standards for newsworthiness established by the common law and the Supreme Court to determine when an outed party has a realistic chance of prevailing.

Section 652D of the *Restatement (Second) of Torts* mirrors the language of the Supreme Court's opinions in *Cox Broadcasting Co. v. Cohn*¹³⁴ and *Florida Star v. B.J.F.*¹³⁵ The comment to 652D notes that the constitutional definition of matters of legitimate public concern controls when the constitutional definition is broader than that of any state.¹³⁶ However, the *Restatement* limits the media's "breathing space" to those matters that respect the customs and mores of the community.¹³⁷ Thus, even though some statements may satisfy the constitutional requirements for newsworthiness, when the publicity is

geographic radius, the *Sipple* case demonstrates the danger of focusing too narrowly on the damage outing does to the individual. Sipple's concern was not with what the average person in San Francisco thought about his being gay, but with what his parents and relatives back home in Detroit would think if they found out. Precisely because cultural norms differ from region to region, and information is so easily disseminated without attention to those differences, any standard of reasonableness in matters concerning sexual orientation would need to be governed by a certain amount of uniformity.

133. By offering this caveat, I do not mean to discourage gay people from coming out. On the contrary, gays and lesbians should seize every opportunity, *to the extent possible*, to come out to others, because only by doing so will attitudes towards homosexuality change. I simply mean to point out that not everyone is similarly situated, and that what may be beneficial for one person may, under certain circumstances, be disastrous for another.

134. 420 U.S. 469 (1975).

135. 491 U.S. 524 (1989).

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

137. "[I]n the last analysis," the authors note, "[t]he line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, which a reasonable member of the public, with decent standards, would say that he had no concern." *Id.* cmt. h.

so offensive as to shock community standards of decency, the statements are nevertheless outside the scope of the privilege.¹³⁸

1. HOMOSEXUALITY AND NEWSWORTHINESS

There is little doubt that most courts would consider the issue of homosexuality or sexual orientation to be a matter of public concern. Independent of the social and political changes outlined in Part II of this Comment, sexual orientation touches on central questions affecting social intercourse, human rights, and the nature of the family.¹³⁹ The mere fact that ten percent of the population is estimated to be gay supports the conclusion that information about issues surrounding homosexuality is newsworthy. The question becomes murkier, however, when courts consider whether information about a particular person's homosexuality is a matter in which the public has a legitimate interest.¹⁴⁰

In *Briscoe v. Reader's Digest Ass'n*,¹⁴¹ the Supreme Court of California addressed the issue whether a question of broad social concern could be a matter of public interest, while the name of the actor involved could be held to be outside the domain of newsworthy information. The plaintiff in *Briscoe*, an ex-convict, was featured in a 1967

138. See *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525, 531 (E.D. Penn. 1982) (nude photograph of plaintiff in bathtub was not newsworthy since it served no "legitimate purpose of disseminating news and needlessly expose[d] aspects of the plaintiff's private life to the public"). In spite of the constraints placed on the media by the community standards clause, the privilege has nevertheless been criticized by some as being overly generous in scope. "What is at issue, it seems to me, is whether the claim of privilege is not so overpowering as virtually to swallow the tort." *Time, Inc. v. Hill*, 385 U.S. 374, 383 (1967) (quoting Harry J. Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 336 (1966)).

139. See *Mazart v. State*, 441 N.Y.S.2d 600, 604 (Ct. Cl. 1981) (letter to editor on prejudice against homosexuals deals with matter of public concern); see also *Coleman v. Tennessee*, 470 U.S. 1009 (1985) (citing *Connick v. Myers*, 461 U.S. 138, 148 (1983), which held that some issues such as "racial discrimination" are "inherently of public concern").

140. "Outside of something like a sex change by the president, I can't think of a situation in which just the pure fact of someone's sexual orientation is newsworthy." Mills, *supra* note 19, at 24 (quoting Deni Elliott, Director of Ethics Institute at Dartmouth College). Gay activists, however, counter that the "public interest" defense is a smokescreen for heterosexist reporting, that far from maintaining a shield of privacy, the media writes about sexuality all the time, and that the real reason for their attitude is that "they just find homosexuality distasteful and don't want to write about it." *Id.* at 25 (quoting author Randy Shilts). Shilts maintains that newspapers' refusals to reveal a person's homosexuality have less to do with ethical considerations of privacy than with the homophobia of particular editors. Shilts, *supra* note 33, at A11; see also Rotello, *supra* note 61, at 10.

For cases that distinguish between the newsworthiness of an issue and the newsworthiness of private facts about a particular person's life, see *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975); and *Vassiliades v. Garfinckel's*, 492 A.2d 580 (D.C. 1985) (distinguishing between newsworthiness of plastic surgery and private fact of plaintiff's facial reconstruction).

141. 483 P.2d 34 (Cal. 1971).

article about truck highjackings and truckers' efforts to stop them. The article identified the plaintiff by name as a man who stole a "valuable looking" truck and fought a gun battle with local police, but neglected to mention that the hijacking occurred in 1956.¹⁴² Although the plaintiff conceded that the subject of truck thefts and the efforts to stop them may have been newsworthy, he maintained that the use of his name was not.¹⁴³

In finding that the plaintiff had a valid cause of action, the court acknowledged that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of the period."¹⁴⁴ However, it drew the line at situations involving past crimes when identification of the actor served little independent public purpose.¹⁴⁵ If the state's goal was to punish Briscoe for robbing trucks, the court saw no problem with publishing his name. If, however, the state's goal was the reformation of criminals, as it was in California, publishing Briscoe's name only served to undermine the state's objective.¹⁴⁶

Not all courts, however, have reached the same result. In *Montesano v. Donrey Media Group*,¹⁴⁷ the Nevada Supreme Court affirmed the trial court's decision to grant summary judgment to a defendant whose name appeared in an article about a hit-and-run accident he had been involved in twenty years earlier.¹⁴⁸ The court held that because the information appeared in the public record, and the conviction for hit and run was intimately connected to the subject matter of the news story, no cause of action had been stated.¹⁴⁹

In granting the defendant's motion for summary judgment, the Supreme Court of Nevada pointed to the importance of giving the article credibility by specifically identifying the plaintiff. "The addition of the plaintiff's identity to the article personalized the report of administrative excesses and lent specificity and credibility to the article."¹⁵⁰ The court added that the plaintiff's experience had "a real

142. *Id.* at 36.

143. *Id.*

144. *Id.* at 38 (quoting *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

145. *Id.* at 40. The court distinguished between an individual whose name is fixed in the public memory, such as that of the political assassin, and an individual whose notoriety has waned as a result of his action. *Id.*

146. *Id.* at 41. The court also pointed out that the consequences of revelation in this case—ostracism, isolation, and the alienation of one's family—militated heavily against dismissing the suit, since a jury might find that the disclosure, in light of the time that had passed, was highly unreasonable. *Id.* at 43.

147. 668 P.2d 1081 (Nev. 1983).

148. *Id.* at 1083.

149. *Id.*

150. *Id.* at 1086.

bearing on the public issue,"¹⁵¹ and that a less stringent standard, such as that adopted by the Supreme Court of Delaware,¹⁵² was too subjective.

Naming names undoubtedly adds credibility and texture to a story. People are seen not merely as statistics, but as human beings, with real problems and concerns.¹⁵³ Indeed, the very reason newspapers publish human interest stories, rather than simply reporting statistics, or documented facts, is to bring home what, in another context, might be regarded as simply someone else's problem.¹⁵⁴

However, the reasons that make disclosure of a person's identity so desirable also make it a risky and often dangerous proposition. People choose to keep certain facts hidden from others because the facts can be harmful if they fall into the wrong hands.¹⁵⁵ A drug dealer, for instance, might be willing to talk to the media about his operations, but only upon the condition of anonymity. Indeed, much of the reporting surrounding highly controversial issues might well be curtailed if journalists were forced to print the actual names of sources in all circumstances.¹⁵⁶

Moreover, limiting the reporting of names of individuals does not prevent the media from writing passionately, and persuasively, about

151. *Id.* at 1087.

152. *Id.* (citing *Barbieri v. News-Journal Co.*, 189 A.2d 773 (Del. 1963)). The test the Delaware Supreme Court adopted in that case was whether "the use of plaintiff's true name was unnecessary and indelicate and a willful and wanton disregard of that charity which should activate us in our social intercourse."

153. See, e.g., Madelaine Blais, *The Disturbance*, MIAMI HERALD, May 24, 1987 (Tropic Magazine) (detailing one woman's battle with schizophrenia); Debbie Sontag, *A Confession of Pride*, MIAMI HERALD, Sept. 16, 1990, at H1 (chronicling gay priest's struggle with the Catholic Church).

154. See, e.g., Elinor Burkett, *The Teen Time Bomb: Unsafe Sex Is Spreading AIDS Among Florida's Youth*, MIAMI HERALD, Nov. 4, 1990, at I1 (discussing spread of AIDS among teenagers).

155. See HUDSON & DAVIDSON, *supra* note 15, at 33. Elinor Burkett reports:

Marsha Goldberg might be the first member of her temple sisterhood to struggle with AIDS in her family. She isn't sure: AIDS isn't something her neighbors in Kendall talk about. In her suburban world, you don't come out and announce that your daughter has just been diagnosed with AID[S].

Burkett, *supra* note 154, at I1.

156. See, e.g., Meg Laughlin, *The Lost Boys: A Year in the Life of a Drug Dealer's Family*, MIAMI HERALD, Jan. 3, 1988 (Tropic Magazine), at 11. The note at the beginning of the article states that the children profiled agreed to tell their story for publication on the condition that neither they nor their parents be identified by name. The author notes: "The children whose lives are chronicled in today's story are not statistical composites. They are real kids" *Id.* Similarly, Burkett notes: "Goldberg wishes she could [talk about her daughter getting AIDS using] her real name and photograph. But her daughter Susan doesn't want people to know that she's not just another University of Miami student." Burkett, *supra* note 154, at I1.

serious social problems. A story about four "average" homosexuals—a banker, a bricklayer, a police officer, and a lawyer—would be no less compelling, if narrated persuasively, than one that identified the individuals by name. So long as the facts of the story are left essentially unaltered, stories that identify persons pseudonymously are no less credible than those that disclose actual names.¹⁵⁷

The question whether the name of a particular plaintiff is newsworthy, then, like the issue of what constitutes a private fact, depends on context—specifically, the status of the plaintiff and his or her role in society.¹⁵⁸

2. THE HOMOSEXUALITY OF PUBLIC FIGURES/PUBLIC OFFICIALS

In keeping with the spirit of the First Amendment, the *Restatement* has adopted a permissive attitude toward publicity about the lives of public officials. The public is considered to have a legitimate interest not only in matters that the individual makes public,¹⁵⁹ but also, to some reasonable extent, in matters that would otherwise be private.¹⁶⁰

It is easy to see why the sexual orientation of public officials who make policy decisions on matters concerning sexual orientation is a matter of public interest. Unlike actors in the private arena, public

157. Laughlin, *supra* note 156, at 11. For other examples of stories in which either names have been altered or identification has been limited to the use of first names, see Elinor Burkett, *The Family That Doesn't Exist*, MIAMI HERALD, Jan. 21, 1990, at 1G (identifying couple with AIDS as "Tim and Lynne"); Doug Clifton, *Should We Print Names of Accused Prostitute's Clients?*, MIAMI HERALD, Sept. 1, 1991, at C4 (querying whether media should print names of clients of accused prostitute); Sandi Wisenberg, *Growing Up Gay*, MIAMI HERALD, Oct. 16, 1983, at G1 (discussing plight of gay teenagers). The story may also not necessarily be more *accurate* as a result of naming the individuals, since those interviewed may be reluctant to speak candidly if they know their names will appear in print. Interview with Steven Smith, Reporter for *The Miami Herald* (Jan. 25, 1991); see also Anna Quindlen, *Anonymous Accusers of Brock Adams*, MIAMI HERALD, March 6, 1992, at 17A (where ages, job descriptions, and telling details of women sexually harassed by U.S. senator were unaltered, anonymous victims appeared "nameless but not faceless").

158. For a discussion of the relationship between newsworthiness and status, see RESTATEMENT (SECOND) OF TORTS § 652D cmt. (b) (1977).

159. *Id.*

160. The *Restatement* is surprisingly tight-lipped on the issue of what constitutes a "reasonable extent." Although the authors explicitly state that the extent of the authority to make public private facts is not unlimited, they fail to offer any guidance as to what the contours of such reasonableness ought to be. The comments say, for instance, that details of an actress' sexual relations are private, yet in the same paragraph, adopt the position that "in the last analysis what is proper becomes a matter of community mores." *Id.* Courts have tended to read the "reasonable extent" language of the *Restatement* liberally where public figures are concerned. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975).

figures owe their allegiance to the people who put them in office.¹⁶¹ Voters rely on public officials to make decisions responsibly and in a manner consistent with the officials' own personal ethics and moral standards.¹⁶² When politicians make decisions that affect the lives of vast numbers of people, it only stands to reason that they, as public officials, owe the public an obligation at least to identify their reasons for making those decisions.

This is not to suggest that officials are bound to a standard of absolute objectivity, or that they must, as a result of their race, gender, or sexual orientation, "toe the party line". A gay congressman, for instance, might vote against a gay rights bill for reasons that have nothing to do with a sense of internalized homophobia, or even the belief, however incongruous, that homosexuality is wrong.¹⁶³ Nevertheless, the integrity of the political process depends upon politicians being candid enough with their constituents to disclose their biases to the public without masquerading behind a false identity.¹⁶⁴

Even when public officials are not legislating or making policy decisions on gay rights issues, the indirect influence they exert on such matters may have a sufficient impact to justify subjecting their private lives to public scrutiny. One would be hard pressed to argue that the Secretary of Transportation, for instance, is in a place, by virtue of his position, to help or harm homosexuals. However, to the extent that he has access to high government officials and attends cabinet meetings with those who do, his influence may be greater on those matters than that of the average citizen.¹⁶⁵

Nor does it follow that the sexual orientation of politicians who are able to sidestep all issues concerning sexuality is irrelevant for purposes of public scrutiny. Public officials serve, in many people's

161. PLATO, *THE REPUBLIC* 262-284 (Richard W. Sterling & William C. Scott trans. 1985) (discussing the statesman's role in promoting a conception of "the good.").

162. *Id.*

163. See ROBERT E. BAUMAN, *THE GENTLEMAN FROM MARYLAND: THE CONSCIENCE OF A GAY CONSERVATIVE* (1986).

164. Such candor is not limited to elected public officials. Assistant Secretary of Defense Pete Williams' credibility, for instance, was seriously undermined when the media reported that over 2,000 gay and lesbian service people had been discharged since his appointment in 1989. Signorile, *supra* note 29, at 34. Although rumors suggesting Williams was gay first began circulating after he became a nightly figure in television reports about the Persian Gulf conflict, Lisa M. Keen, *Advocate Outs DOD Spokesperson Williams*, WASH. BLADE, Aug. 9, 1991, at 3, so many men apparently knew of Williams' homosexuality before that time that "it [was] questionable as to whether he was ever in the closet." Signorile, *supra* note 29, at 39.

165. Even if a public official is not in fact biased, the public's perception that he is not fair-minded may prevent him from doing his job effectively. See Signorile, *supra* note 29, at 34-35; see also *Withdraw Judge Ryskamp*, MIAMI HERALD, Mar. 17, 1991, at C2 (faulting U.S. Court of Appeals nominee for belonging to allegedly discriminatory country club).

minds, as models of civic and political decency.¹⁶⁶ The fact that gay politicians would choose to ignore issues that affect a substantial minority of their constituency, particularly when that group looks to them for leadership, says something about their fitness as leaders.¹⁶⁷

The situation with public figures who are not public officials presents a more difficult problem. There are two possible grounds on which to justify the publication of non-political public figures' sexual orientation: their positions as role models in society; and their assumption of the risk of publicity. The first of these reasons—the public figure's position—is addressed by the Supreme Court in *Hustler Magazine v. Falwell*.¹⁶⁸

Jerry Falwell, a well-known religious leader, sued *Hustler Magazine* after it published a caricature of him.¹⁶⁹ Falwell argued that the state's interest in protecting public figures from emotional distress was sufficient to deny First Amendment protection to speech that is patently offensive and intended to inflict emotional injury, even when the speech could not reasonably have been interpreted to assert actual facts about the public figure involved.¹⁷⁰ The Court disagreed. In finding that Falwell failed to state a cause of action, the Court looked to the First Amendment's role in encouraging "robust political debate"¹⁷¹ to justify its decision:

[T]he First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." . . . "[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures."¹⁷²

Although *Falwell* involved an action for intentional infliction of emotional distress rather than invasion of privacy, the Court's reasoning is relevant to the question of whether outed public figures ought to be afforded a cause of action for invasion of privacy. It is true that public figures are not responsible to the public in the same way as politicians. Yet to the extent that a public figure reaps the benefits of the public's like or dislike of his personal characteristics, he ought to shoulder the social responsibility that accompanies such a position.

166. See, e.g., *Withdraw Judge Ryskamp*, *supra* note 165, at C2.

167. Cf. Signorile, *supra* note 29, at 34.

168. 485 U.S. 46 (1988).

169. *Id.* at 47-48.

170. *Id.* at 50.

171. *Id.* at 51.

172. *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring) and *Baumgartner v. United States*, 322 U.S. 665 (1944) (citations omitted)).

Indeed, because of the emphasis society places on achieving celebrity status, actors and actresses are often more influential in affecting social attitudes and public policy than politicians who spend their lives lobbying for change.¹⁷³

Finally, although public figures do not completely bargain away their right to privacy when they assume a position of civic or social prominence, they voluntarily assume some risk that their lives will come under public scrutiny when they enter the public eye. Part of what becoming a celebrity involves is opening up one's private life to public view. An actor whose sexual orientation is revealed to millions of readers in the *National Enquirer* can express outrage, or even anger, but he certainly cannot be said to express surprise.

3. THE HOMOSEXUALITY OF INVOLUNTARY PUBLIC FIGURES

The most difficult question raised by outing concerns the private lives of those who are involved in a public event, but are not themselves public figures. In *Sipple*, the California Court of Appeal found that the publication of the plaintiff's homosexuality involved a matter of legitimate public concern because it dealt with a public official's response to a minority group and dispelled false stereotypes about homosexuals.¹⁷⁴ While no one would dispute that an assassination attempt on the President or the President's position on issues affecting homosexuals are matters of public concern, the real question the opinion presents is what, if anything, Sipple's homosexuality had to do with the newsworthy assassination attempt on Gerald Ford's life.

Section 652D of the *Restatement (Second) of Torts* takes a liberal attitude toward publicity of private facts concerning involuntary public figures. Newsworthiness is not limited to the event that arouses the public interest, but includes, to some reasonable extent, facts about the individual that otherwise would be purely private.¹⁷⁵ However, there seems to be at least some authority for the proposition that

173. Magic Johnson's shocking announcement that he tested positive for the AIDS virus is undoubtedly the best example of a star's ability to influence public opinion. Gary Blonston, *Celebrities Trigger Awareness*, MIAMI HERALD, Nov. 9, 1991, at 11A. For examples of other celebrities whose works have dispelled public misconceptions about social problems, see KITTY DUKAKIS & JANE SCOVELL, NOW YOU KNOW (1990) (alcoholism); HUDSON & DAVIDSON, *supra* note 15 (AIDS); BARBARA GORDON, I'M DANCING AS FAST AS I CAN (1979) (drug addiction); Roseanne *Star Joins Those Breaking Silence on Incest*, MIAMI HERALD, Sept. 24, 1991, at 6A (incest).

174. *Sipple v. Chronicle Pub. Co.*, 201 Cal. Rptr. 665, 670 (Ct. App. 1984). The court did not address the issue whether Sipple had become a public figure, although presumably it would have concluded that he was not, since he did not voluntarily seek to place himself in the public eye.

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

there must be a logical nexus between the facts published and the newsworthy event for the newsworthiness privilege to be triggered.¹⁷⁶

In Sipple's case, it is unclear from the court's opinion whether the publicity of his homosexuality would have been newsworthy if the circumstances surrounding the assassination had been different. The court of appeal certainly could have found that the disclosure of Sipple's homosexuality was newsworthy on the facts as presented, because there was considerable speculation that Gerald Ford did not invite Sipple to the White House because he was gay. A more difficult question would have arisen, however, if Ford had invited Sipple to the White House, because the President's position on homosexuality would have borne no relation to the newsworthy event in which Sipple was involved.

The distinction between these two propositions is critical. In the first instance, the public could be said to have a legitimate interest in private facts about Sipple's life only to the extent that those facts had bearing on his participation in the newsworthy event. Under this interpretation of the common law, although the public might be interested in, say, Sipple's alcoholism, and the media might dispel negative stereotypes about alcoholics by printing the information, it could not do so unless a sufficient nexus existed between his alcoholism and the aborted assassination attempt.¹⁷⁷ Alternatively, a court could find under a liberal reading of the newsworthiness privilege that the public had the right to know Sipple was homosexual not because of anything Gerald Ford did, but simply because Sipple "became news."¹⁷⁸ Under that line of reasoning, the public not only could be argued to have an interest in Sipple's sexual orientation, but also in the fact that he was an alcoholic, or a paranoid schizophrenic—even though he was neither drinking or on medication at the time he saved the president's life.¹⁷⁹

It is not at all clear that such a broad reading of the newsworthi-

176. *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980). In *Campbell*, the wife of author Joseph Campbell brought suit against Campbell's brother and a publisher for disclosure of facts about her marriage. The court sidestepped the issue whether Carlyne Campbell was a public figure, focusing instead on the scope of the newsworthiness privilege. In granting the defendants' motion for summary judgment, the Fifth Circuit held that the newsworthiness privilege for publishing private facts about involuntary public figures was not limited to the dissemination of news "either in the sense of current events or commentary upon public affairs, [but] extends to information concerning interesting phases of human activity." *Id.* at 397. However, the court required a logical nexus between the private facts disclosed and the matter of public interest as a means of safeguarding the plaintiff's privacy. *Id.*

177. *Id.* at 396.

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

179. *Id.*

ness privilege serves the best interest of either the plaintiff or the public. It is difficult to see how Sipple's drinking habits, or who he spends his free time with, would become "legitimate" matters of public concern simply because he happened to find himself in the midst of a public event. Indeed, such unwarranted intrusion into the details of a person's private life may well have a chilling effect on the willingness of citizens to involve themselves in community activities. People may be more reluctant to speak to the media, or attend political rallies, if they know that their lives may be subjected to the same sort of scrutiny as persons who voluntarily assume the risk that personal information about their private lives may come out. A public policy that discourages citizens from performing public service not only harms the individual, but cripples society as a whole.

4. THE HOMOSEXUALITY OF PRIVATE FIGURES

If publishing private facts about public figures and public officials in most cases can be justified on the basis of consent and benefit to the public, a different rationale is necessary in cases where the actors are purely private figures. Intuitively, it would seem that private litigants would stand a better chance of recovering on a theory of invasion of privacy, since their sexual orientation is less newsworthy under most circumstances than that of a public figure. Yet in reality, this is not the case. While private figures normally are able to satisfy the *Restatement's* lack-of-newsworthiness requirement, they usually fail to meet the tort's stringent publicity prong.

Beard v. Akzona, Inc.,¹⁸⁰ illustrates this problem. In *Beard*, the United States District Court for the Eastern District of Tennessee held that the plaintiff's privacy was not violated when the defendant played a tape of a conversation between a co-worker and his female lover, another co-worker, to a group of five management employees.¹⁸¹ The court acknowledged that disclosure of the facts surrounding the plaintiff's relationship with his co-worker was both highly offensive and not a legitimate matter of public concern.¹⁸² However, because the publication of the fact was confined to five individuals, all of whom were management employees of the defendant corporation and had some job-related connection to at least one of the parties,¹⁸³ the court held that the plaintiff had failed to show the publicity necessary to give rise to an action for invasion of privacy.

180. 517 F. Supp. 128 (E.D. Tenn. 1981).

181. *Id.* at 131.

182. *Id.* at 132.

183. *Id.* at 133.

When plaintiffs do manage to state a cause of action for small group disclosures, they normally must rely on state privacy statutes requiring publication, rather than publicity, of the facts disclosed. In *Bratt v. International Business Machines Corp.*,¹⁸⁴ the Supreme Court of Massachusetts held that the disclosure of private facts about an employee through an intracorporate communication was sufficient publication under the state's right to privacy statute to give rise to a cause of action.¹⁸⁵ In determining whether the publication constituted an "unreasonable interference" with the plaintiff's privacy right as defined under the statute, the court balanced the employer's interest in obtaining information about the plaintiff's mental condition against the nature and scope of the intrusion on his privacy.¹⁸⁶ The court held that since the information was highly intrusive and not "reasonably necessary to serve a substantial and valid business interest of the employer,"¹⁸⁷ the employee had a right to keep the information private.¹⁸⁸

The discrepancy between the results in *Bratt* and *Beard* underscores the problem with requiring publicity, rather than publication, in an action for public disclosure of private facts. It is unclear why the plaintiff in *Bratt* suffered greater injury than the plaintiff in *Beard* simply because sixteen individuals, rather than five, received the intracorporate communication detailing the plaintiff's psychological condition. Nor does the court's emphasis on the management status of those privy to the disclosure justify the result, since management employees are no more bound to confidentiality than others within a company.¹⁸⁹ In both cases, the facts disclosed, not the number of persons to whom they were told, constitutes the real offense.¹⁹⁰

This is not to say that statements about private actors are never circulated widely enough to satisfy the publicity requirement. Indeed,

184. 467 N.E.2d 126 (Mass. 1984).

185. *Id.* at 129.

186. *Id.* at 135.

187. *Id.* at 129. The court defined information reasonably necessary to include information that would be important in the employees' effectiveness in their jobs. *Id.*

188. *Id.* at 135. The plaintiff in *Bratt* objected to the disclosure of facts about his mental condition to sixteen employees, two of whom were managerial supervisors. *Id.* at 130.

189. Even if management employees were obligated to keep the information private, there is no guarantee that such information will remain confidential. One of the supervisors in *Beard*, in fact, acknowledged that he may have told his wife of the affair. *Beard v. Akzona, Inc.*, 517 F. Supp. 128, 131 (E.D. Tenn. 1981).

190. The degree of damage also may depend on the size and nature of the company. In certain instances, disclosure to one person in a small company may do much greater damage than disclosure to a number of people in a large corporate structure, where relationships are more impersonal.

two recent cases, one currently pending in a federal court,¹⁹¹ suggest the opposite is the case.¹⁹² But since most outings in the private context involve employer-employee situations,¹⁹³ unless the disclosure is sufficiently widespread, plaintiffs face an uphill battle.¹⁹⁴

191. O'Neill, *supra* note 25, at 13. The Lambda Legal Defense Fund brought the action in question under a state antidiscrimination statute on behalf of a former reporter for United Press International who also freelanced for the Washington Blade, a gay newspaper. Lambda sued UPI, a Wisconsin radio talk show host, and a Christian radio network after the reporter was harassed and fired from her job because of her sexual orientation. According to the complaint, the plaintiff was outed by a talk show host for the Voice of Christian Youth after he learned from her coworkers that she was a lesbian. *Brienza v. United Press International, Inc.*, No. CA 90-2925 (CRR) (D.D.C. filed Nov. 29, 1990). UPI subsequently fired her for violating its no-freelance rule, even though the company had never fired an employee for the first violation of free-lancing rules, and when it did fire employees for more than a single violation, the dismissal involved much more extreme circumstances. The reporter's complaint involved two claims: first, that the talk-show host violated the state's hate-crime law and common law right to privacy by using the telephone and public airwaves to personally harass her and reveal her as a lesbian without her consent; and second, that UPI violated the District of Columbia's Human Rights Law, which prohibits discrimination on the basis of sexual orientation. *Id.*

192. See *Matherson v. Marchello*, 473 N.Y.S.2d 998 (App. Div. 1984) (reinstating defamation complaint against group of musicians who made statements over radio that plaintiff was homosexual). Interestingly enough, the plaintiff in *Matherson* did not bring a cause of action in invasion of privacy, and therefore the court did not rule on the issue of whether adequate publicity had been made. However, were the court to have ruled on such a claim, it would have presumably found the broadcast to be sufficiently widespread to satisfy the tort's publicity requirement.

193. In *Ruden v. Kay-Bee Toy & Hobby Shops*, an action brought under the Massachusetts Human Rights Act, the plaintiff, a gay male, sued his supervisor and co-worker after he was fired. *Ruden v. Kay-Bee Toy & Hobby Shops, Inc.*, No. 90-BEH0748 (Mass. Comm'n Against Discrimination filed June 7, 1990). According to the complaint, Ruden had received consistently high evaluations from his supervisors until he got into an altercation with one of his assistant managers. When the assistant manager threatened to tell other employees that Ruden was gay, Ruden was forced to reveal his sexual orientation to his supervisor. *Id.* at 2. Shortly thereafter Ruden was written up for defective performance and fired without justification. *Id.* Ruden eventually settled out of court for an undisclosed sum. Telephone interview with Mary Bonauto, Attorney for Michael Ruden (Nov. 5, 1990).

In *Strawinski v. Murphy*, a similar action brought under the same statute, a foreman with an irrigation company was fired by the owner of his company after the owner of the company supposedly learned from one of his friends that Strawinski was gay. *Strawinski v. Murphy*, No. 90-BEA1230 (Mass. Comm'n Against Discrimination filed Sept. 12, 1990). Murphy repeatedly asked Strawinski if he "ha[d] anything contagious for me and the crew,"—an alleged reference to AIDS—according to the complaint, and later when Strawinski went for a job interview, a prospective employer told him that "Murphy mentioned something about what you do in your private time." *Id.* at 2.

194. Wick proposes modifying the *Restatement* test to remedy this problem. Specifically, he suggests adopting a Fourth Amendment approach to the question of whether the facts disclosed were private and eliminating the community mores aspect of the newsworthiness defense with regard to private figure plaintiffs. Wick, *supra* note 108, at 428-29. I agree with Wick on these two points. I disagree, however, with his conclusion that the "highly offensiveness" prong of the private facts tort "should hardly be an obstacle for a victim of outing." *Id.* at 424. The *Restatement* specifically states that the protection afforded to the plaintiff with respect to highly offensive publicity "must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow

It is also possible to imagine situations in which the sexual orientation of a private figure would be a matter of legitimate public concern. Imagine, for instance, that a private liberal arts college is embroiled in a debate over whether to fund a student forum on gay rights. The dean of students, a closeted homosexual, sits on the panel that decides how funds to student groups are to be allocated. The dean receives requests from ten other organizations, including two that propose similar forums on date rape and the crisis in the Middle East. When the funding committee deadlocks, the dean decides to fund the Middle East forum, but not the other two.

Under a pure public figure analysis, the dean of the college would probably retain her right to privacy, since she does not meet the Supreme Court's definition of a public figure.¹⁹⁵ Under a "newsworthiness" standard, however, the dean's decisions might well become a matter of legitimate public interest, because they affect a significant number of students and faculty members in the community.

Where precisely courts should draw the line between matters of legitimate public concern and matters that are purely private within the context of private actors does not lend itself easily to bright line rules. A high school teacher who advocates homosexuality as an alternative lifestyle in a class on comparative cultures ought not to forfeit all rights she may have to keep the public out of her bedroom simply because she is doing her job in a manner some people might question. Yet, to the extent that her decisions concerning textbook selection and course materials have an impact on hundreds of students every year, her actions are no less a matter of public concern to the members of her community than a congressional decision to adopt a spousal benefits program for same-sex partners.¹⁹⁶ Ultimately, the best that can be said of situations in which private figures set policy or make managerial decisions involving gay issues is that they need to be examined closely, and on a case-by-case basis, with sensitivity to all the parties involved.

E. *The Limits of the Newsworthiness Privilege*

Were the newsworthiness privilege an unqualified license to print

citizens." RESTATEMENT (SECOND) OF TORTS § 652D (1977) cmt. c. (emphasis added). Thus, if the modification of the tort is truly to be effective, the question of whether the publicity of a person's homosexuality is highly offensive to the reasonable person of ordinary sensibilities must be analyzed without regard to locality. See *supra* note 131 and accompanying text.

195. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

196. Bok limits public interest to matters that "affect [the public] welfare." Bok, *supra* note 73, at 249-58.

whatever the media deemed of interest to the public, the legal analysis of the outing dilemma would end here. However, the privilege is not without its limits. In order for the publication of a person's sexual orientation to be newsworthy, it must not be so offensive as to shock community notions of decency.¹⁹⁷

In *Sipple*, the California Court of Appeal offered two explanations to support its finding that the publication was not so offensive as to shock community notions of decency. First, because Sipple had already publicly disclosed the facts of his homosexuality through his conduct and association with members of the gay community, his homosexuality could not be considered a private fact.¹⁹⁸ Second, because the publication of Sipple's homosexuality was motivated by political considerations, rather than "a morbid and sensational prying into appellant's private life,"¹⁹⁹ the court held that "a much greater intrusion into an individual's private life [would] be sanctioned."²⁰⁰

The language in *Sipple* offers some support for the proposition that "political" outings fall into a different category than those motivated by simple malice because of the difference in intent, and as a result, ought to receive a higher level of protection.²⁰¹ Such a theory has since been categorically rejected by the Supreme Court with regard to public figures²⁰² on the grounds that outrageousness in the area of political and social discourse has "an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the juror's tastes or views, or perhaps on their dislike of a particular expression."²⁰³ Whether such a distinction between the two types of outings would still be recognized by the Supreme Court in actions brought by private figures, however, is unsettled.

The Court's refusal to take motive into account in the area of public debate makes sense in the context of public figures. Robust debate concerning the lives of public officials is, as has often been pro-

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

198. *Sipple v. Chronicle Pub. Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984).

199. *Id.* at 670.

200. *Id.*

201. For a discussion of the notion that political expression might be entitled to greater protection than other "lesser" forms of speech, see *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (Stevens, J.). Justice Stevens' position, however, has never been adopted by a majority of the Court.

202. *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988).

203. *Id.* at 54. In his complaint, Falwell attempted to distinguish the caricature which appeared in *Hustler* from the broader genre of traditional political cartoons on the basis of the author's intent. While the court acknowledged that the *Hustler* publication was at best a distant cousin of the [traditional] political cartoons, it was ultimately unwilling to draw a bright line separating the one from the other because of the threat such action posed to the First Amendment.

claimed, central to a healthy democracy,²⁰⁴ and people who enter the limelight assume the risk that their lives will be subjected to close scrutiny.²⁰⁵ Nevertheless, there are compelling reasons why motive ought to play at least some role in determining the defendant's liability in an outing action involving private figures. First, although the results of an outing motivated by spite and an outing motivated by politics may be the same, the two are qualitatively different. A public policy that encourages political change through nonviolent means necessarily enhances the democratic process, even if, as is the case here, individuals sometimes get hurt.²⁰⁶ Second, to the extent that the judicial system serves the public not merely to compensate for specific injuries, but also to deter people from engaging in certain kinds of behavior, drawing distinctions between good and bad outing promotes an appropriate conception of "the good."²⁰⁷

The difficulty with applying a pure motive test to the problem of outing in the realm of private figures, however, is that it is inherently subjective. Suppose, for instance, that an employee involved in gay rights activities outs a co-worker after he writes him up for failing to show up on time for his job.²⁰⁸ Under a motive test, a court certainly could look to objective evidence of a hostile motive, such as political affiliations or camaraderie with fellow employees. However, the ultimate determination about which motive was the proximate cause of the outing—the legitimate or the illegitimate one—would rest on speculation. Courts might presume outings by heterosexuals to be illegitimate unless the defendants could offer evidence of a political motive, but this presumption would still leave open the problem of what to do in a situation involving mixed motives within the homosexual community.²⁰⁹

The real problem with relying exclusively on motive as a predicate for liability, however, is that it promotes behavior that violates human dignity. Although outing is certainly a form of political protest, it is not the same as boycotting a business²¹⁰ or fighting taxes.²¹¹ A bankrupt business can be rebuilt, and a tax reinstated, but an outed

204. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1963).

205. *Id.* at 275.

206. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

207. *PLATO*, *supra* note 161, at 262-84.

208. *See, e.g., Complaint of Michael Ruden*, *supra* note 193.

209. For an analysis of how the problem of mixed motive is dealt with in the area of Title VII discrimination actions, see *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

210. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

211. HENRY D. THOREAU, *On the Duty of Civil Disobedience*, in *WALDEN, OR LIFE IN THE WOODS AND ON THE DUTY OF CIVIL DISOBEDIENCE* 222 (Signet 1960) (1844).

homosexual can never go back into the closet once his sexual orientation has been revealed.

Outing differs from other forms of political protest precisely because the damage it causes is irrevocable. In the same way that a woman can be irreparably harmed psychologically by protesters lying down in front of an abortion clinic and shoving pictures of a fetus at her,²¹² the outed plaintiff can never recover the opportunity of revealing core information about himself to the most important people in his life, even if the experience ultimately proves beneficial. Such a loss may seem like a small price to pay in the name of combatting prejudice and educating people about homosexuality, but to those affected by it, the damage is often incalculable.

This is not to suggest that the actor's methods or the nature of the publicity are irrelevant to a consideration of whether the publicity is newsworthy. Both *Sipple* and the *Restatement* allow for a cause of action where the publicity is unduly sensational and constitutes "a morbid . . . prying into appellant's private life."²¹³ Thus, although a story announcing the homosexuality of a public figure might not be actionable, a photograph of him having sex with his lover or a discussion in graphic detail of the nature of his sexual exploits would almost certainly give rise to a cause of action.²¹⁴

V. CONCLUSION

Whether a person's sexual orientation is a matter of legitimate public concern is ultimately less a question about whether sex is private than a question about when sex becomes public. When a person's sexual orientation substantially affects the lives of others outside the realm of his circle of intimate acquaintances, it can no more be considered a private fact than his eye color, or what he eats for lunch. If, on the other hand, a person's sexual orientation is of no legitimate concern to the public, it ought to be off limits to the media and other disinterested third parties.

No bright line rule exists for determining the precise contours of the right to privacy. In general, the more prominent a role a person plays in society, the more likely his homosexuality should be regarded as a matter of legitimate public concern. Public officials have an obli-

212. See Dudley Clendinen, *The Abortion Conflict: What It Does to One Doctor*, N.Y. TIMES, Aug. 11, 1985 (Magazine), at 18 (discussing the effect of abortion protests on women seeking abortions).

213. *Sipple*, 201 Cal. Rptr. at 670.

214. See *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525 (E.D. Pa. 1982) (nude photograph of plaintiff in bathtub served "no legitimate purpose of disseminating news" (quoting *Aquino v. Bulletin Co.*, 154 A.2d 422, 429 (1959))).

gation to speak candidly about their sexual orientation in order to preserve the integrity of the political process, as do celebrities and other non-elected public figures to the extent that they shape public opinion. Private citizens ought to be afforded a greater right to privacy as a result of their decision not to opt for notoriety, although that right is subject to revocation if they place themselves in a political role in which homosexuality becomes a political issue, or make their homosexuality a matter of general public knowledge.

Courts which recognize a cause of action for outing should not be accused of being antigay simply because they find as a matter of law that the publicity of a person's homosexuality is highly offensive to the reasonable person of ordinary sensibilities. Saying the publicity of homosexuality is highly offensive to the average person is not the same thing as saying homosexuality is highly offensive. The former involves acknowledging homophobia as a social problem; the latter, condemning it. It behooves both heterosexuals and homosexuals to take note of the difference.

In the end, the legal arguments surrounding outing can best be summed up by two disparate images: the image of the closeted gay teenager, desperately in search of role models to help him develop a sense of self-esteem, and the image of the outed employee, stripped of his livelihood, his friends, and his right to determine the direction of his life. That neither image is particularly palatable is less a reflection of any shortcoming in the legal system and its inability to "do justice," than a reflection of the damage that results when certain members of a society are regarded as inherently less worthy, or valuable, than others. Until we as a nation accept gay people as citizens, affording them not only full legal protection, but also dignity and respect, we will continue to be haunted by these images, the faces of countless men and women, no different from the rest of society, except for whom they choose to love.

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