

WHEN IS A CONFLICT REALLY A CONFLICT? OUTING AND THE LAW

In 1990, *OutWeek*—a relatively unknown gay magazine—printed a cover story which “outed” Malcolm Forbes.¹ That is, the magazine printed details of the publishing tycoon’s gay life.² Forbes was a well-known figure, so the mainstream national media noticed the story, and began a debate over the ethics of outing.³ Since then, other prominent people have been outed, including entertainment figures such as David Geffen and Jodie Foster, and political figures such as Pete Williams.⁴

With the advent of outing, the specter arose that an outed person might lose a job, friends, reputation, or face a number of other risks posed by being a known homosexual in an intolerant and prejudiced society.⁵ Proponents of outing, in response to this scenario, argued that by remaining “in the closet” and invisible, gay people perpetuate their own oppression.⁶ Outing famous and powerful gay people, the propo-

¹ LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 1 (1993); see MICHELANGELO SIGNORILE, *QUEER IN AMERICA* 70–77 (1993).

² Michelangelo Signorile, *The Other Side of Malcolm*, *OUTWEEK*, Mar. 18, 1990, reprinted in GROSS, *supra* note 1, at 207, 207–16.

³ GROSS, *supra* note 1, at 60–64; Jon E. Grant, Note, “Outing” and Freedom of the Press: Sexual Orientation’s Challenge to the Supreme Court’s Categorical Jurisprudence, 77 CORNELL L. REV. 103, 105 n.13 (1991). For examples of the media debate, see the articles reprinted in GROSS, *supra* note 1, at 217.

⁴ See *infra* notes 202–09 and accompanying text; see generally GROSS, *supra* note 1; SIGNORILE, *supra* note 1. The most recent outing involves publisher Jann Wenner. See Richard Goldstein, “Wink Wink, Nudge Nudge,” *VILLAGE VOICE*, Mar. 14, 1995, at 8.

Arguably, this Note engages in outing. The names appearing in the text are limited to a few representative examples, all of which were widely publicized. Some direct quotes within the footnotes include less-publicized names. In all cases, however, the names contained in this Note have appeared in a number of sources. Accordingly, the use of these names represents only a limited further invasion of privacy.

⁵ See GROSS, *supra* note 1, at 2. Some commentators argue that, if nothing is wrong with being gay, then nothing should be wrong with the world knowing it. See *infra* notes 175–76 and accompanying text. Civil rights attorney and Harvard Law Professor Alan Dershowitz has answered this by saying, in regard to bringing a defamation claim for outing, “No court is going to say that calling someone gay is legally defamatory, because to say that is to buy into the notion that being gay is somehow bad. On the other hand, you and I know that being exposed as gay can be harmful to a person.” Pat H. Broeske & John M. Wilson, *Outing Targets Hollywood*, *L.A. TIMES*, July 22, 1990, at 6.

⁶ See GROSS, *supra* note 1, at 20. The issues within this Note apply equally to gays, lesbians and bisexuals. For simplicity, the Note will use the term “gay.” Many academics and activists have started to use the term “queer,” which distinguishes itself from the normal, as opposed to the heterosexual. Michael Warner, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY*, vii, xxvi (Michael Warner ed., 1993). “Queer” points to normalization, rather

nents reason, will make homosexuality visible.⁷ Visibility, they contend, represents an important and necessary step on the path toward equality.⁸ Opponents of outing claim that the practice invades the outed person's individual freedom.⁹

Legal commentators who have considered the possibility of a legal remedy for an outed person have focused on the longstanding conflict between privacy and the First Amendment.¹⁰ Although a tort for the invasion of privacy exists, plaintiffs are often precluded from prevailing in civil suits against the mass media.¹¹ When privacy rights and the First Amendment conflict, the First Amendment usually wins.¹² First Amendment jurisprudence would demand that outing be tolerated—perhaps even celebrated—as part of the robust, open debate upon which the Supreme Court believes our democracy depends.¹³

This Note argues that the justifications behind the First Amendment and the right to privacy are actually very similar: both seek to protect an individual's right to participate in government and to achieve self-fulfillment.¹⁴ Gay people who are outed are hindered in their ability to speak, their ability to participate in government and their ability to achieve self-fulfillment.¹⁵ Outing, because the justifications for privacy and the freedom of speech converge, rather than conflict, presents a good vehicle for reexamining the purposes and the bounds of the invasion of privacy tort in relation to the First Amendment.¹⁶

than intolerance, as the site of violence. *Id.* "Queer" also works against "mandatory gender divisions." *Id.*

⁷ Douglas Crimp, *Right On Girlfriend!*, in *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* 300, 311 (Michael Warner ed., 1993); see Larry Bush, *Naming Gay Names*, *VILLAGE VOICE*, Apr. 27, 1982, reprinted in GROSS, *supra* note 1, at 177, 181.

⁸ See Steve Warren, "Telling 'Tales' about Celebrity Closets," an Interview with Armistead Maupin, *AU COURANT*, Oct. 23, 1989, reprinted in GROSS, *supra* note 1, at 200, 201-02.

⁹ See, e.g., C. Carr, *Why Outing Must Stop*, *VILLAGE VOICE*, Mar. 19, 1991, reprinted in GROSS, *supra* note 1, at 274, 274.

¹⁰ See John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 *YALE L.J.* 747, 749-50 (1991); Grant, *supra* note 3, at 103; David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 *U. MIAMI L. REV.* 711, 711 (1992); Ronald F. Wick, Note, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 *Geo. L.J.* 413, 415-16 (1991).

¹¹ Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 *TEX. L. REV.* 1195, 1198 (1990).

¹² *Id.*

¹³ See Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 *YALE L.J.* 1577, 1597, 1622 (1979); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁴ See *infra* notes 127-31, 265-67 and accompanying text.

¹⁵ See *infra* notes 254-64 and accompanying text.

¹⁶ See *infra* notes 265-67 and accompanying text.

Part I of this Note provides a brief overview of First Amendment theory, and then traces the relevant United States Supreme Court First Amendment cases.¹⁷ Part II provides an overview of the right to privacy, and then examines two representative privacy cases.¹⁸ Part III tells the story of outing, explains the political importance of coming out, explores arguments for and against the practice, and examines a case that approximates an outing.¹⁹ Finally, this Note concludes that outing, because it illustrates the convergence of privacy and political speech, shows the need to reexamine the invasion of privacy tort in relation to the First Amendment.²⁰

I. THE FIRST AMENDMENT

This section will begin with an examination of the First Amendment, because the First Amendment fundamentally affects liability for printed information.²¹ Part A briefly explores the most common theoretical justifications asserted for First Amendment protection.²² Part B examines use of these justifications in Supreme Court cases when privacy and the First Amendment conflict.²³

A. *The Theory*

Current First Amendment jurisprudence is a relatively new phenomenon.²⁴ Modern First Amendment theory in the United States Supreme Court began in 1919 with a series of well-known opinions by two notable Justices of that Court: Oliver Wendell Holmes and Louis D. Brandeis.²⁵ From these opinions, as well as from subsequent commentators, three general justifications for First Amendment protections have evolved: the marketplace of ideas, self-fulfillment and self-government.²⁶

¹⁷ See *infra* notes 21–118 and accompanying text.

¹⁸ See *infra* notes 119–78 and accompanying text.

¹⁹ See *infra* notes 179–240 and accompanying text.

²⁰ See *infra* notes 241–75 and accompanying text.

²¹ The First Amendment to the Constitution states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. 1.

²² See *infra* notes 24–52 and accompanying text.

²³ See *infra* notes 53–113 and accompanying text.

²⁴ See David Kairys, *Freedom of Speech, in THE POLITICS OF LAW* 237, 237 (David Kairys ed., rev. ed. 1990).

²⁵ E.g., Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 452 (1988). The first three cases in the series, decided in 1919, were *Schenck v. United States*, 249 U.S. 47 (1919), *Debs v. United States*, 249 U.S. 211 (1919), and *Abrams v. United States*, 250 U.S. 616 (1919).

²⁶ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6–17 (1992).

Justice Holmes explained the marketplace of ideas in his dissent in *Abrams v. United States*.²⁷ According to this justification, the best way to find and test ideas is through "the competition of the market."²⁸ Truth is most likely to be found when all opinions are expressed openly and the public may compare and contrast opposing opinions.²⁹ Freedom of expression, therefore, derives value from its role in discovering truth.³⁰ Since *Abrams*, the marketplace of ideas paradigm has had a continuous influence on First Amendment jurisprudence.³¹

Modern criticisms of the marketplace theory focus on an assumption contained within the theory: that everyone has meaningful speech that benefits from the protections offered by the First Amendment.³² Critics argue that the marketplace of ideas, which might work in theory, is in practice subject to distortion based on disparities in power.³³ The marketplace theory assumes that everyone already possesses an equal ability to speak.³⁴

Where a minority group or a group with fewer resources has limited access to speech to begin with, then the protection offered by

²⁷ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes' dissent marked the first time that a Supreme Court Justice attached a theory of freedom of expression to the First Amendment. Lahav, *supra* note 25, at 454. Holmes wrote:

{W}hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

Commentators have observed that Holmes' theory derives from the liberal views of John Stuart Mill. See JOHN STUART MILL, *ON LIBERTY*, 15–52 (Elizabeth Rapaport ed., 1978) (1859); Lahav, *supra* note 25, at 455; Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw. U. L. REV. 54, 68–69 (1989).

²⁸ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁹ Solum, *supra* note 27, at 69.

³⁰ Lahav, *supra* note 25, at 455; Solum, *supra* note 27, at 69.

³¹ Lahav, *supra* note 25, at 471–81; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Justice Brennan's opinion in *Sullivan* invoked the need for "robust, and wide-open" debate and quoted Judge Learned Hand's opinion that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.* (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

³² ALEXANDER MEIKLEJOHN, *Free Speech and its Relations to Self-Government*, in *POLITICAL FREEDOM* 86 (1948). Meiklejohn wrote, "the stark fact remains that the First Amendment is a negation. It protects. It forbids interference with something. And that protection can have value only as the 'something' which is protected has value." *Id.*

³³ DEBORAH L. RHODE, *JUSTICE AND GENDER* 272 (1989). In the context of pornography, Rhode wrote, "While in theory, the best response to false and degrading speech may be more speech, in practice such an approach is limited by disparities in power, status, and money among the potential speakers. By definition, the First Amendment protects only those able to exercise the rights it secures." *Id.*

³⁴ CATIARINE A. MACKINNON, *FEMINISM UNMODIFIED* 140, 157–58 (1987).

the First Amendment might be not only of minimal value, but also, in some cases, detrimental.³⁵ In the context of pornography, Professor Catharine MacKinnon argues that the First Amendment is used to guarantee the continued speech of the dominant group (men) at the expense of the dominated (women), who are silenced.³⁶ Similarly, in the context of racism, commentators have argued that hate speech silences minorities, thereby distorting the marketplace of ideas.³⁷

The second and third justifications, self-fulfillment and self-government, derive from Justice Brandeis's concurring opinion in *Whitney v. California*.³⁸ Self-fulfillment, as a justification for the First Amendment, rests on the belief that a proper goal for human life is the full realization of human character and potential.³⁹ Because achievement of this goal requires the mind to be free, restriction on expression should be prevented.⁴⁰ Self-fulfillment requires "the freedom to communicate."⁴¹ Although to a lesser extent than the marketplace theory, self-fulfillment also relies on counter-speech, rather than state regulation, to best answer offensive or harmful speech.⁴²

³⁵ See Kairys, *supra* note 24, at 264-66 (freedom of speech validates and legitimizes existing social and power relations and masks lack of real participation and democracy).

³⁶ MacKinnon, *supra* note 34, at 156.

³⁷ See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *WORDS THAT WOUND* 53, 78 (1993). Obvious differences exist between outing and racist speech. Racist speech is used by the majority, according to Lawrence, to subhumanize the minority. *Id.* at 68. When gays out gays in order to create role models, it is more difficult to argue that the outed are subhumanized.

³⁸ 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see Lahav, *supra* note 25, at 459. Brandeis wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth.

Whitney, 274 U.S. at 375 (Brandeis, J., concurring).

³⁹ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970). As Justice Thurgood Marshall wrote:

The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.

Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

⁴⁰ EMERSON, *supra* note 39, at 6. "[S]uppression of belief, opinion, or other expression is an affront to the dignity of man." *Id.*

⁴¹ Solum, *supra* note 27, at 80.

⁴² EMERSON, *supra* note 39, at 8. As Emerson wrote:

The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. The society may seek to achieve other or more inclusive ends—such as virtue, justice,

The third justification, self-government, is most closely associated with the work of Alexander Meiklejohn.⁴³ For Meiklejohn, the First Amendment is not a device for finding the truth.⁴⁴ Rather, the First Amendment assures that every member of the body politic has access to the information necessary for a full understanding of, and participation in, self-government.⁴⁵ Thus, for Meiklejohn, no idea, opinion, belief or any other type of information may be withheld from any citizen, and no citizen may be restrained from participating fully in self-government.⁴⁶

According to the latter two justifications, satisfying the purposes of the First Amendment would require that government actively protect minorities' ability to speak.⁴⁷ The First Amendment should, according to these justifications, ensure that no one is prohibited from speaking on issues of public importance.⁴⁸ Thus, the First Amendment should

equality, or the maximum realization of the potentialities of its members. These are not necessarily gained by accepting the rules for freedom of expression. But, as a general proposition, the society may not seek them by suppressing the beliefs or opinions of individual members. To achieve these other goals it must rely upon other methods: the use of counter-expression and the regulation or control of conduct which is not expression. Hence the right to control individual expression, on the ground that it is judged to promote good or evil, justice or injustice, equality or inequality, is not, speaking generally, within the competence of the good society.

Id.

⁴³ Solum, *supra* note 27, at 72; see MEIKLEJOHN, *supra* note 32, at 24. Meiklejohn's model of freedom is the "traditional American town meeting." MEIKLEJOHN, *supra* note 32, at 24.

In the town meeting the people of a community assemble to discuss and to act upon the matters of public interest . . . Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unabridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator . . . "calls the meeting to order." . . . His business on its negative side is to abridge speech. . . . The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged. . . . It is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.

Id. at 24-25.

⁴⁴ MEIKLEJOHN, *supra* note 32, at 75.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ MACKINNON, *supra* note 34, at 140. MacKinnon wrote, "What I think is that people who are absolutely interested in the First Amendment should turn their efforts to getting speech for people, like women, who have been denied that speech almost entirely, who have not been able to speak or to get themselves heard." *Id.*

⁴⁸ CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 40-41 (1993). Rather than embracing the battle of the marketplace, Sunstein invokes the liberalism of Kant, Mill and Rawls, and the commitment to "government by discussion." *Id.* at 248-49.

guarantee that people from every different perspective and position found in the United States have equal access to the political process.⁴⁹ This conception echoes Brandeis's opinion in *Whitney*, with its ideal of democratic deliberation, founded on a norm of political equality.⁵⁰ The First Amendment, according to these justifications, ought to ensure every citizen's ability to participate in the country's political discussion.⁵¹ In sum, the latter two justifications would require a new model of free speech, which, rather than protecting social dominance, would recognize specific experiences, notice who is being hurt and provide equal opportunity to speak.⁵²

B. *The Cases*

The preceding justifications have guided the Supreme Court in cases in which the First Amendment and privacy rights clash.⁵³ In 1964, in *New York Times Co. v. Sullivan*, the United States Supreme Court subjected libel—traditionally a question of state tort law—to First Amendment scrutiny.⁵⁴ The Court held that a public official must show “actual malice” in order to prevail in a libel suit.⁵⁵ The *New York Times* had published an advertisement containing inaccuracies about a local police commissioner.⁵⁶ The Court reasoned that the First Amendment's guarantee of a free press required protecting some erroneous statements.⁵⁷ Because the *New York Times* had not acted with actual malice, the Court reversed the previous damage award.⁵⁸

Sullivan, an Alabama police commissioner, believed that he had been unfairly accused of civil rights violations in the text of an advertisement printed by the *New York Times*.⁵⁹ The *New York Times* had not made an effort to confirm the advertisement's content, and the ad's inaccuracies went uncontroverted at trial.⁶⁰ The judge instructed the jury that the statements were libelous per se, and the jury found in favor of Sullivan.⁶¹

⁴⁹ *Id.* at 241–42.

⁵⁰ *Id.* at 244–45.

⁵¹ *Id.* at 241.

⁵² CATHARINE MACKINNON, *ONLY WORDS* 109 (1993).

⁵³ See *supra* notes 24–52 and accompanying text.

⁵⁴ See 376 U.S. 254, 256 (1964).

⁵⁵ *Id.* at 283.

⁵⁶ *Id.* at 256–57.

⁵⁷ *Id.* at 271–72.

⁵⁸ *Id.* at 285–86, 292.

⁵⁹ *Sullivan*, 376 U.S. at 256–58.

⁶⁰ *Id.* at 258, 261.

⁶¹ *Id.* at 262.

The Supreme Court reversed, holding that a public official, in order to bring a successful action, must prove that a defamatory statement was made with "actual malice."⁶² The First Amendment, according to the Court, assured freedom of discussion and a government that was responsive to the political and social goals of the people.⁶³ The Court characterized the right to speak one's mind as "a prized American privilege," unaffected by the content of that speech.⁶⁴ The Court observed that allowing too many defamation suits would detract from the marketplace of ideas upon which democracy rests.⁶⁵ Moreover, the Court reasoned that an "erroneous statement is inevitable" and protecting the press is instrumental in providing the "breathing space" necessary for free debate.⁶⁶ The Court concluded that, absent actual malice, the First Amendment limited a state's ability to award libel damages in actions brought by public officials.⁶⁷

In 1967, in *Time, Inc. v. Hill*, the United States Supreme Court first faced a direct conflict between the First Amendment and the right to privacy,⁶⁸ holding that the *Sullivan* actual malice standard applied not only to public officials, but also to matters of public interest.⁶⁹ The case involved a *Life* magazine story based upon the experiences of an otherwise anonymous family.⁷⁰ Emphasizing that democracy required the press to have extensive freedom of speech,⁷¹ the Court concluded that the First Amendment prohibited liability for printing matters of public interest absent proof of knowledge of falsity or reckless disregard for truth.⁷²

Life magazine published a review of a play that described a family taken hostage by escaped convicts.⁷³ The play abstracted the true ex-

⁶² *Id.* at 283. A finding of actual malice required that the publisher had knowledge that the statement was false, or else acted with reckless disregard for whether it was true or false. *Id.* at 279-80.

⁶³ *Id.* at 269.

⁶⁴ *Sullivan*, 376 U.S. at 269.

⁶⁵ See *id.* at 270. Justice Brennan wrote, "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.*

⁶⁶ *Id.* at 271-72.

⁶⁷ *Id.* at 283.

⁶⁸ 385 U.S. 374, 376 (1967); see also Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, HARV. C.R.-C.L. L. REV. 329, 334 (1970).

⁶⁹ *Hill*, 385 U.S. at 387-88.

⁷⁰ *Id.* at 377-78.

⁷¹ *Id.* at 389.

⁷² *Id.* at 387-88.

⁷³ *Id.* at 377.

periences of the Hill family, who had involuntarily become a subject of public interest.⁷⁴ The Hills sued under a New York privacy statute.⁷⁵

The Court held that the First Amendment precluded liability for printing matters of public interest absent proof of actual malice.⁷⁶ The Court ruled that the risk of public exposure is a necessary evil in a society that highly values freedom of speech and press.⁷⁷ Freedom of the press, the Court reasoned, assures the continued well-being of the political system.⁷⁸ Although the Court recognized the possibility of revelations that might be so private as to warrant protection, the decision protected the press.⁷⁹

In a dissenting opinion, Justice Fortas refused to accept the proposition that the First Amendment assumed greater weight than the right to privacy.⁸⁰ Justice Fortas traced the history of privacy, and characterized it as "a basic right."⁸¹ He then accused the Court of paying "lip service" to privacy while, in reality, according privacy no more than "verbal acknowledgment."⁸²

In 1975, in *Cox Broadcasting Corp. v. Cohn*, the United States Supreme Court held that liability could not be imposed for publication of information contained in the public record.⁸³ A television station broadcast the name of a rape victim, which the station found in the public record.⁸⁴ The Court reasoned that nothing in the public record

⁷⁴ *Hill*, 385 U.S. at 377-78.

⁷⁵ *Id.* at 378. New York Civil Rights Law § 50 provided that any use for advertising or trade purposes, of the name, portrait or picture of any living person, without permission, is a misdemeanor. *Id.* at 376 n.1. New York Civil Rights Law § 51 allowed the victim to bring a civil suit. *Id.*

⁷⁶ *Hill*, 385 U.S. at 387-88.

⁷⁷ *Id.* at 388.

⁷⁸ *Id.* at 389.

⁷⁹ *See id.* at 383 n.7. Speaking of a New York Court of Appeals decision interpreting the New York statute, the Court said:

This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages where "Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." . . . This case presents no question whether truthful publication of such matter could be constitutionally proscribed.

Id. (quoting *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

⁸⁰ *Hill*, 385 U.S. at 412 (Fortas, J., dissenting). Justice Fortas wrote:

There are great and important values in our society, none of which is greater than those reflected in the First Amendment, but which are also fundamental and entitled to this Court's careful respect and protection. Among these is the right to privacy, which has been eloquently extolled by scholars and members of this Court.

Id.

⁸¹ *Id.* at 412-15.

⁸² *Id.* at 415-16.

⁸³ 420 U.S. 469, 496 (1975).

⁸⁴ *Id.* at 471-74.

was sufficiently private to be entitled to protection.⁸⁵ The Court concluded that private information, if it is to be protected, must not become part of the public record.⁸⁶

In 1971, Cohn's seventeen-year-old daughter was raped and killed.⁸⁷ Although the press gave substantial coverage to the crime, the victim's name was not disclosed.⁸⁸ Eight months later, during a court session in which five of the defendants pleaded guilty, a reporter learned the victim's name by examining the indictments.⁸⁹ The reporter then broadcast the name on television.⁹⁰ Relying on a Georgia statute that made it a misdemeanor to broadcast a rape victim's identity, Cohn brought suit claiming invasion of his right to privacy.⁹¹ The Georgia Supreme Court held that the statute was a legitimate limitation of the First Amendment.⁹²

Reversing the Georgia Supreme Court, the United States Supreme Court held that the Constitution would not allow liability for publishing truthful information contained in public records.⁹³ The Court noted the important "face-off" between the First Amendment and the right to privacy, and recognized that the case involved a private person and a very private matter.⁹⁴ Because of the "collision" between privacy and the First Amendment, the Court adopted a case-by-case approach to the problem rather than answering whether truthful publications could ever create liability.⁹⁵ Citing the important role of the press in monitoring the government, the Court reasoned that printing matters contained in the public record must reside within the protection of the First Amendment.⁹⁶ Therefore, the Court concluded that facts in the public record were not entitled to privacy protection.⁹⁷

Expanding on *Cox*, in 1989, in *Florida Star v. B.J.F.*, the United States Supreme Court held that the press could publish lawfully obtained material, except under very narrow circumstances.⁹⁸ B.J.F. was

⁸⁵ *Id.* at 492-94.

⁸⁶ *Id.* at 496.

⁸⁷ *Id.* at 471.

⁸⁸ *Cox*, 420 U.S. at 471.

⁸⁹ *Id.* at 472.

⁹⁰ *Id.* at 473.

⁹¹ *Id.* at 474.

⁹² *Id.* at 475.

⁹³ *Cox*, 420 U.S. at 496.

⁹⁴ *See id.* at 489, 491.

⁹⁵ *See id.* at 491.

⁹⁶ *See id.* at 491-92.

⁹⁷ *Id.* at 496.

⁹⁸ *See* 491 U.S. 524, 530, 541 (1989).

a rape victim.⁹⁹ After B.J.F. reported the rape, the local police office prepared a report that identified her.¹⁰⁰ Florida law prohibited the identification of rape victims in the public record.¹⁰¹ A reporter trainee copied the report, including B.J.F.'s name.¹⁰² Later, the newspaper included B.J.F.'s name in its weekly compilation of crimes.¹⁰³ B.J.F. and her family were subsequently threatened and forced to change their phone number and residence, after which B.J.F. sued the newspaper.¹⁰⁴ Although the Florida Circuit Court and the Florida District Court of Appeal found for the plaintiff, the United States Supreme Court reversed.¹⁰⁵

First, the Court recognized that it had always upheld the press' right to publish accurate information, but resolved to continue balancing free speech and privacy on a case-by-case basis.¹⁰⁶ Although the Court noted that the "tragic reality" of rape heightened the state's interest in protecting B.J.F.'s name, the Court observed that the newspaper had published information lawfully obtained.¹⁰⁷ Moreover, the Court reasoned that, while the name was not a part of the public record, the government had disclosed the name.¹⁰⁸ Thus, the Court concluded that *The Florida Star* could not be held liable, because publication of truthful and lawfully obtained information could be punished only under a narrowly tailored statute protecting a state interest of the highest order.¹⁰⁹

In a dissenting opinion, Justice White argued that the Court had not recognized the uniqueness of the facts in this case.¹¹⁰ According to

⁹⁹ *Id.* at 527.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 526.

¹⁰² *Id.* at 527.

¹⁰³ *Florida Star*, 491 U.S. at 527.

¹⁰⁴ *Id.* at 528.

¹⁰⁵ *Id.* at 529. The Supreme Court of Florida denied discretionary review. *Id.*

¹⁰⁶ *Id.* at 530.

¹⁰⁷ *Id.* at 537, 541.

¹⁰⁸ See *Florida Star*, 491 U.S. at 535. "[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." *Id.*

¹⁰⁹ *Id.* at 541.

¹¹⁰ See *id.* at 543-46 (White, J., dissenting). Justice White distinguished *Florida Star* from *Cox* because in *Florida Star* the name was not in the public record. *Florida Star*, 491 U.S. at 543 (White, J., dissenting). Justice White further argued that the majority's reliance on *Smith v. Daily Mail Publishing Co.* was misplaced. *Florida Star*, 491 U.S. at 544-45 (White, J., dissenting) (citing *Daily Mail*, 443 U.S. 97, 104 (1979) (publication of lawfully obtained, truthful information may not be punished absent state interest of highest order)). *Daily Mail*, according to Justice White, involved the rights of someone accused of a crime, not of someone who was the victim of a crime. *Florida Star*, 491 U.S. at 545 (White, J., dissenting). Further, Justice White argued, *Daily Mail* was a narrow

White, Florida's statute was sufficiently narrowly tailored to withstand First Amendment scrutiny.¹¹¹ Justice White expressed his willingness to balance the needs of a free press against other important interests, and condemned the Court for placing too little weight on the side of B.J.F.¹¹² The result, according to Justice White, was one further step toward the inevitable obliteration of the tort of publication of private facts.¹¹³

In sum, the justifications commonly cited by scholars to explain the First Amendment are the marketplace of ideas, self-fulfillment and self-government.¹¹⁴ In practice, when privacy and the press collide, the justifications have translated into protection for the press.¹¹⁵ In *Sullivan*, the Court protected statements about public officials, absent actual malice.¹¹⁶ In *Hill*, *Cox* and *Florida Star*, the Court expanded that protection to include all legally obtained information about all matters of public interest.¹¹⁷ In dissenting opinions, Justices Fortas and White advocated balancing the First Amendment right to speak against other equally important rights, such as privacy.¹¹⁸

II. THE RIGHT TO PRIVACY

A. *The Theory*

In contrast to the right to free speech, the right to privacy has a less certain origin and a more elusive definition.¹¹⁹ In 1890, in their seminal article *The Right to Privacy*, Samuel D. Warren and Louis D.

opinion, which explicitly stated that "there is no issue here of privacy." *Florida Star*, 491 U.S. at 545 (White, J., dissenting) (quoting *Daily Mail*, 443 U.S. at 105.)

¹¹¹ *Florida Star*, 491 U.S. at 549 (White, J., dissenting).

¹¹² *Id.* at 547 n.2, 551 (White, J., dissenting). Justice White wrote: "The Court's concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society. An absolutist view of the former leads to insensitivity as to the latter." *Id.* at 547 n.2 (White, J., dissenting).

¹¹³ *Id.* at 550 (White, J., dissenting). Justice White did not find this step particularly noteworthy; rather, he thought the decision had been foreshadowed by earlier Supreme Court cases. *Id.* at 552-53 (White, J., dissenting).

¹¹⁴ See *supra* notes 24-52 and accompanying text.

¹¹⁵ *Florida Star*, 491 U.S. at 530; Edelman, *supra* note 11, at 1198.

¹¹⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65 (1964).

¹¹⁷ *Florida Star*, 491 U.S. at 541; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967).

¹¹⁸ *Florida Star*, 491 U.S. at 547 n.2 (White, J., dissenting); *Hill*, 385 U.S. at 412 (Fortas, J., dissenting).

¹¹⁹ Emerson, *supra* note 68, at 329-32. This Note is concerned with the tort right of privacy, which is different from the constitutional right to privacy. EMERSON, *supra* note 39, at 547; Felcher & Rubin, *supra* note 13, at n.42. The constitutional right to privacy limits governmental intrusion upon the privacy of the individual. EMERSON, *supra* note 39, at 547. The tort right protects the individual from private behavior. *Id.*

Brandeis explained what the right to privacy ought to protect.¹²⁰ Warren and Brandeis hypothesized the existence of a right to be let alone, which ought to protect citizens from seeing their lives subjected to public scrutiny through unwanted attention from the media.¹²¹ Although privacy has no clear definition,¹²² it is understood to protect a zone of individual will from intrusion by the collective society.¹²³ The broadest definitions of privacy include allowing control of how information about an individual is communicated to others.¹²⁴ Commentators aiming at narrower definitions contend that the right to privacy protects autonomy, identity and intimacy,¹²⁵ or secrecy, anonymity and solitude.¹²⁶

Under any formulation, privacy's aim is to separate individuals from society.¹²⁷ The justifications for this protection are the same as two of the justifications for the First Amendment: privacy allows indi-

¹²⁰ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

¹²¹ *Id.* at 193, 195-96. For instance, "The press is overstepping in every direction the obvious bounds of propriety and of decency." *Id.* at 196.

¹²² See Felcher & Rubin, *supra* note 13, at 1582; see also Emerson, *supra* note 68, at 338-41.

¹²³ Emerson, *supra* note 68, at 337.

¹²⁴ ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1966).

Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.

Id.

As a basis for a legal right, the problem with Westin's definition of privacy is that it is simply too broad. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 261-63 (1977). The absence of restrictions "confounds every attempt to cabin the right to privacy with prudent and plausible remedies." *Id.* at 262.

¹²⁵ Gerety, *supra* note 124, at 236. Gerety's article is an attempt to develop a concrete definition of privacy, which will limit the valid application of the right. *Id.* at 234-35. Privacy, according to Gerety, is in danger of claiming to protect so much that it, in fact, protects nothing. See *id.* at 261. Thus, Gerety begins with the broad interests of privacy: control and identity. *Id.* at 263. He then limits privacy by adding intimacy. See *id.* at 268.

Although Gerety does not address outing directly, he argues that exposure of private information has the capacity to "deprive us of autonomy in information at just those points where autonomy in other important life-choices is at stake." *Id.* at 287.

¹²⁶ Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 433 (1980). According to Gavison, those three words are shorthand for "the extent to which an individual is known, the extent to which an individual is the subject of attention, and the extent to which others have physical access to an individual." *Id.* at 433-34 n.40. Gavison characterizes the three things as capable of operating individually, yet still comprising a coherent whole. *Id.* at 434. All three relate to the "same notion of accessibility." *Id.*

¹²⁷ WESTIN, *supra* note 124, at 7; David Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 588 (1977); see also Emerson, *supra* note 68, at 337. It is beyond the scope of this Note to discuss the merits of the many different theories and definitions of privacy. What is relevant is that virtually

viduals to become fully realized and allows society to govern itself democratically.¹²⁸ Without privacy, people would be less likely to produce creative and insightful ideas.¹²⁹ Instead, everyone's ideas would tend to be identical, stifling individual self-fulfillment, as well as development of political ideas.¹³⁰ Privacy also ought to protect sufficient personal information to insure each individual autonomy in important life choices.¹³¹

Most jurisdictions have recognized a tort for invasion of privacy.¹³² Professor Prosser has divided the tort into four different causes of action, of which the relevant one in an outing case is disclosure of private facts.¹³³ The tort's definition, though, has never explicitly ac-

all theories and definitions of privacy rely in some form on the benefits of self-fulfillment and self-government as justifications.

¹²⁸ See, e.g., D.F.B. TUCKER, *LAW, LIBERALISM AND FREE SPEECH* 110-14 (1985); Bazelon, *supra* note 127, at 589-94; Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1003 (1964); Emerson, *supra* note 68, at 339; Gavison, *supra* note 126, at 444, 445, 455-56.

¹²⁹ SMOLLA, *supra* note 26, at 120.

¹³⁰ See Bloustein, *supra* note 128, at 1003.

The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual.

Id.

¹³¹ Gerety, *supra* note 124, at 287.

We are often forced to present ourselves for judgments by others occupying decisive institutional positions in our society and in our lives: they will make judgments about a job, a mortgage, or even a sentence or parole. These others may well have in their possession such stale, partial, or false information about us . . . Far from consenting to this, we will often have no knowledge of it, and of course no way to prevent or correct it.

Id.

¹³² Dianne L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 365 (1983). By Professor Dianne Zimmerman's count, 36 jurisdictions have recognized a private-facts tort. *Id.*

¹³³ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 856 (5th ed. 1984). Prosser's other torts are: appropriation, unreasonable intrusion, and false light in the public eye. *Id.* at 851, 854, 863. The relevant action for public disclosure of private facts is defined by the *Restatement (Second) of Torts* as follows:

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.

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

counted for the existence of the First Amendment.¹³⁴ Consequently, the First Amendment is applied over the structure of the privacy tort, limiting the scope of privacy's protection for individuals, and maintaining the protection of the press.¹³⁵ One commentator has noted that, while the Supreme Court could have taken the difficult road of balancing privacy and speech, it has implicitly chosen the easier road of First Amendment absolutism.¹³⁶

Because of this absolutism, the private-facts tort, in practice, has never amounted to much.¹³⁷ In 1966, Professor Harry Kalven noted that the newsworthiness privilege, a product of *New York Times Co. v. Sullivan*, might very well have "swallow[ed] the tort."¹³⁸ One commentator has gone so far as to characterize the creation of the tort as "pernicious" because it cannot coexist with the First Amendment.¹³⁹ In this view, the creation of a "phantom tort" has prevented the law from developing an effective remedy for protecting privacy.¹⁴⁰

B. Privacy Cases

In 1940, in *Sidis v. F-R Publishing Corp.*, the United States Court of Appeals for the Second Circuit, in a private-facts case, held that truthful comments about everyday aspects of a person's life could not be considered so private as to justify liability.¹⁴¹ William Sidis' attempts to escape scrutiny had been overcome by *The New Yorker*.¹⁴² The court reasoned that the public interest in a story, at some point, overcame the individual's desire for privacy.¹⁴³ The Second Circuit concluded that the First Amendment protected the magazine's story.¹⁴⁴

In 1910, William James Sidis was a famous child prodigy.¹⁴⁵ At eleven, he lectured to distinguished mathematicians on Four-Dimensional Bodies.¹⁴⁶ At sixteen, he graduated from Harvard College.¹⁴⁷

¹³⁴ Felcher & Rubin, *supra* note 13, at 1579, 1592.

¹³⁵ See *id.* at 1585.

¹³⁶ Edelman, *supra* note 11, at 1214-15.

¹³⁷ Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 341 (1966).

¹³⁸ *Id.* at 336.

¹³⁹ Zimmerman, *supra* note 132, at 293.

¹⁴⁰ *Id.* at 362.

¹⁴¹ See 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940).

¹⁴² *Id.* at 807.

¹⁴³ *Id.* at 809.

¹⁴⁴ See *id.* at 809-10.

¹⁴⁵ *Id.* at 807.

¹⁴⁶ *Sidis*, 113 F.2d at 807.

¹⁴⁷ *Id.*

Thereafter, he chose to live his life away from public scrutiny, working as an "insignificant" clerk.¹⁴⁸ In 1937, *The New Yorker* printed a biographical sketch of Sidis, which he had not approved, and which traced Sidis' life since he had receded from public view.¹⁴⁹ Sidis did not contend that the story was untrue or unfriendly.¹⁵⁰ Rather, he objected to the publication of private details of his personal life.¹⁵¹ He sued, including among his claims violation of his right to privacy.¹⁵²

The Second Circuit discussed the Brandeis and Warren article, and recognized the magazine's invasion of Sidis' privacy.¹⁵³ The court also reasoned, however, that obtaining information about matters of public interest, at some point, becomes dominant over any individual's desire for that information to remain private.¹⁵⁴ Sidis had once been a public figure.¹⁵⁵ While he had tried to live in secrecy, the story of his life remained within the broad reach of public concern.¹⁵⁶

The court expressly refrained from declaring that newsworthiness would always defeat privacy.¹⁵⁷ In fact, the court stated that some news might be so intimate and so unwarranted as to cause community outrage.¹⁵⁸ But the Second Circuit reasoned that truthful comments about everyday facts and habits of public characters will generally not cross the line.¹⁵⁹ The Second Circuit ruled that *The New Yorker's* story could not be held libelous.¹⁶⁰

In contrast, in 1969, in *Commonwealth v. Wiseman*, the Supreme Judicial Court of Massachusetts held that protecting privacy was a reasonable interference with publication of matters of public concern.¹⁶¹ A documentary filmmaker filmed inmates in embarrassing situations, and intended to show the film to the public.¹⁶² The court reasoned that the film was an unnecessary invasion of the inmates'

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Sidis*, 113 F.2d at 807.

¹⁵² *Id.*

¹⁵³ *Id.* at 808-09.

¹⁵⁴ *Id.* at 809.

¹⁵⁵ *Id.*

¹⁵⁶ *Sidis*, 113 F.2d at 809.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see *supra* note 79.

¹⁵⁹ *Sidis*, 113 F.2d at 809. The court did not say what would cross the line. See *id.*

¹⁶⁰ *Id.* at 809-10.

¹⁶¹ *Commonwealth v. Wiseman*, 249 N.E.2d 610, 617 (Mass. 1969).

¹⁶² *Id.* at 612-13.

privacy.¹⁶³ The Supreme Judicial Court allowed a limited injunction to protect the privacy of inmates at the correctional institution.¹⁶⁴

In 1966, Frederick Wiseman, a documentary filmmaker, was given permission to make an educational documentary concerning the Massachusetts Correctional Institution at Bridgewater.¹⁶⁵ The documentary was intended to be a non-commercial, non-sensational film.¹⁶⁶ Wiseman and his crew filmed 80,000 feet of film, including pictures of "mentally incompetent patients . . . in the nude . . . [and] in the most personal situations."¹⁶⁷ The Attorney General subsequently informed Wiseman that the film was an invasion of privacy.¹⁶⁸ The trial judge found the final product to be crass commercialism, intended to be shown in public theaters.¹⁶⁹ Witnesses' reaction to the film varied from those who were adversely critical to those who considered the film to be fine journalism, educational and artistic.¹⁷⁰

The Supreme Judicial Court reasoned that the film contained degrading scenes of identifiable individuals, which represented an indecent intrusion into the privacy of those inmates.¹⁷¹ While the court did not express an opinion on the tort of invasion of privacy, it did state that the Commonwealth had a duty to protect the inmates from any invasions of their privacy.¹⁷² The court recognized the important public interest in Bridgewater, and that the film might well lead to improvements in the institution.¹⁷³ The court stressed, however, the absence of anyone in the film who had any "special news interest as an individual."¹⁷⁴ The court explicitly distinguished this case from cases such as *Hill*, which treated dissemination of news as more important than interests in privacy.¹⁷⁵ Therefore, after balancing privacy and the

¹⁶³ *Id.* at 615.

¹⁶⁴ *See id.* at 618.

¹⁶⁵ *Id.* at 612. Wiseman had originally been denied permission. *Id.* When permission was granted, it was subject to the receipt of a letter from the Attorney General, as well as various conditions to protect the rights and privacy of the institution and the inmates. *Id.*

¹⁶⁶ *See Wiseman*, 249 N.E.2d at 613. This is according to Wiseman's statement to the Commissioner and Superintendent before he received permission to film. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* The Attorney General also maintained that the releases that Wiseman had obtained from the mental patients, pursuant to the grant of permission to film, were not valid. *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 614.

¹⁷¹ *Wiseman*, 249 N.E.2d at 615.

¹⁷² *Id.*

¹⁷³ *Id.* at 616.

¹⁷⁴ *Id.* at 617.

¹⁷⁵ *Id.* The court upheld the injunction against showing the film to the general public, but

publication of matters of public concern, the court concluded that preventing publication did not represent an unreasonable interference with speech.¹⁷⁶

Sidis and *Wiseman* illustrate two different approaches to private-facts cases. The *Sidis* court refused to limit the First Amendment right to speech, while the *Wiseman* court gave the right to privacy weight equal to the right to free speech.¹⁷⁷ The majority of courts faced with private-fact cases have followed the *Sidis* approach, giving the First Amendment considerably more weight than privacy rights.¹⁷⁸

III. OUTING

A. *The Politics of Outing*

In his book, *Contested Closets*, Larry Gross documents the history of outing, and reprints many of the original articles which framed the debate.¹⁷⁹ Gross first places outing within its context: homosexuals "constitute a 'people' set apart" from the society within which they live.¹⁸⁰ Gross explains that, for many years, solidarity within the gay community, born of oppression, created a code of silence which prevented revealing the names of closeted homosexuals to heterosexual society.¹⁸¹

Within the gay community, though, tension has always existed between the right to free choice and the fact that most gay people do not come out.¹⁸² The gay liberation movement is founded on the idea that "coming out" is a powerful political act.¹⁸³ Gays in the closet remain hidden from society and confirm for heterosexuals how to treat

not against ever showing the film. *Id.* at 618. The court held that the film could be shown to legislators, judges, sociologists, and others in the field of custodial care. *Id.* For those people, the interest in informing would outweigh the interest in privacy. *Id.* As the court wrote, "the likelihood of harm seems to us less than the probability of benefits." *Id.* What is important, for this Note, is the court's willingness to balance the right to speech against the right to privacy.

¹⁷⁶ *Wiseman*, 249 N.E.2d at 617. The court also based its conclusion on *Wiseman* going "unreasonably beyond the scope of the conditional permission." *Id.*

¹⁷⁷ Compare *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940) with *Commonwealth v. Wiseman*, 249 N.E.2d 610, 617 (Mass. 1969).

¹⁷⁸ See *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967); Felcher & Rubin, *supra* note 13, at 1579.

¹⁷⁹ See generally GROSS, *supra* note 1.

¹⁸⁰ *Id.* at 6. For Gross, this idea—a people set apart—"leads inevitably to the question of what obligations" gays have to their own, separate community. *Id.*

¹⁸¹ See *id.* at 13. Gross argues that the code of silence was developed because of, among other things, homosexuality's criminal status and society's McCarthyist tendencies. *Id.* at 7, 13.

¹⁸² *Id.* at 21-23.

¹⁸³ E.g., *id.* at 20; RICHARD MOHR, *GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW* 327-28 (1988).

homosexuals: by hiding the people they love, the argument goes, gay people convey the message that they are ashamed of their own identities.¹⁸⁴ On the other hand, by living their lives openly, gay people force heterosexual society to recognize the pervasiveness of homosexuality.¹⁸⁵ Some argue that only by living openly, and not hiding, will gay people ever gain freedom and civil rights.¹⁸⁶ Thus, a gay liberation slogan proclaims, "out of the closets and into the streets."¹⁸⁷ From the start, though, the strategy of self-disclosure contained a rift between those who are openly gay and those who remain in the closet.¹⁸⁸ For an openly gay person, the question is not whether outing is ethical, but rather, whether hiding one's sexuality is ethical.¹⁸⁹

According to Gross' book, the AIDS crisis was an important development on the path to outing because of two lessons learned by the gay community.¹⁹⁰ First, a "gay" disease will not receive adequate attention from mainstream press or politics.¹⁹¹ Second, the country will only pay attention to the disease if famous and important people are associated with the cause.¹⁹² Thus, for groups which battled AIDS, using

¹⁸⁴ Steve Warren, "Telling 'Tales' about Celebrity Closets," an interview with Armistead Maupin, *AL COURANT*, Oct. 23, 1989, reprinted in GROSS, *supra* note 1, at 200, 201-02. Armistead Maupin is quoted saying:

What it boils down to is, the message that is being communicated is that there is something wrong with us. . . . If you are being secretive about the people you love, you are conveying the impression that you are ashamed of who and what you are. . . .

If gay people themselves act ashamed of who they are, then the straight people around them have no choice but to believe that there must be something wrong with it.

Id.

¹⁸⁵ *Id.* at 202. Maupin also said, "the only way to attack the homophobia is to refuse to maintain the secret of homosexuality, either your own or anyone else's." *Id.*

¹⁸⁶ As one gay man said, at New York City's first gay pride march, "We're probably the most harassed, persecuted minority group in history, but we'll never have the freedom and civil rights we deserve as human beings unless we stop hiding in closets and in the shelter of anonymity." TOBY MAROTTA, *THE POLITICS OF HOMOSEXUALITY* 170 (1981).

¹⁸⁷ GROSS, *supra* note 1, at 21.

¹⁸⁸ Michael Bronski, *Outing: The Power of the Closet*, *GAY COMMUNITY NEWS*, June 3-9, 1990, reprinted in GROSS, *supra* note 1, at 262, 264; see also William A. Henry III, *Forcing Gays out of the Closet: Homosexual Leaders Seek to Expose Foes of the Movement*, *TIME*, Jan. 29, 1990, reprinted in GROSS, *supra* note 1, at 205, 207 ("The gay movement is actually based upon two principals that collide. One is privacy, and the other is disclosure, the process of coming out.") (quoting Thomas Stoddard, adjunct professor of law at N.Y.U.).

¹⁸⁹ Victoria Brownworth, *Campus Queer Query*, *OUTWEEK*, May 16, 1990, reprinted in GROSS, *supra* note 1, at 249, 251. Brownworth asked, "Is it ethical to stay in the closet, pass for straight, assume the mantle of heterosexual privilege and enjoy its benefits while those who are openly gay suffer the oppression of their minority status?" *Id.*

¹⁹⁰ GROSS, *supra* note 1, at 34.

¹⁹¹ *Id.*

¹⁹² *Id.*

the media to advertise homosexuality and to show the human faces of AIDS became essential.¹⁹³

According to Michelangelo Signorile, the foremost practitioner of outing, outing is necessary because of hypocrisy in journalism, entertainment and the government.¹⁹⁴ Only outing, according to proponents, will make homosexuality visible.¹⁹⁵ Regarding the world of journalism, Signorile argues that the media happily reports all private aspects of everyone's life, particularly heterosexual aspects.¹⁹⁶ The only taboo subject, about which the media will not speak, is homosexuality.¹⁹⁷ According to Signorile, the media thereby indicates that being gay is so bad that it cannot be reported.¹⁹⁸

¹⁹³ SIGNORILE, *supra* note 1, at 63. This, of course, is the major strategy of ACT UP (the AIDS Coalition to Unleash Power). See GROSS, *supra* note 1, at 56-57.

¹⁹⁴ SIGNORILE, *supra* note 1, at xiii-xv. Signorile's column, *Gossip Watch*, in *OutWeek*, was the most visible vehicle for outing. GROSS, *supra* note 1, at x. To give a flavor of what Signorile was doing, several footnotes will quote at length from some of his columns:

Why am I doing this?

Well, I'll not deny that in the process I get some sort of kick out of it. Yeah, it's satisfying; even fun. But there is another, bigger reason. See, FOR ABOUT TEN YEARS WE HAVE TRIED TO MOTIVATE YOU [expletive] IDIOTS. We have tried to EDUCATE you. We have tried to make you see that we are all—including yourselves—being wiped out. We have tried to make you realize that we're being murdered by a negligent government.

Signorile, *Gossip Watch*, *OUTWEEK*, Dec. 17, 1989, reprinted in GROSS, *supra* note 1, 197, 199.

¹⁹⁵ See Crimp, *supra* note 7, at 311.

¹⁹⁶ Responding to the criticism of other journalists, Signorile said:

Of course, none of these seasoned journalists mentioned their own day-to-day descriptions of the sex lives of *heterosexuals*—from Gary Hart and Donald Trump to Liz Taylor and Warren Beatty to Jim and Tammy Faye Bakker to, later on, Bill Clinton and George Bush. Somehow, to publicize heterosexual liaisons was right—it was considered "reportage"—while to cover homosexuality was to invade people's privacy.

SIGNORILE, *supra* note 1, at 75.

¹⁹⁷ Bronski, *supra* note 188, at 266. Even within the context of gossip, according to Michael Bronski: "[T]here is a standard blackout on any gay information. Speculation on Liz Taylor's love life is open season in any newspaper, but speculation as to whom k. d. lang, John Travolta or Tracy Chapman may be dating is verboten." *Id.* To emphasize his point, Bronski gives the following example:

[A]n episode of Joan Rivers' morning talk show . . . focussed on gossip columnists: all of the dirt was being dragged out—the Trumps, the Helmsleys, Bess Myerson and most everyone in Hollywood. Suddenly Joan got very serious and said, "But sometimes people go too far. That New York paper [*OutWeek*] is saying those terrible things about a certain man who has just died, I won't even say his name [Malcolm Forbes], and it just makes me sick." This from a woman who built her stand-up comedy and talk show career recycling gossip and quizzing people on their personal lives.

Id.

¹⁹⁸ SIGNORILE, *supra* note 1, at 75. "I smelled homophobia. It seemed to me that the American media didn't report about the lives of famous queers because they saw homosexuality as the most

According to those in favor of outing, not only does the media not report homosexuality, but also, it actively participates in an elaborate cover-up in order to make gay celebrities appear heterosexual.¹⁹⁹ Thus, the outing movement might be considered a journalistic movement aimed at treating homosexuality as equal to heterosexuality.²⁰⁰ Given that heterosexuality is not hidden by the press, or treated as private and unbroachable, outers ask why homosexuality should be so treated.²⁰¹

Signorile's outing campaign aimed particularly at powerful gay figures who either used their power to hurt gay people or declined to use their power to help gay people.²⁰² Signorile outed Pete Williams, the Pentagon spokesman seen on television every day during the Gulf War, who, in Washington circles, was known to be gay.²⁰³ Signorile considered Williams—a powerful figure in the United States Army, an

disgusting thing imaginable—worse than extramarital affairs, abortions, boozing, divorces, or out-of-wedlock babies, all of which are fodder for the press." *Id.*

¹⁹⁹ See Gross, *supra* note 1, at 45–56. Gross argues that gossip and celebrity columnists engage in what he calls "inning," which is to actively lie in order to make homosexuals appear to be heterosexual. *Id.* at 46–47. Examples include speculation about the romances of gay men, such as Malcolm Forbes and Merv Griffin, or the use of phrases such as "confirmed," "eligible" and "lifelong" bachelor. *Id.* at 50–53. Nor is this process restricted to famous people, as Gross demonstrates by quoting Lindsay Van Gelder's observation about photos from the 1989 Bay Area earthquake, showing a:

survivor pounding the earth . . . so riveting . . . that they were sent around the world . . . but nowhere was there a mention that the body under the building was anyone more intimate than a "friend." Later I learned that the woman, a long-time lesbian activist, had been widely interviewed and completely open about the nature of their relationship; indeed, she had insisted that it should be acknowledged. Most reporters refused.

Id. at 55.

²⁰⁰ Gabriel Rotello, *Why I Oppose Outing*, OUTWEEK, May 29, 1991, reprinted in Gross, *supra* note 1, at 277, 278. Gabriel Rotello argued that "outing" was a misnomer that falsely characterized the practice. See *id.* at 277. "Outing," according to Rotello, conveys the idea of a person "being forced from a safe place into a dangerous one." *Id.* The closet, he argues, is not actually a safe place. *Id.* Rather, the closet is "out" of the community. *Id.* Those who are publicly gay have "come in," "meaning into the safety of a healthy self-image and a burgeoning community." *Id.* Thus, to Rotello, the correct term is not "outing," but rather, "equalizing." *Id.* at 278.

²⁰¹ Rotello, *supra* note 200, at 278. Signorile wrote:

Homosexuality seems to be the only area in which journalism in New York is mandated to pursue lies and cover-ups rather than the truth. If you write about a closeted gay man's woman friend as his "lover," that is applauded. If you print the truth you are deemed "frightening and offensive."

Gross, *supra* note 1, at 60 (quoting Michelangelo Signorile, *Gaystyles of the Rich and Famous*, VILLAGE VOICE, Apr. 3, 1990, at 23–24).

²⁰² Signorile, *Gossip Watch*, OUTWEEK, July 18, 1990, reprinted in Gross, *supra* note 1, at 289.

²⁰³ See SIGNORILE, *supra* note 1, at 104–10.

institution whose anti-gay policies are pervasive—a very appropriate figure to be outed.²⁰⁴

Signorile also outed powerful, gay, Hollywood figures who acted against the gay community, such as Barry Diller, head of 20th Century Fox, who promoted anti-gay comedian Andrew Dice Clay.²⁰⁵ Signorile outed David Geffen after a *Forbes* profile portrayed him as “a jet-setting, rich, hetero bachelor who’d dated a movie actress.”²⁰⁶ Finally, Signorile condemned Jodie Foster for her role in *The Silence of the Lambs*, which many found homophobic.²⁰⁷ Those who favor outing believe that gay

²⁰⁴ See *id.* at 98. Actually publishing the Williams piece ended up being very difficult, because Signorile’s magazine, *OutWeek*, folded the week before the story was to run. *Id.* at 123. In Chapter 7 of his book, *Inning the Outing*, Signorile describes *Village Voice*’s initial acceptance and subsequent refusal of the piece, before it was finally published in the *Advocate*. *Id.* at 124–29. Signorile also describes the dilemma then faced by the mainstream press, which had to decide how to treat the story and whether or not to name Williams in their own stories. *Id.* at 129.

²⁰⁵ Signorile, *Gossip Watch*, *OUTWEEK*, July 18, 1990, reprinted in GROSS, *supra* note 1, at 289, 290–91.

But what we should really concern ourselves with is what the [expletive] Diller can do for us *now*. No, we won’t be content with his dropping a film with some homophobic [Dice Clay] screaming offensive remarks. We expect that. THE [expletive] SHOULDN’T HAVE BEEN SIGNED TO BEGIN WITH (as lots of other offensive acts are not signed because 20th Century Fox has certain standards and ethics). . . . We’re merely asking for treatment equal to that of other groups which Fox is mindful of and tries not to offend. . . . What we want is for Fox to develop, back, distribute and release films about us—about the lesbian and gay community and about this horrific crisis we’ve suffered through for ten years. . . . What we want is for Diller to stand up for this community. WHY DOESN’T HE GET TOGETHER HIS FRIENDS DAVID GEFFEN AND LIZ SMITH AND MERV GRIFFIN AND HOLD A PRESS CONFERENCE IN WHICH THEY COULD ALL DECLARE THEMSELVES, HOLD THE GOVERNMENT ACCOUNTABLE FOR ITS ACTIONS AND TELL THE AMERICAN PEOPLE WHAT IS RIGHT AND WHAT IS WRONG? Why don’t they simply say they won’t stand for homophobia and won’t back homophobes? None of these people is going to lose anything. Two are among the richest people in America. The other two rule the entertainment industry. No one is going to stop them. IT’S AMAZING WHAT THEY COULD DO!

Id.

²⁰⁶ Signorile, *Gossip Watch*, *OUTWEEK*, Dec. 26, 1990, reprinted in GROSS, *supra* note 1, 291, 292–93.

[I]t is up to Geffen himself A simple “I’m gay” will do. HERE IS THIS ALL-POWERFUL QUEER GETTING HIMSELF ON THE COVERS OF MAGAZINES—AND HE CAN’T EVEN STAND UP, BE PROUD AND GIVE VISIBILITY TO THIS COMMUNITY. Meanwhile, as he revels in his \$850 million, the rest of this community is in a shambles, with a disease ravaging us and while thousands are being beaten on the streets BECAUSE OF THE VERY HATRED THAT ONE OF HIS OWN [expletive] BANDS, GUNS N’ ROSES, ENCOURAGES.

Id.

²⁰⁷ Signorile, *Gossip Watch*, *OUTWEEK*, Feb. 20, 1991, reprinted in GROSS, *supra* note 1, at 294, 297.

HOLLYWOOD DISGUSTS ME! ALL OF YOU LYING FREAKS MAKE ME WANT TO VOMIT. Jodie Foster, TIME’S UP! If lesbianism is too sacred, too private, too

people who have power, and who use that power to hurt other gay people, lose their right to invoke the code of silence.²⁰⁸ Public figures who pretend to be straight reinforce the idea that America is straight, and thereby harm the gay community.²⁰⁹

Opponents argue that outing constitutes an invasion of privacy.²¹⁰ Anti-outers do not deny the importance of visibility and of being out of the closet.²¹¹ They argue that coming out—which is emotionally and psychologically difficult—should be done strictly on a voluntary basis.²¹² They argue that coming out is a personal decision, and that intentional outing can be dangerous to those who have chosen to remain silent for self-preservation.²¹³ Anti-outers charge outers with gay bashing and “cannibaliz[ing their] own.”²¹⁴ According to the anti-out-

infringing of your damned rights for you to discuss publicly, then the least you can [expletive] do is refrain from making movies that insult this community! Is that too much to ask of you? Jesus, you want to have your queer little cake and eat it too, right? NO WAY, SISTER!

Id.

²⁰⁸ See GROSS, *supra* note 1, at 182.

²⁰⁹ Larry Bush, *Naming Gay Names*, VILLAGE VOICE, Apr. 27, 1982, reprinted in GROSS, *supra* note 1, at 177, 181. As Vito Russo, gay activist and author of *The Celluloid Closet*, explained: “Every star who is in the public eye does the community a disservice by pretending to be straight By their silence, they are reinforcing the idea that America is straight.” *Id.*

²¹⁰ See Hunter Madsen, *Tattle Tale Traps*, OUTWEEK, May 16, 1990, reprinted in GROSS, *supra* note 1, at 236, 238; see also Ayofemi Folayan, *Whose Life Is It Anyway*, OUTWEEK, May 16, 1990, reprinted in GROSS, *supra* note 1, at 248, 249.

²¹¹ See, e.g., C. Carr, *Why Outing Must Stop*, VILLAGE VOICE, Mar. 19, 1991, reprinted in GROSS, *supra* note 1, at 274, 274.

²¹² Madsen, *supra* note 210, at 237. Hunter Madsen, author of *After the Ball*, wrote in an *OutWeek* symposium on outing:

Being out is good, but coming out is better. We must cherish the process of coming out. No gay person should deny another the incomparable, irreplaceable, once-in-a-lifetime opportunity to come out of the closet under his or her own steam, as the fruit of deep personal reflection, courage and conviction.

Id.

²¹³ Dirk Johnson, *Privacy vs. the Pursuit of Gay Rights*, N.Y. TIMES, Mar. 27, 1990, reprinted in GROSS, *supra* note 1, at 222, 225.

²¹⁴ Bush, *supra* note 209, at 234; Carr, *supra* note 211, at 274. Randy Shilts, the well-known author and journalist, said the following:

No matter how high-sounding the rhetoric, outing makes some of the most august gay journalists and leaders look like a lot of bitchy queens on the set of *Boys in the Band*, bent not on helping each other but on clawing each other. It's not a pretty sight.

As for the nastiness of outing, whether outing is done to Army privates by Pentagon policy or to prominent officials by the gay press, it's still a dirty business that hurts people.

SIGNORILE, *supra* note 1, at 152. Signorile's response was that Shilts failed to realize that outing is simply a part of journalism, because journalism's business is to tell the truth, not to protect people or their feelings. *Id.*

ers, a bedrock principle of gay rights has always been privacy; outing is a violation of the right to privacy.²¹⁵ The uncertain and speculative benefit of outing is simply not great enough to justify the outing.²¹⁶

The outers' response to the criticism is that the "right" to privacy, in this context, is not a right at all.²¹⁷ Rather, being in the closet is "having to hide the way you live because of fear of punishment."²¹⁸ The closet is maintained through the force of the heterosexual majority, not through the choice of gay people.²¹⁹ Being gay, outers argue, is the equivalent of being black or Jewish; how can that fact be private?²²⁰ As Michelangelo Signorile wrote, "How can being gay be private when being *straight* isn't? Sex is private. But by outing we do not discuss anyone's sex life. We only say they're gay."²²¹ Outers are willing to leave sexual acts private; what they are not willing to leave private is sexual orientation.²²²

B. *The Case Law*

In the case that came closest to addressing outing, in 1975, in *Sipple v. Chronicle Publishing Co.*, the California Court of Appeal held

²¹⁵ See Madsen, *supra* note 210, at 238.

²¹⁶ Carr, *supra* note 211, at 276. As one lesbian columnist wrote, "I'm still waiting for the news of Malcolm Forbes's homosexuality to improve my life." *Id.*

²¹⁷ GROSS, *supra* note 1, at 148 (quoting Scott Tucker).

[T]he right to privacy is easily translated into the duty of sexual secrecy. . . . A standard statement made by both gay rights advocates and anti-gay bigots is that *sexuality is a private matter*. Each side means something different: *Let us live our lives in peace*, and *Get back into the closet*.

Id.

²¹⁸ *Id.* at 67.

²¹⁹ *Id.*; Crimp, *supra* note 7, at 305 (closet is function of compulsory and mandatory heterosexuality).

²²⁰ See SIGNORILE, *supra* note 1, at 79-80. In his book, Signorile quotes at length a pro-outing piece by Marshal Alan Phillips, which appeared opposite the Randy Shilts piece quoted above.

If a public figure is Jewish or Jehovah's Witness or Hindu, divorced or married or single, Asian or Icelandic or Kenyan, those personal and private facts, if verified, may be duly reported. No need for an on-the-record admission. Only in the case of gays does this silly rule of invisibility apply.

It is based on the hackneyed straight assumption that, somehow, being a gay person is innately bad. Never mind that such a person may be well-bred, well-educated and doing a terrific job, have a stable romantic relationship, even attend church every Sunday. If he or she is gay, the media pulls a pious veil of privacy around that fact. Why? Because doing otherwise would confirm the terrifying (to straight folks) truth that gays are normal, happy, well-adjusted, hard-working, capable and everywhere. If you're not gay, you know someone who is.

SIGNORILE, *supra* note 1, at 157.

²²¹ *Id.* at 80. Therefore, one might say that outing "outs" the media's homophobia, not the sexual orientation of gay people. See Crimp, *supra* note 7, at 307.

²²² GROSS, *supra* note 1, at 168-69.

that publication of a man's well-known homosexuality was not cause for liability.²²³ Sipple was identified in newspapers as a gay man after he helped to thwart an attempted assassination of President Gerald Ford.²²⁴ The court reasoned that private facts had not been exposed, because the man's homosexuality was well known.²²⁵ Therefore, the court concluded that liability could not be imposed.²²⁶

In 1975, Oliver W. Sipple, an ex-marine, became a focus of media attention when he obstructed an attempt to assassinate President Gerald R. Ford.²²⁷ Two days after the event, a column in the *San Francisco Chronicle* identified Sipple as a prominent member of the city's gay community.²²⁸ Newspapers around the country picked up the report, some speculating that President Ford had treated Sipple shabbily because of Sipple's sexual orientation.²²⁹ Sipple sued the *Chronicle* for invasion of privacy.²³⁰ He claimed that the paper had published private facts, without authorization.²³¹ Sipple claimed the publication was highly offensive because his family had learned about his homosexuality through the papers.²³² As a consequence of publication, according to Sipple, he had been abandoned by his family, as well as exposed to contempt and ridicule which caused mental anguish, embarrassment and humiliation.²³³ The San Francisco County Superior Court granted summary judgment for the newspaper.²³⁴

The California Court of Appeal listed the elements of a tortious public disclosure, but noted that the First Amendment exempted the press from liability if the disclosure is truthful and newsworthy.²³⁵ The court determined that Sipple's sexual orientation and participation in the gay community was well-known, therefore private facts had not been disclosed.²³⁶ His sexual orientation was "in the public domain" and "open to the eye of the public."²³⁷ In addition, the court reasoned that Sipple's sexual orientation was newsworthy.²³⁸ The publications

²²³ 201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984).

²²⁴ *Id.* at 666.

²²⁵ *Id.* at 669.

²²⁶ *Id.* at 671.

²²⁷ *Id.* at 666.

²²⁸ *Sipple*, 201 Cal. Rptr. at 666.

²²⁹ *Id.*

²³⁰ *Id.* at 667.

²³¹ *Id.*

²³² *Id.*

²³³ *Sipple*, 201 Cal. Rptr. at 667.

²³⁴ *Id.*

²³⁵ *Id.* at 667-68.

²³⁶ *Id.* at 669.

²³⁷ *Id.*

²³⁸ *Sipple*, 201 Cal. Rptr. at 669.

were not motivated by sensationalism, but rather, were motivated by legitimate political considerations, because Sipple might combat the false stereotypes of gays.²³⁹ The court concluded that Sipple's story was genuine news, and was therefore protected from liability.²⁴⁰

IV. IS THE CONFLICT REALLY A CONFLICT?

Whether the First Amendment prevents all suits for the publication of truthful information about private issues is technically still open to debate, because the United States Supreme Court has consistently and explicitly said it is leaving the issue open.²⁴¹ The cases show that the Court has rarely ruled against the press, and that the First Amendment's guarantee of free speech has usually meant that the press is free from legal interference with what it chooses to print.²⁴² The Supreme Court has given lip-service to the privacy interests of those injured by printed material, but, for the sake of robust, open debate, has generally read the First Amendment to protect the liberty of the press.²⁴³ Thus, should an outing case ever actually reach the courts, it is hard to imagine that liability will be found.²⁴⁴

Under current law, a court would apply standards such as true/false, newsworthy and public/private to the outer's speech, in order to determine whether or not that speech is protected by the First Amendment. Commentators have already attempted to apply these standards, and have identified a number of potential problems.²⁴⁵ The true/false dichotomy does not create a clear, static line in relation to sexual orientation.²⁴⁶ Newsworthiness is an exceedingly difficult, if not impos-

²³⁹ *Id.* at 670.

²⁴⁰ *Id.*

²⁴¹ See Edelman, *supra* note 11, at 1195. Most recently, Justice Marshall wrote: "Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *The Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989).

²⁴² Edelman, *supra* note 11, at 1198.

²⁴³ *Id.*; *Florida Star*, 491 U.S. at 530 (Court's decisions have "without exception" upheld the press's right to publish).

²⁴⁴ See Wick, *supra* note 10, at 419.

²⁴⁵ See Elwood, *supra* note 10; Grant, *supra* note 3; Pollack, *supra* note 10; Wick, *supra* note 10.

²⁴⁶ The true/false dichotomy stems from *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). Sexual orientation is ungovernable by this dichotomy because sexual orientation is not so simply identified as either "true" or "false." Grant, *supra* note 3, at 121. When can someone be considered gay? *Id.* at 122. How many sexual acts constitute homosexuality? *Id.* Or, rather, is homosexuality defined by a lifestyle? *Id.* Courts might be forced to differentiate between statements such as "X is a homosexual," and "X was seen performing a homosexual act." *Id.* at 124.

sible, term to define.²⁴⁷ Finally, the line between public and private is not only difficult to draw, but also, tends to be drawn to the detriment of gay people.²⁴⁸

After applying these tests, a court would likely determine that the outing was protected speech; the outed person's homosexuality would be considered true, newsworthy, of public interest, or, perhaps, public knowledge. The case would be seen as pitting the weighty speech of the press against the less-weighty privacy interest of the individual. The courts, unduly swayed by the marketplace of ideas justification for the

As long as sexuality and sexual identity are not defined by static, clear lines, the Court's true/false dichotomy will encounter difficulty when used to analyze questions of sexual orientation. See Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131-39 (1979); Rhonda Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 800-02 (1979).

²⁴⁷ See Elwood, *supra* note 10, at 754-56; Pollack, *supra* note 10, at 734-49. The newsworthiness defense limits liability to statements which are of no legitimate concern to the public—that is, they are not newsworthy. See RESTATEMENT (SECOND) OF TORTS § 652D (1977). The Ninth Circuit adopted the following *Restatement* definition of newsworthy:

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The 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, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976).

Some feel that only the media, because that is its job, is qualified to decide what is newsworthy. Elwood, *supra* note 10, at 755. This view, though, would seem to destroy the public disclosure tort altogether. *Id.*

More subtle definitions also encounter problems. Clearly, a gay politician who continually votes against gay rights is a newsworthy story. Pollack, *supra* note 10, at 738. How would the newsworthy standard apply to a private figure involved in a public event? *Id.* at 741. Although commentators have argued different theoretical lines, in practice the courts have steadily expanded the "newsworthy" category. Elwood, *supra* note 10, at 755-56. The sexual orientation of anyone well known enough to actually be outed would probably be considered newsworthy under any standards that the courts have adopted.

²⁴⁸ The public/private dichotomy is problematic because it is not clear which facts, conducts or issues the right to privacy protects. Pollack, *supra* note 10, at 725. When is sexual orientation a private fact? See *id.* at 727-28. Gays are wrongly forced into the closet because society discriminates. However, when gays move towards equality by becoming open with their lifestyle, they forfeit their "private" status, and become "public" figures. See Wick, *supra* note 10, at 428.

It is problematic to argue that any fact that the press has discovered is still a private fact. See Wick, *supra* note 10, at 422. It is also problematic to argue that sexual orientation—the way in which we relate to others—can ever be a private fact. See Pollack, *supra* note 10, at 730.

As applied to gay people, it is clear that the Supreme Court's interpretation of privacy is not a beneficial interpretation. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). For a general discussion of *Bowers* and its impact on privacy rights, see Rhonda Copelon, *A Crime Not Fit to be Named: Sex Lies and the Constitution*, in *THE POLITICS OF LAW* 177 (David Kairys ed., rev. ed. 1982) (privacy is not tolerable when it protects proud alternative to social norms).

First Amendment, would protect the press in the name of robust, open debate. While the damage done to outed individuals might be recognized, it would be considered a necessary evil in a society which places so much value on the speech of the press. An outed person's remedy, under the marketplace theory, would be in speaking for herself.

This approach fails to take into account the perspective of the outed individual. In examining outing, the law ought to attempt to view the question from the perspective of a gay person who is either in the closet, or outed,²⁴⁹ because those are the individuals upon whom the law has the most effect.²⁵⁰ The outing dilemma has been characterized as presenting a tragic dilemma: either way, someone is hurt.²⁵¹ It is the hurt, the real world effect, on which the law ought to focus, and the effect on individuals, in particular.²⁵² Therefore, this argument will attempt to consider the issue of outing from the perspective of a gay individual.²⁵³

²⁴⁹ An assumption of this Note is that discrimination on the basis of sexual orientation is pervasive in American society and the American legal system. *E.g.*, Editors of the Harvard Law Review, *SEXUAL ORIENTATION AND THE LAW* 43, 73, 170 (1990). Discrimination and prejudice against gays were recognized by Judge Patrick F. Kelly, in *Jantz v. Muci*, 759 F. Supp. 1543, 1548-51 (D. Kan. 1991).

²⁵⁰ See Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting*, in *THE FATE OF LAW* 209, 209-11 (Austin Sarat & Thomas R. Kearns eds., 1991). Sarat and Kearns argue that law's violence is inflicted "wherever legal will is imposed on the world, wherever a legal edict, a judicial decision, or a legislative act cuts, wrenches, or excises life from its social context." *Id.* at 210. Or, as Robert Cover wrote, the law always plays "a field of pain and death." Robert Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1601 (1986).

²⁵¹ Stuart Byron, *Naming Names*, *ADVOCATE*, Apr. 24, 1990, reprinted in *GROSS*, *supra* note 1, at 233, 235. Writing for the *Advocate*, Stuart Byron offered this assessment of outing:

I used to think that "dragging people out of the closet" was unacceptable under all circumstances. Now that Maupin and *OutWeek* have made me rethink the question, I've moved somewhat to the left. I see the issue as presenting a tragic dilemma to the gay community and the gay press, and it is one for which every answer is equally troubling. No matter what position one takes, someone's going to get hurt.

Id. at 235. Byron's conclusion applies equally to the legal dilemma: whichever way the First Amendment applies, gay people are injured.

²⁵² Sarat and Kearns argue that, because law plays on a field of violence, a jurisprudence of violence is needed. Sarat & Kearns, *supra* note 250, at 221. In other words, law must acknowledge the distance between law's appeal to reason, and its reliance on force. *Id.* Only after it has recognized the violence inherent in law, can any system of jurisprudence be valid. See *id.* The violence inherent in a judge's decisions in not only criminal law, but also, civil law, is discussed by Judge Patricia M. Wald of the United States Court of Appeals for the District of Columbia Circuit in *Violence Under the Law: A Judge's Perspective*, in *LAW'S VIOLENCE* 77 (Austin Sarat & Thomas R. Kearns eds., 1992).

As Tom Gerety wrote of the publication of private facts, "When effective . . . such disclosures wrench what was private out of its context with an abruptness and force indeed massive." Gerety, *supra* note 124, at 292 (emphasis added).

²⁵³ As the author, I have been aware throughout the process of writing this Note of the

Some speech has power not only for what it *says*, but more importantly, for what it *does*.²⁵⁴ At some point, expressing certain words becomes a harmful act.²⁵⁵ Outing is a harmful act because of the unique nature of coming out. Announcing another individual's sexual orientation does great harm to that individual's ability to achieve self-fulfillment and to participate in government.

Outing someone takes away that person's ability to come out on her own. Coming out is not only an important personal event, but also, arguably, the most important political act which a gay person can make.²⁵⁶ By outing a gay person, the press speaks for that individual and steals the ability to ever make an important political declaration.²⁵⁷ As such, outing harms an outed person's ability to participate in government.

In addition, an outed person's voice loses authority.²⁵⁸ When a voice belongs to a group which historically has been hated, ideas spoken in that voice are less persuasive.²⁵⁹ Being identified as gay can thus reduce a person's ability to be an effective advocate for any political position.²⁶⁰ Again, outing defeats the ability to participate in government.

Coming out is also instrumental in creating a gay person's identity.²⁶¹ A person who is declared to be gay by someone else is deprived of the ability to define his own identity.²⁶² At least one federal judge

difficulty in undertaking this project as a straight man. Nowhere is this problem more evident than with this sentence. One might easily argue that I have no business attempting to figure out anything that depends upon a perspective that I have not experienced. However, as the law must attempt to view outing from the perspective of a gay individual, so must I attempt it.

²⁵⁴ MacKINNON, *supra* note 52, at 29. MacKinnon is not the only commentator to make this observation. For instance, Professor Edward J. Bloustein wrote, "What matters for a legal system is what words *do*, not what they *say* . . ." Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283, 299 (1988).

²⁵⁵ MacKINNON, *supra* note 52, at 30. MacKinnon argues that all actions express some idea or say something, including murder and rape. *Id.* This does not, however, make murder or rape into protected expression, although speech theory never says why not. *Id.*

²⁵⁶ MOHR, *supra* note 183, at 327-28, 331.

²⁵⁷ After all, you cannot come out twice. Thus, to be outed is to lose your ability to join in the public discussion. Being outed takes away the most important statement that the First Amendment could protect.

²⁵⁸ "Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.).

²⁵⁹ See Lawrence, *supra* note 37, at 78.

²⁶⁰ *Id.* at 79.

²⁶¹ MOHR, *supra* note 183, at 327. See Gerety, *supra* note 124, at 282.

²⁶² On the importance of identity within the context of the law, see Janet E. Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET 91-99 (Michael Warner ed., 1993)

has recognized homosexuality as a central trait of personhood, intrinsic in an individual's sense of self.²⁶³ The spoken act of outing defines an individual's identity, thereby constructing social reality for that individual.²⁶⁴ Outing defeats a person's ability to define central aspects of her own identity, and thereby defeats the ability to achieve self-fulfillment.

Stripping away the ability to voluntarily come out harms the outed person's ability to achieve self-fulfillment and to participate in government. Therefore, the right to come out is something that ought to be protected by both the right to privacy and the First Amendment.²⁶⁵ Outing is different from ordinary media speech because of its impact on these protected interests, and the law ought to recognize it as such.²⁶⁶ In the context of outing, the goals of the right to privacy exist consistently with the goals of the First Amendment.²⁶⁷ Both demand that an outed individual be protected.

When the gay press outs a gay individual, the group acts in what it perceives as the best interests of the entire group.²⁶⁸ Although this allows for a compelling argument on behalf of outing, it must be resisted. Outers, analogizing gays to Jews in Nazi Germany, argue that

(next generation of constitutional arguments must explain why official imposition of fixed identities and official administration of incoherent identities undermine civic values).

²⁶³ *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (sexual orientation may be altered only at expense of significant damage to sense of self).

²⁶⁴ See MACKINNON, *supra* note 52, at 30-31.

²⁶⁵ This is different from arguing that the right to remain in the closet ought to be protected, although the arguments may be two sides of a coin. See Elwood, *supra* note 10, at 765-66. Elwood argues that if gay people are not able to keep their identities hidden, free thought and free discussion will be stultified. *Id.* Elwood compares the right to remain in the closet to the right of the NAACP to keep its members' names a secret. *Id.*; see *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (exposure of members' names may adversely affect group's ability to be effective).

²⁶⁶ It is axiomatic of this argument that gay people in contemporary American society be understood as a group that is subject to discrimination because of its status. See, e.g., MOHR, *supra* note 183, at 27-31. With this understanding, the law may legitimately treat gay people (and therefore outing) differently from heterosexuals, because gay people are differently situated. See Martha Minow, *Partial Justice: Law and Minorities*, in *THE FATE OF LAW* 67-77 (Sarat & Kearns eds., 1991) (law should recognize multiple, irreconcilable perspectives inherent in heterogeneous, pluralistic society).

²⁶⁷ In fact, Rodney Smolla argues that privacy aids free speech, because a "life devoid of any intimacy or quiet contemplation is a life less likely to produce creative or insightful expression." SMOLLA, *supra* note 26, at 120.

²⁶⁸ See Lauren Berlant & Elizabeth Freeman, *Queer Nationality*, in *FEAR OF A QUEER PLANET* 193, 199 (Michael Warner ed., 1993). Berlant and Freeman argue that Queer Nation's policy of making homosexuality visible attempts to shift from "silent absence into present speech, from nothingness into collectivity." *Id.* Although this is a worthy goal, outing creates more than present speech. Because the outed individual has not chosen to speak, the outing also creates a present, spoken for, silence.

they are exposing those who believe "they'll never get marched to the gas chambers because 'nobody knows.'"²⁶⁹ Anti-outers correct the analogy, saying that the outers are "Jews lining up other Jews to go to a concentration camp."²⁷⁰ Outing is a situation in which the speech of the individual is at least as weighty as the speech of the press. Recognizing this equality of interests would require the Supreme Court to refocus the supposed conflict between the First Amendment and privacy on the mutual justifications of self-fulfillment and self-government.

The law's current approach fails to weigh heavily enough the significance of the rights lost by the individual who is outed. The First Amendment, according to Justice Brennan, has as its bedrock principle that speech may not be prohibited because "the idea itself [is] offensive or disagreeable."²⁷¹ Prohibiting outing is not prohibiting an offensive or disagreeable idea.²⁷² Rather, it is prohibiting a harmful act. It is protecting information which is reserved for times when individuals believe themselves to be in private.²⁷³ Outing shows the importance of according the mutual justifications for privacy and the First Amendment the weight of a fundamental right, which can stand against the weight of the marketplace-justified First Amendment.²⁷⁴

So far, the Supreme Court has not ruled on the constitutionality of the private-facts tort. But the hallmark of the common law has always been its adaptability. Where publication of private facts has preempted a unique and important aspect of an individual's political speech, the individual ought to be able to recover. She ought to be able to recover because her rights to both privacy and speech have been injured. Until society changes, gay people—as both individuals and as a community—will be oppressed. An expansion of the invasion of privacy tort would recognize this situation, and recognize the right of both the individual and the community to speak.²⁷⁵

²⁶⁹ Brownworth, *supra* note 189, at 251.

²⁷⁰ GROSS, *supra* note 1, at 127.

²⁷¹ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

²⁷² "Both intrusion and publication of private facts implicate 'invasions' of interests distinct from mere outrage at a speaker's message; they are forms, so to speak, of 'psychic trespass.'" SMOLLA, *supra* note 26, at 380 n.2; *see also*, MACKINNON, *supra* note 52, at 105.

²⁷³ *See* TUCKER, *supra* note 128, at 118.

²⁷⁴ For instance, Tom Gerety argues that by using his strong, yet limited definition of privacy, we gain a concept that requires "some strong argument of policy or urgency to justify us in overriding it." Gerety, *supra* note 124, at 281.

²⁷⁵ Scott Tucker characterizes this as a Rawlsian approach, wherein every citizen's right to equal concern and respect in the design of political institutions is fundamental to all other rights. TUCKER, *supra* note 128, at 59.

In current privacy versus First Amendment jurisprudence, the marketplace theory is dominant, and the press' right to speak is protected. In a self-fulfillment and self-government based First Amendment jurisprudence, privacy and the First Amendment would not necessarily be pitted against each other. Under the current law, an outed individual's right to achieve self-fulfillment and to participate in government would not be protected, because the press and the marketplace are overly protected. Outing, therefore, shows the need to further develop the common law right to privacy tort in conjunction with the First Amendment.

V. CONCLUSION

Outing is a harmful act, which prevents gay people from making an extremely important political statement. First Amendment jurisprudence, unduly influenced by the marketplace of ideas theory, would call outing merely "offensive," and therefore require that outing be tolerated. According to the marketplace of ideas theory, the best answer to outing is more speech.

The answer of more speech, though, fails to recognize the harm caused by outing. Outing prevents a person from achieving self-fulfillment and from participating in government. Both of these interests are supposed to be protected by both the First Amendment and the right to privacy. Under current law, in an outing case, the First Amendment would protect the press' speech. By focusing on self-fulfillment and self-government, the First Amendment and the right to privacy could be brought together, in a unified theory. Under a unified theory, the speech and privacy of gay people would be protected by an expanded private-facts tort, which would work in conjunction with the First Amendment.

MATHIEU J. SHAPIRO