OUTING: JUSTIFIABLE OR UNWARRANTED INVASION OF PRIVACY? THE PRIVATE FACTS TORT AS A REMEDY FOR DISCLOSURES OF SEXUAL ORIENTATION*

I. INTRODUCTION

A flick of the television channel selector on any given weekday will reveal talk show hosts and their guests candidly discussing topics that only a decade ago would have been unmentionable.[1] At the supermarket counter, tabloids scream out intimate details of the lives of the rich and famous. Even the mainstream press seems to have abandoned restraint and entered the realm of the sleazy tabloid.[2]

This type of sensational reporting has led one political commentator to lament:

> [S]candal coverage is no longer restricted to misuse of public office, incompetence in the exercise of public responsibilities,

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[1] The public appetite for this kind of fare shows no signs of abating. The January 9-15, 1993 issue of *TV Guide* listed the following daytime talk shows: Phil Donahue, Oprah Winfrey, Sally Jessy Raphael, Montel Williams, Maury Povich, Geraldo, Jenny Jones, Jane Whitney, Faith Daniels, Jerry Springer and Joan Rivers. A sampling of topics for the week included sex after age 90, sexual child abuse, eating disorders, adultery with a member of one's bridal party, remaining married to an abusive husband, serial rape, drugs among the elderly, sexual assualt by a trusted male and overprotective parents. In addition, there is a myriad of nightly shows that specialize in gossip; e.g., *Hard Copy*, *Entertainment Tonight*, *Inside Edition* and *A Current Affair*.

[2] In October of 1991, the networks featured live broadcasts of Anita Hill's graphic allegations of sexual harassment by Supreme Court nominee Clarence Thomas and the mainstream press followed suit in print. December of that same year found CNN broadcasting the William Kennedy Smith rape trial. Richard Zoglin, *How a Handful of News Executives Make Decisions Felt Round the World*, TIME, Jan. 6 1992, at 30. While acquaintance rape is a serious issue, media coverage of the Palm Beach rape trial focused more on William Kennedy Smith's celebrity status as a member of the fallen Kennedy clan than on the root causes and dimensions of acquaintance rape. Networks or newspapers that attempted more restrained coverage risked viewer "defections" to competitors who tended toward lurid sensationalism. Ed Siegel, *Smith Trial Frenzy: More Is Crumbling Than Camelot*, BOSTON GLOBE, Dec. 3, 1991, at 61.

Likewise, 1992 was scarcely underway before the press was scrambling to cover Gennifer Flowers's intimate revelations about an alleged twelve-year affair she had with then presidential hopeful Bill Clinton. Lance Morrow, reporter for *Time* magazine, made this observation about the supposed affair: "Did Bill Clinton have an affair with Gennifer Flowers? The question must get in line behind real news: drugs and drug murders, AIDS deaths, illiteracy, a population getting dumber, 74,000 jobs lost at General Motors, Pan Am and Eastern folding, and the highest homicide rate in the Western world." Lance Morrow, *Who Cares, Anyway?*, TIME, Feb. 3, 1992, at 15.

> or some other inadequacy or malfeasance in a *public* role; it extends to purely *private* misbehavior, even offenses, some of them trivial, committed long before an individual's emergence into public life . . . . At the same time more vital and revealing information is ignored or crowded off the agenda. *Real* scandals, such as the savings-and-loan heist or the influence peddling at the Department of Housing and Urban Development in the 1980s, go undetected for years. The sad conclusion is inescapable: the press has become obsessed with gossip . . . .[3]

The media's obsession and willingness to print gossip has led a militant faction of the gay and lesbian community to adopt a controversial tactic known as "outing" or "tossing." Outing is a practice by which gays and lesbians publicly expose those whom they believe are secretly homosexual. Proponents of the tactic argue that only when the public realizes how many prominent men and women are gay and lesbian—and who they are—will funding to combat the Acquired Immune Deficiency Syndrome (AIDS) epidemic be seen as a priority rather than the "indulgence of an aberrant fringe."[4] They also contend that some of the most vocal opponents to legislation that would benefit homosexuals are themselves regular participants in the gay and lesbian social scene.[5]

Outing was first seriously considered as a strategy for attracting attention to the AIDS crisis at the 1988 gay and lesbian "war conference" in Washington, D.C.[6] Shortly thereafter, gay and lesbian extremists, frustrated by what they perceived as governmental indifference to the AIDS crisis and the slow pace of homosexual civil rights legislation, began targeting politicians whom they felt were guilty of hypocrisy in promoting or endorsing anti-homosexual measures.[7]

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[3] LARRY J. SABATO, FEEDING FRENZY: HOW ATTACK JOURNALISM HAS TRANSFORMED AMERICAN POLITICS 3, 5-6 (1991).

[4] Michelle E. Hammer, *Coming Out, or Being Dragged?*, NEWSDAY, Apr. 17, 1990, at 50.

[5] Jean Latz Griffin, *'Closet' Politicians Targeted By Faction of Militant Gays*, CHI. TRIB., Mar. 29, 1990, at D1.

[6] *Id.*

[7] In street demonstrations and pickets outside the homes of such politicians, activists carried signs and chanted slogans accusing various politicians of hiding their homosexuality and pursuing policies detrimental to gays and lesbians. Others began mass leafletting at political rallies of the targeted politician. One politician had his campaign billboards defaced with slogans alleging he was a homosexual. News organizations learned of the incident and took pictures before the billboards were restored. Several newspapers elected to run the story and identify the politician. Eleanor Randolph, *The Media, At Odds Over 'Outing' of Gays*, WASH. POST, July 13, 1990, at C1; Griffin, *supra* note 5, at D1, D6; David Tuller, *Uproar Over Gays Booting Others Out of the Closet*, S.F. CHRON., Mar. 12, 1990, at A9. There are many issues that concern homosexuals: appropriations

Soon, activists began naming names and pointing fingers at press conferences, AIDS rallies, lectures, and interviews across the nation. An Oregon politician was the target of an outing effort after he opposed funding for school programs that described homosexuality as "normal."[8] A New York politician was similarly victimized for an alleged failure to provide adequate public services for AIDS sufferers.[9] An Illinois politician was outed after he supported legislation that allowed doctors to test people for infection with the AIDS virus without their knowledge, and which made it a felony for an infected person to engage in sex with another person.[10]

For the most part, these activities were not reported in the mainstream press and were generally ignored by the gay press as well.[11] Often, there was little proof offered to back up the allegations.[12] Additionally, many newspapers had internal policies that governed the reporting of a public figure's sexual orientation.[13]

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for AIDS research, efforts to exclude homosexuals from the military, from teaching, or from being foster parents, mandatory testing for AIDS, and legal recognition of homosexual marriages. With each issue, there are legitimate priorities to be weighed, and opinions may differ on the correct approach to a problem. It is, therefore, not always possible simply to characterize a stand as either endorsing or opposing gay and lesbian rights. The message, however, from these activists is clear: an "incorrect" vote on issues of concern to homosexuals can put a politician at risk for an outing.

[8] Griffin, *supra* note 5, at D6.

[9] Tuller, *supra* note 7, at A9. The politician's sexuality had long been the subject of rumors. Many gay and lesbian leaders believed that this politician feared the general public would assume he was gay if he responded too quickly to demands for increased AIDS funding and services.

[10] Griffin, *supra* note 5, at D6.

[11] *Id.* See also SABATO, *supra* note 3, at 192, for a description of a 1990 press conference held by gay activists to announce the names of three U.S. Senators and five U.S. House members they claimed were gay.

[12] In *Outweek*, a now defunct gay publication, writer Michelangelo Signorile regularly engaged in outing in his column *Gossip Watch*. In an interview, Signorile revealed that items in his column came primarily from unnamed sources who claimed to have had a sexual experience with the person in question. In some cases, Signorile based the items merely on the fact that the person "is generally known within their social circles to be gay." Pat H. Broeske & John M. Wilson, *Outing: Target Hollywood*, L.A. TIMES, July 22, 1990, at 6, 86.

Whether or not rumors are fit to print is a hotly debated issue in journalistic ethics. *See* Michael Kinsley, *Private Lives: How Relevant?*, TIME, Jan. 27, 1992, at 68. This note will not address the ethics of reporting stories based on rumors or on facts supplied by sources who insist on remaining anonymous, but rather will concentrate on the inherently private nature of the facts disclosed.

[13] *USA Today* editor Peter Prichard explained, "We would not just report some person's sexual preference frivolously. We need a good, newsworthy reason for doing it." Craig Wilson, *Forcing Gay Celebs Out of the Closet*, USA TODAY, May 7, 1990, at 1D, 2D. *Washington Post* managing editor Leonard Downie, Jr., stated that his paper will not report on the subject unless the allegation is true and it affects the official's job or reflects on his character in a way that the voters would consider important. *New York Times* spokesman William Adles said the *New York Times* will not print "hearsay," and even if the allegation is true, the *New York Times* will not report it if the sexual preference is incidental or mentioned "purely for revelation's sake." Randolph, *supra* note 7, at C4.

These policies reflected a general feeling on the part of journalists that a person's sexual preference is "off limits" to the press.[14]

All of that changed, however, with the death of millionaire publisher and businessman Malcolm Forbes. In its March 18, 1990 issue, the now defunct *Outweek* featured as its cover story, *The Secret Gay Life of Malcolm Forbes. Newsweek, People Magazine*, and a number of newspapers including *The Los Angeles Times* and *USA Today* immediately picked up the story.[15] No sooner had the furor over Forbes subsided, when a new scandal erupted. This time the target was Pete Williams, Pentagon spokesman during the Gulf War. Williams was outed not for any stand he had taken or scandal he was involved in, but simply as a means of embarrassing the military for its policy of excluding homosexuals from the armed services. The only documentation provided for the allegation were quotes from unnamed sources and the fact that Williams had formerly been a regular customer at a predominantly gay bar.[16]

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[14] Ted Gup, *Identifying Homosexuals: What Are the Rules?*, 10 WASH. JOURNALISM REV. 30 (Oct. 1988).

[15] Pat H. Broeske & John M. Wilson, *Dragging People Out of their Closets: Is 'Outing' a Search for the Truth or a New Kind of Media Witch Hunt?*, THE TORONTO STAR, Aug. 25, 1990, at F3.

In the *Outweek* article, unnamed waiters and male employees at the Forbes publishing company claimed either to have had sex with or to have been propositioned by Forbes. Michelangelo Signorile, *The Other Side of Malcolm*, OUTWEEK, Mar. 18, 1990, at 40 [hereinafter Signorile, *The Other Side*]. The tabloids immediately picked up the story and Forbes's supposed secret life was the subject of frenzied headlines at the supermarket checkout racks. Leonard Doyle, *Forbes 'Gay' Claim Stirs Up a VIP Closet Debate*, THE INDEPENDENT, Apr. 1, 1990, at 14. Several editors of mainstream publications say that one good reason for publishing an allegation of this sort is that when the information is so widely known, withholding publication becomes a form of censorship. Randolph, *supra* note 7, at C4.

Sabato, however, believes this reasoning is often just an excuse for the press to practice what he dubs "lowest-common-denominator journalism." SABATO, *supra* note 3, at 58. According to Sabato, lowest-common-denominator journalism means that "only one media outlet need give the story legitimacy before all can publish or broadcast it guilt-free." *Id.* at 142. A good example of this is the March, 1990 story on outing in the *San Francisco Chronicle*. The *Chronicle* repeated names that had appeared in *Outweek* and a supermarket tabloid. The *Chronicle* justified its inclusion of the names without any evidence to substantiate the claims on the grounds that the names were already well-known. Beth Ann Krier, *Whose Secret Is It?*, L.A. TIMES, Mar. 22, 1990, at E1, E24.

[16] Michelangelo Signorile, *The Outing of Assistant Secretary of Defense: Pete Williams*, THE ADVOCATE, Aug. 27, 1991, at 34, 37-38. The story first broke in *The Advocate*, a bi-weekly gay news magazine based in Los Angeles. Though *The Advocate* generally avoids outing, it felt this story was defensible because of the inherent hypocrisy of Defense Secretary Cheney's retention of a high-ranking gay civilian while continuing to enforce the military's ban on homosexuals. *Advocate* editor Richard Rouilard also faulted Williams for his failure to intercede on behalf of gay soldiers confronted with the ban, an action Rouilard implied was cowardly and allowed Williams to profit at the expense of others. David Firestone, *Columnist Stokes Gay-Naming Debate*, NEWSDAY, Aug. 9, 1991, at 17. Cheney, in turn, insisted that civilian defense employees' private lives were their own business and that he did not find the ban "fundamentally wrong" because "you cannot make the kind of separation in the military between private and professional life that you can

This Note will argue that outing constitutes an unwarranted invasion of privacy that threatens individual autonomy and liberty. Part II will examine the private-facts tort[17] and recommend it as a remedy for unwarranted disclosures of sexual orientation. Part III will examine the constitutional issues posed by the private-facts tort, which pits powerful First Amendment rights guaranteed to the press against an individual's right to privacy. Part IV will examine the defense of newsworthiness as it relates to the practice of outing. Finally, the conclusion will argue that when disclosures of sexual orientation are unrelated to any issue before the public and do no more than satisfy mere public curiosity, they are unwarranted and unjustified invasions of privacy for which the private-facts tort provides a remedy.

II. THE PRIVATE-FACTS TORT

In 1890, Samuel D. Warren and his wife were among the elite of Boston society. "Yellow journalism" was in its heyday, and the press took particular delight in detailing with lurid sensationalism the comings and goings of the socially prominent. Annoyed by all this gossiping and snooping, Warren sought to vent

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with respect to civilians." Rita Giordano, *Gays Bitter in Division Over Outing*, NEWSDAY, Aug. 9, 1991, at 17. *See also* William A. Henry III, *To 'Out' or Not to 'Out'*, TIME, Aug. 19, 1991, at 17; John Cassidy, *'Outing' Claims Pentagon Victim*, SUNDAY TIMES, Aug. 11, 1991, at 19. Cheney stopped short of an unequivocal endorsement of the ban: "I can't say no, absolutely never, that it wouldn't happen, but I don't at this point have any plans to change the policy." David C. Morrison, *How Disruptive Are Uniformed Gays?*, NAT'L J., Sept. 14, 1991, at 2241. Proponents of outing point to this statement as evidence that their tactics forced Cheney to distance himself from the ban.

[17] The private-facts tort protects individuals against the "unjustifiable infliction of mental pain and distress." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 850 (5th ed. 1984). Because it attempts to impose liability for speech, the private-facts tort is conceptually related to defamation, which is made up of the twin torts of libel and slander. The tort of defamation is designed to protect against an "invasion of the interest in reputation and good name." *Id.* § 111, at 771. A defamatory statement is one in which the plaintiff is held up to hatred, contempt or ridicule, or which causes him to be shunned or avoided, and which necessarily involves the idea of disgrace. *Id.* § 111 at 773. To hold a defendant liable for defamation, the published matter must be both defamatory and false. *Id.* § 116, at 839. Therefore, if it is falsely alleged that a plaintiff is a homosexual, the plaintiff may have a cause of action for defamation. *See* Head v. Newton, 596 S.W.2d 209 (Tex. Ct. App. 1980) (holding the statement that someone is "queer" is slanderous *per se* because it imputes the crime of sodomy).

There are difficulties, however, with claiming that an allegation of homosexuality is defamatory. There are many who would bristle at the notion that being homosexual is somehow disgraceful. However, where the allegation is completely unfounded, the "defamatory character of the statement may arise from and affect a particular characteristic or activity of the plaintiff." KEETON ET AL., *supra* § 111, at 776. Thus, if the plaintiff is a leader in a church which preaches that homosexuality is immoral, or a politician who professes to adhere to traditional family values, such allegations constitute defamation. In these instances, an allegation of homosexuality implies that an individual has or is engaged in activities that violate professed beliefs or vows taken.

his displeasure with the popular press.[18] He turned to his friend and recent law partner, Louis D. Brandeis, and together they wrote what was to become one of the most influential law review articles in the development of American law.[19] Decrying a press which was "overstepping in every direction the obvious bounds of propriety and of decency,"[20] they observed:

> Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . Each crop of unseemly gossip . . . becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people.[21]

Warren and Brandeis proceeded to argue for the legal recognition of a right "to be let alone."[22] Their argument prevailed,[23] and today a common law right to privacy is recognized in at least thirty-six states.[24]

Yet, there remains considerable confusion over just what interests are protected by the right to privacy—a confusion that prompted one judge to liken the state of the law of privacy to a "haystack in a hurricane."[25] In an attempt to bring some semblance of order to the law of privacy, Willaim Prosser divided the interest identified by Warren and Brandeis into four distinct categories: (1) intrusion upon plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private

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[18] DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 25 (1972).

[19] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

[20] Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193, 196 (1890).

[21] *Id.*

[22] *Id.* at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)).

[23] *Id.* at 205-6, 211. Warren and Brandeis argued that past decisions which purported to protect private property were in reality based on the principle of inviolate personality, and argued that the right of property, in its widest sense, embraced the possession of a right to an inviolate personality.

[24] *See infra* Appendix.

[25] Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir. 1956). *See generally* Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964); Harry Kalven Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966) (the rules of law establishing a right of privacy which can override the First Amendment are exceedingly vague, the theory behind them not clearly formulated, and the results are inconsistent). J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 631 (1968) ("courts have failed to articulate a well defined, fully developed body of law" in the area of privacy rights).

facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[26]

This Note will focus on the private-facts tort, which protects the second interest identified by Prosser—that of public disclosure of private facts about the plaintiff. This interest was the main thrust of the Warren and Brandeis article, which argued that "[s]ome things all men alike are entitled to keep from popular curiosity, whether in public life or not . . . ."[27]

While elements of the private-facts tort may vary from jurisdiction to jurisdiction, the tort can be summarized as consisting of three elements: 1) a private fact, 2) a public disclosure of the private fact, and 3) a showing that the matter disclosed would be offensive and objectionable to a reasonable person of ordinary sensibilities.[28] The defendant has a complete defense if he can demonstrate that the facts disclosed were of legitimate concern to the public.[29]

A. *The Requirement that the Facts Disclosed Be Private*[30]

An outing involves an allegation that a secretly homosexual party is masquerading as a heterosexual. The allegation may be accompanied by revelations of affairs the party has purportedly had with members of his or her own sex.[31] Proof may consist of

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[26] Prosser, *supra* note 19, at 389.

[27] Warren & Brandeis, *supra* note 20, at 216.

[28] *See infra* Appendix. Those jurisdictions which recognize the private-facts tort often explicitly adopt or cite with approval the formulation of the RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[29] *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

[30] Legal scholars frequently have addressed the problem of identifying facts which are truly private and thus entitled to special protection. *See generally* Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1410 (1976) (arguing that the private-facts tort is not unconstitutionally vague because it can be confined to disclosures of one's sexual activities, health, and distant past); Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 616 (1968) (arguing there is no need to categorize facts into distinct categories, because publishers always know the private and intimate character of what they print); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) (asserting that we all have some common conception of what *is* private); Louis Lusky, *Invasion of Privacy: A Clarification of Concepts*, 72 COLUM. L. REV. 693, 709 (1972) (suggesting that facts can be either absolutely or contingently private; absolutely private facts are those which reveal what goes on in the marital bed, the confessional, the psychiatrist's office, the voting booth, or the jury room; other intimate facts are contingent because there may be circumstances that justify revealing them); Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 343 (1979) (suggesting that emphasis should be placed on the element of intimacy, i.e., sexual relations, performance of bodily functions, family relation, etc.).

[31] Signorile, *The Other Side*, *supra* note 16, at 41.

details and photos provided by supposed ex-lovers.[32] Consequently, an outing involves disclosures concerning one's sexual activities, desires, fantasies, or preferences—matters that are essentially private.[33] Outing is peculiar because, while it often involves the disclosure of intimate sexual details about events that took place between two people in the privacy of their own bedroom, it may also consist of a simple assertion that a party has "dated" a member of the same sex or been a frequent patron at establishments with a predominantly gay or lesbian clientele.[34]

By most standards, a similar disclosure about heterosexual dating or patronage would not be considered private.[35] There are justifications, however, for treating similar disclosures about homosexuals differently. A person is generally assumed to be heterosexual. An individual who communicates to others that he does not share this status is revealing facts that normally are shared only with intimates. It is private information, just as information about any other unusual or unique personal characteristic that is not readily observable is private.[36] Privacy is really no more than the "claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others."[37] Undoubtedly, most of us share an

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[32] The practice of paying a source to provide such details is known as "checkbook journalism." The ethics of such a practice are questionable and the reliability of information gained in this manner is suspect. Michael Kramer, *Moment of Truth*, TIME, Feb. 3, 1992, at 12, 14. *See also* Broeske & Wilson, *supra* note 12, at 6.

[33] However, one who has publicly announced his homosexuality cannot later reclaim the fact as private. Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665 (Cal. App. 1 Dist. 1984). See *infra* notes 133-42 and accompanying text for a discussion of the case.

[34] See *supra* notes 15 and 16 and accompanying text for a discussion of the allegations made about Malcolm Forbes and Pete Williams.

[35] It should be noted, however, that heterosexual dating often involves some sort of public assertion about the relationship of the parties. A heterosexual who escorts his or her date to a movie or dinner often makes a public statement about the nature of their relationship by hand-holding or other displays commonly perceived as indicating sexual interest. Homosexual dating often does not involve such public displays, and the parties may take great care to be discreet.

[36] Journalist Andrew Sullivan recalled that in his early 20's, an open-minded acquaintance casually asked, "Are you gay?" and the terrifying effect and feeling of powerlessness that the question evoked in him because someone else was defining who he was and how he would be presented. He could no longer control the moment when he would come out or how he would explain his homosexuality and what it meant to him. Andrew Sullivan, *Sleeping With the Authoritarians*, OTTAWA CITIZEN, Sept. 15, 1991, at B3. To ask the same question of a heterosexual is also violative of privacy. While it might not evoke the same feelings of panic, "asphyxiation," and loss of control that Sullivan felt, it nonetheless is a demand to proclaim one's sexual proclivities. At the very least, it prompts a sense that one's personal relationships and tastes have been subjected to a type of Orwellian scrutiny.

[37] Gerety, *supra* note 30, at 261. Privacy has also been defined as "control over when and by whom the (physical) parts of us . . . can be seen or heard, . . . touched, smelled, or tasted by others," Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275, 283-84 (1974), or as "control over how and when to interact with others." Note, *Tortious*

expectation that we are entitled to maintain some measure of control over the dissemination of facts that would reveal our most intimate thoughts, feelings, and activities to public scrutiny.

Sexuality is at the very core of a person's identity. For that reason, labeling a person homosexual without his or her consent constitutes a denial of that person's right to self-identity. Complicating matters is the fact that the definition of gay or lesbian is itself unclear.[38] Homosexuality can manifest itself across a broad spectrum of human activity. A person may support homosexual causes, become involved with gay or lesbian organizations or politics, or simply feel strong attractions for members of his or her own sex without ever engaging in any homosexual activity. Conversely, an individual may have homosexual experiences and yet be equally or more attracted to the opposite sex. Gay or lesbian may be defined solely in terms of conduct or, alternatively, as an expression of attitudes and beliefs.[39]

This lack of clarity has led author William H. DuBay to argue that labels such as "gay" or "homosexual" are " 'highly stigmatic terms that severely alter our perceptions of people while telling us nothing about their inner qualities.' "[40] He suggests that men who define themselves as gay are in reality choosing to adopt a role. He explains that those who adopt such a role often do so as a means of coping with society's disapproval, and to justify their sexual feelings for the same sex.[41] He cautions that moving from a closet of denial to one of deviant identity can severely limit life options for one who has chosen to adopt the role of gay, even

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Invasion of Privacy: Minnesota as a Model, 4 WM. MITCHELL L. REV. 163, 171 (1978) [hereinafter *Tortious Invasion*], or as "selective anonymity — the principle that each of us should be able to control, with few exceptions, the circles within which details of our lives and characters are disseminated." Diane L. Zimmerman, *Requiem For a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 338 (1983).

[38] As one writer explained, "who decides what and who is gay? Is a married actor who once had a youthful affair with another man homosexual? Three affairs? Five? Who sets the definition, chooses the label?" Broeske & Wilson, *Outing*, *supra* note 12, at 86. Interestingly enough, the Kinsey Institute New Report on Sex has found that approximately one-third of all males have had at least one same-sex experience since puberty. Among females, the Kinsey Institute found that around half of all college-educated women and approximately 20% of the non-college educated women, had at least one same-sex erotic contact after puberty. JUNE M. REINISCH, THE KINSEY INSTITUTE NEW REPORT ON SEX, WHAT YOU MUST KNOW TO BE SEXUALLY LITERATE 139-40 (1990).

[39] Marsha Jones, Comment, *When Private Morality Becomes Public Concern: Homosexuality and Public Employment*, 24 HOUS. L. REV. 519 n.1 (1987) (noting the various ways courts, commentators, and social scientists define the terms used in discussing homosexuality).

[40] *Book Challenges Myth of Homosexuality*, PR NEWSWIRE, Nov. 30, 1987 (quoting WILLIAM H. DUBAY, GAY IDENTITY: THE SELF UNDER BAN (1987)).

[41] WILLIAM H. DUBAY, GAY IDENTITY: THE SELF UNDER BAN 111-29 (1987).

when the choice to assume the role is freely made.[42]

Therefore, labeling an individual gay or lesbian absent consent denies that individual the opportunity to define for himself or herself the role he or she wishes to play in society. Such a label can have a profound effect on personal relationships by influencing others to judge an individual not by that individual's capacity for kindness, intelligence, achievement, humor, or integrity, but rather by a resort to ugly stereotypes.[43] Additionally, media outings threaten to erode democratic principles closely associated with privacy, such as "autonomy, individuality, and freedom of association in organizations advocating unconventional ideas."[44] Individuality and autonomy are threatened because personal relationships and tastes are no longer private concerns

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[42] *Id.*

[43] See *infra* note 67 and accompanying text, for a discussion of the problems homosexuals face in society.

[44] *Tortious Invasion*, *supra* note 37, at 177. The threat of being outed increases the apprehension both gays and heterosexuals may feel about expressing or embracing views sympathetic towards homosexuals, or in maintaining friendships without regard to sexual orientation. In many instances, a person struggling to define his own sexual identity is denied the opportunity to sort out his own feelings and beliefs for himself. Additionally, he must watch as loved ones and close acquaintances are confronted with revelations of this sort. Those closest to the victim are often left feeling betrayed, confused, hurt, and angry, and are sometimes themselves the objects of public ridicule.

Hence, in choosing to come forward with a public announcement of homosexuality, a gay or lesbian person must weigh the effects his or her announcement will have on associates and family members. This involves decision-making of an intensely private nature, which rightly belongs solely to the individual contemplating coming out.

When Joseph S. Grabarz, Jr., a Democratic State Representative from Bridgeport, Connecticut, publicly identified himself as a homosexual, he found he had underestimated the effects his announcement would have on others.

> I had come out to my family, I had come out to my friends, but they had not come out to their friends and associates as being somebody who is a friend of someone who is gay.
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> While I had no problem, and they had no problem with the relationship with me, a lot of my friends and family members did find that they had to deal with it with their friends and relatives, and that represented a step that I should have been more aware of beforehand . . . .
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> There was some negative reaction from political associates, friends and family members for not notifying them. Some felt I deprived them of the opportunity to be able to stand with me when I did it. In many ways, I regret not discussing it with more people.

Lennie Grimaldi, *Connecticut Q&A: Joseph Grabarz; A Legislator Speaks Up for Gay Rights*, N.Y. TIMES, Mar. 3, 1991, at 3CN.

Regardless of the truth of the allegations, a victim is forced to defend herself against the implication that she is deceitfully, cowardly, and selfishly denying her sexuality for personal gain. At the same time, she may be additionally burdened with the task of repairing damaged personal relationships, as well as perhaps salvaging a career.

Unfortunately, involvement with homosexual issues or maintaining friendships with gays or lesbians significantly increases one's risk of becoming a potential target, especially if one manages to arouse an activist's ire by expressing an "incorrect" view. The understandable effect of the press's willingness to publish such allegations, is that both homosexuals and heterosexuals will limit or avoid associations that put them at risk for such disclosures.

and serve instead as fodder for gossip. As Professor Edward J. Bloustein has observed, "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."[45] Clearly, some common notion of privacy must prevail if the quality of life in modern society is to remain tolerable.

While few would disagree that privacy is a value worth protecting, there are those who argue that public figures should be afforded less privacy than ordinary citizens. Those who so argue reflect the view that public figures

> have sought publicity and consented to it, and so cannot complain of it; . . . their personalities and . . . affairs already have become public, and can no longer be regarded as their own private business; and . . . the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest.[46]

This argument, however, relates more to the issue of whether the information is of legitimate public interest than to whether or not the disclosed facts are private.[47]

Hence, whether a fact can truly be categorized as private depends not on the status or position enjoyed by the plaintiff, but rather on the nature of the fact itself. Facts such as sexual orientation are private because they involve matters of intimacy. Private facts are those which, when exposed to the public eye, are violations of reasonable expectations of privacy. There can be little doubt that sexuality and intimate associations have long been viewed as private matters.[48]

B. *The Requirement of Public Disclosure*

The tort posited by Warren and Brandeis was aimed primarily at the mass media.[49] For it was "mass exposure to public gaze

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45 Bloustein, *Privacy, supra* note 25, at 1003.

46 PROSSER, *supra* note 19, at 411.

47 *See* Part IV *infra* for a discussion of the newsworthiness defense to the private-facts tort.

48 *See generally* Gerety, *supra* note 30, at 266 ("control over who, if anyone, will share in the intimacies of our bodies" comprises the "core expectations of privacy in our society"). Exposing someone's sexual orientation is an intrusion into that individual's most intimate associations. Professor Tom Gerety believes that by making intimate facts public, intimacy is diminished. *Id.* at 268. Gerety points out that without intimacy, "much of that we take as distinctively human — love, reflection, choice — cannot flourish or perhaps even survive in our society." *Id.* at 266.

49 Warren and Brandeis argued that existing law "afford[ed] a principle which [could] be invoked to protect the privacy of the individual from invasion either by the

as opposed to backyard gossip, which threatened to deprive men of the right of 'scratching wherever one itches.' "[50] The private-facts tort, however, makes no distinctions between media and non-media defendants, and it applies equally to both.[51] Thus, the tort allows for liability to be imposed upon an employer who publishes private facts about an employee's termination in a company newsletter.[52] Likewise, it would allow for liability to be imposed on church elders who reveal details of a former member's transgressions to their congregation.[53]

Nevertheless, media defendants clearly pose a far more serious threat to privacy interests than those posed by non-media defendants.[54] Bloustein points out that it was "only with the emergence of newspapers and other mass means of communication [that] degradation of personality by public disclosure of private intimacies [became] a legally significant reality."[55] Ac-

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too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds." Warren & Brandeis, *supra* note 20, at 206. Interestingly, this article was written in 1890, when the age of technology was in its earliest formative stages. The explosion of technology in the past few decades has lent decided force to their argument that individuals should be protected against such invasions of privacy.

50 Briscoe v. Reader's Digest Ass'n., 483 P.2d 34, 37 (Cal. 1971) (quoting Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1025 (1966)).

51 In Florida Star v. B.J.F., 491 U.S. 524 (1989), the Court invalidated a Florida Statute which imposed liability only on an "instrument of mass communication" for the publication of private facts. "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* at 540.

52 Zinda v. Louisiana Pac. Corp., 440 N.W.2d 548, 555 (Wis. 1989)

53 Guinn v. Church of Christ of Collinsville, 775 P.2d 766 (Okla. 1989). In Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962), the court held that a complaint alleging that defendant's authorized agents removed tires and tubes from the plaintiff's car and left it standing in full view of the plaintiff's fellow employees and others stated a cause of action under the tort. *See also* Biederman's of Springfield, Inc., v. Wright, 322 S.W.2d 892 (Mo. 1959) (holding that a complaint which alleged that defendant's agent appeared in a cafe where the plaintiff worked and followed her around the restaurant, loudly proclaiming that plaintiff and her husband had refused to pay their bill, and did not intend to pay for goods delivered to them, stated a cause of action for an invasion of privacy under the tort).

54 Some commentators argue that the dangers of an unrestrained press so feared by Warren and Brandeis have simply failed to materialize. Zimmerman, *supra* note 37, at 335. However, in light of increasing public acceptance of the media's reporting of gossip (*see supra* notes 1-3 and accompanying text), a fear that the press is steadily eroding concepts of privacy is not an unreasonable one. With the advent of CNN, international viewers in the millions have been given a front-row seat to newsbreaking events in the United States. *Targeting the Audience Abroad*, TIME, Jan. 6, 1992, at 32. Thus, an outing involving an internationally known figure results in worldwide exposure, compounding the devastating consequences for the victim, whose exposure to hatred and prejudice is thereby increased.

55 Bloustein, *Privacy*, *supra* note 25, at 984. The court in *Briscoe v. Reader's Digest Ass'n*, 483 P.2d at 37 (Cal. 1971), noted that media dissemination, unlike backyard gossip,

cordingly, the non-media disseminator poses a far less significant threat to privacy because such disclosures are limited to a smaller group. A media disclosure, on the other hand, has the potential to reach thousands, if not millions, and therefore is far more invasive.[56]

Ironically, an individual must call further attention to the very facts he insists are private in order to recover under the private-facts tort.[57] For this reason, transgressors under the tort are much more likely to come from the media. Ordinarily, a plaintiff would only compound the injury suffered by suing a non-media defendant for the public disclosure of private facts. A plaintiff who truly values his privacy would normally be unwilling to incur the additional exposure that filing such a suit would entail. However, the shattered personal relationships and career devastation left in the wake of a media outing may mean that a plaintiff cannot be further damaged by the attendant publicity a lawsuit would bring.[58]

C. *The Requirement That a Disclosure Be Highly Offensive*

The third element of the tort has been approached differ-

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interferes with the conflicting role performances demanded of an individual in a complex society.

> [M]uch of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity.

Id.

This is particularly true for a homosexual who prefers to keep her sexual preferences private. She may find disclosure of her sexual orientation to those with whom she has only a passing or superficial acquaintance deeply offensive. Additionally, such disclosures may rob her of her dignity by making her an object of public curiosity.

[56] Professor Gerety observes:

> We suffer less . . . from private than from public . . . speculation about our intimacies and secrets. Sheer numbers make a difference. No one can make privacy absolute; few ever try . . . . There is . . . reason enough to tolerate the more or less constant seepage of . . . often intimate information [] about ourselves that comes with living in society. . . . [Nevertheless, w]e maintain our autonomy to the extent that we retain some measure of control over further significant disclosures . . . . Others [may] continue to talk without our consent, but the power and even the life-span of such talk is likely to be limited, for memories are short and curiosity is inconstant.

Gerety, *supra* note 30, at 284.

[57] This aspect of the tort prompted Professor Harry Kalven to suggest that "victims on whose behalf the privacy tort remedy was designed will not in the real world elect to use it and that those who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation." Kalven, *supra* note 25, at 338.

[58] See Part III *infra* for a discussion of the special constitutional concerns raised by a tort that proposes to impose liability on the media for truthful speech.

ently by various courts. Courts have sometimes looked at the passage of time in deciding whether or not a disclosure was offensive. For example, *Melvin v. Reid*[59] and *Briscoe v. Reader's Digest Association*[60] were both cases that involved media defendants who had raked up stories of crimes long past, where the criminals involved had been rehabilitated for some time and had done nothing further to call attention to themselves.[61] In *Briscoe*, the court held that "revealing one's criminal past for all to see is grossly offensive to most people in America," and pointed to the consequences felt by the plaintiff in this case: ostracism, isolation and the alienation of his family.[62]

A more common approach to defining what constitutes an offensive and objectionable disclosure under the private-facts tort was articulated in *Diaz v. Oakland Tribune, Inc.*.[63] There, the court noted that a disclosure is highly offensive when "publicity is so intimate and unwarranted as to outrage the community's notion of decency . . ., [when] publicity is so offensive as to con-

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[59] 297 P. 91 (Cal. Ct. App. 1931). Defendant had produced a movie based on the life of the plaintiff, who eight years earlier had been a prostitute tried and acquitted of murder. The defendant used the plaintiff's true maiden name in the movie and in advertising for it. While the recovery in *Melvin* was for public disclosure of private facts, this case can be analyzed as falling into Prosser's fourth category—appropriation for the defendant's advantage, of the plaintiff's name or likeness. For a discussion of Prosser's four categories, see *supra* note 26 and accompanying text.

[60] 483 P.2d 34 (Cal. 1971). *Briscoe* might be analyzed by using Prosser's third category—publicity that places the plaintiff in a false light in the public eye. See *supra* text accompanying note 26 for a discussion of Prosser's four categories. Defendant had published an article, *The Big Business of Highjacking*, describing an incident in which plaintiff and another man had hijacked a truck. There was nothing in the article to indicate that the highjacking had occurred eight years earlier and that the plaintiff had since reformed. Thus, plaintiff could have conceivably asserted that he had been placed in a false light in the public eye.

[61] *Briscoe*, 483 P.2d at 41. Today, the outcome in these cases might be different due to the Supreme Court's decisions in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (finding no liability for media disclosure of the name of a rape victim obtained from official court documents open to public inspection) and Florida Star v. B.J.F., 491 U.S. 524 (1989) (see *infra* notes 76-85 and accompanying text for a discussion of the facts and holding in *Florida Star*). However, in both *Cox* and *Florida Star*, the disclosures were made contemporaneously with the event being reported. In *Cox*, a newspaper reporter disclosed the name of a rape victim in the course of covering the trial of the accused rapists. 420 U.S. at 474. In *Florida Star*, the rape victim's name was disclosed in a newspaper report nine days after the alleged incident. 491 U.S. at 527. It is unclear from these holdings, however, whether the passage of time will have any effect on the media's right to publish information that is a matter of public record.

The rationale behind the Court's holdings in these two cases stressed the importance of the press's role in conferring public scrutiny on official proceedings in a democracy. By contrast, the courts in *Melvin* and *Briscoe* reasoned that, under certain circumstances, allowing media defendants to rake up events long past might adversely affect the state's compelling interest in the rehabilitation of former offenders. *Briscoe*, 483 P.2d at 43; *Melvin*, 297 P. at 93.

[62] *Briscoe*, 483 P.2d at 43.

[63] 188 Cal. Rptr. 762 (1983).

stitute a 'morbid and sensational prying into private lives for its own sake.' "[64] This standard, however, seems to blur the distinction between a disclosure that is offensive and objectionable, and one that is protected as newsworthy. For when a jury decides that a disclosure was a "morbid and sensational prying into private lives for its own sake" as measured by community mores, it seems to be deciding summarily that the information was not newsworthy.

However, the Supreme Court, by overturning jury awards in favor of plaintiffs who sue media defendants,[65] has indicated that determinations of newsworthiness are for the court. Therefore, the requirement that a disclosure be "offensive and objectionable" should be viewed primarily as a means to separate disclosures that are particularly violative of one's privacy from those that are merely inconvenient or embarrassing. Nevertheless, in deciding whether a disclosure is highly offensive, the jury may neccessarily have to take into consideration some of the same factors that go into a determination of newsworthiness. For example, if the disclosure came about because of some misconduct on the part of the plaintiff, then obviously the press is not guilty of "sensational prying for its own sake." The attendant publicity would be a direct result of the plaintiff's own misconduct.

Thus, a disclosure which is highly embarrassing to a particu-

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[64] *Id.* at 767 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. h). The court found that the following facts had crossed the line into "sensational prying." Diaz was a transsexual who had kept secret her gender corrective surgery. She was elected president of the student body of a local college. Near the middle of her term, she accused the college administration of misusing school funds. A local newspaper then ran the following article:

> More Education Stuff: The students at the college of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio.
>
> Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.

Id. at 766.

[65] *See* Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). In both *Cox* and *Florida Star*, the Court held that the publication was protected by virtue of the press's right to report on a matter of public interest.

These cases seem to indicate that while a jury may determine whether the elements of the private-facts tort are satisfied, the court is the final arbiter of whether the information is newsworthy. While there is always the danger that juries will use a verdict to punish unpopular speech or persons, at least one court has concluded that any risk of prejudice may be checked by close judicial scrutiny at certain stages of the litigation (such as summary judgment, directed verdict, and judgment notwithstanding the verdict). *See* Virgil v. Time, Inc., 527 F.2d 1122, 1130 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). One court has noted that allowing a jury to decide when liability can be imposed for the disclosure of private facts presents no greater concerns than those present in the related field of obscenity law, where community standards define what speech is constitutionally protected. *Diaz*, 188 Cal. Rptr. at 772.

lar plaintiff may not always satisfy the requirement of being highly offensive.[66] However, when a plaintiff suffers severe social or professional repercussions as a result of the disclosure, the requirement is surely met. Accordingly, a disclosure of homosexuality could be considered highly offensive in that it exposes the individual to hatred, prejudice, and discrimination.[67] Moreover, a fact-finder will be more inclined to find a disclosure highly offensive when the plaintiff belongs to a class that society stigmatizes, often unfairly, such as rape victims and people suffering from AIDS or other communicable diseases.[68]

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[66] For example, in Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940), the plaintiff, who as a child prodigy had achieved wide renown for mathematical and other intellectual abilities, sued a publication for revealing that he was surviving as an adult through relatively menial jobs and was leading a reclusive life. The court found that though the article was a "merciless" exposure, the facts disclosed did not rise to the level of revelations that would "outrage the community's notions of decency." *Id.* at 809.

The fact that someone has held a succession of menial jobs is not, in and of itself, private information. Yet, if the gravamen of the offense is, as Bloustein suggests, the act of "turning a private life into a public spectacle," then surely Sidis's privacy had been seriously violated. Bloustein, *Privacy*, *supra* note 25, at 979. It is at least arguable, then, that finding one's adult life dissected in the pages of a magazine would be highly offensive to the ordinary person, even one not as reclusive as Sidis.

[67] In a society where homosexuals are feared and loathed, many homosexuals prefer to keep their status a secret. Gays and lesbians who elect to come out face the possibility of estrangement from family members, as well as discrimination in the workplace. A 1988 New York State survey concluded that "queer bashing" constituted the most severe and widespread of all bias-related crime. Zoe Heller, *Outed: The Campaign Hits the Superstars*, THE INDEPENDENT, June 16, 1991, at 12, 13. Another study found that in the six cities surveyed, violence and harassment against gays rose by 42 percent from 1989 to 1990. *Houston Police Set Trap to Quell Tide of Violence Against Homosexuals*, N.Y. TIMES, Aug. 9, 1991, at A12. For this reason, gays and lesbians have traditionally maintained an informal code of silence about the identities of fellow homosexuals. Griffin, *supra* note 5, at D1. *See also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1302 (1985) ("gays as a group suffer from stigmatization in all spheres of life").

Historically, homosexuals have faced discrimination in the military, the teaching profession, immigration policies, and in the area of family law. Frequently, they are stereotyped as child molesters or as mentally ill. *See* Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 803-07, 817-25 (1984). It was not until 1973 that the American Psychiatric Association removed homosexuality from its list of mental disorders. Before that, homosexuality was often thought of as a disease, and attempts to 'cure' it ran the gamut from mutilating surgery to treatment with hormones, and, most recently, to the study of hormonal prenatal intervention. Dr. Charles Silverstein, *Weird Science*, OUTWEEK, July 18, 1990, at 36.

Society offers little protection to victims of homosexual bias, often looking the other way when violence is directed against homosexuals. The "homosexual panic" or "gay advance" defense—claiming self-defense or temporary insanity in response to a homosexual advance—has resulted in lenient sentences or acquittals for defendants charged with assaulting or murdering gay men in several communities in California. Peter Finn, *Bias Crimes: Difficult to Define, Difficult to Prosecute*, 3 CRIM. JUST. 18, 47 (1988).

[68] An argument is sometimes made that societal mores have changed, and that homosexuality is no longer as unacceptable as it once was. The argument goes on to suggest that to say that a disclosure that someone is gay or lesbian is highly offensive is to buy into the notion that homosexuality is somehow shameful. While it is true that ho-

III. CONSTITUTIONAL ISSUES

Warren and Brandeis readily acknowledged that great care must be taken when attempting to balance rights guaranteed to the press through the First Amendment against an individual's right to privacy.[69] Historically, the press has always been viewed as an important safeguard in assuring "the maintenance of our political system and an open society."[70] "Without the information provided by the press, most of us, and many of our representatives, would be unable to vote intelligently or to register opinions on the administration of government generally."[71] Thus, any tort that attempts to hold the media liable for truthful disclosures raises serious constitutional issues.[72] Courts are understandably hesitant to impose any burdens on the press that will have the effect of "chilling" free and open discourse on matters of legitimate interest.[73] At the same time, courts have recog-

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mosexuality, which was once an unmentionable subject, is now a routine subject on talk shows and in news and magazine articles, that does not change the essentially private nature of one's sexual orientation. An allegation of homosexuality subjects one's personal life to a heightened scrutiny, and encourages speculation about personal tastes and relationships that is a clear violation of reasonable expectations of privacy. It is this serious invasion of privacy that makes such disclosures offensive.

69 They acknowledged that there could be "no fixed formula [in prohibiting] obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case . . . ." Warren & Brandeis, *supra* note 20, at 215-16.

70 Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

71 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

72 Some scholars have concluded that the private facts tort cannot co-exist peacefully with first amendment rights guaranteed the press. *See, e.g.*, Kalven, *supra* note 25, at 329 (arguing that the private-facts tort is an anachronism, a nineteenth-century response to the mass press, and no longer in keeping with today's tastes and mores). Consequently, the private-facts tort is swallowed by the exception for newsworthiness. Zimmerman, *supra* note 37, at 365 (suggesting the interests that the private-facts tort seeks to protect are beyond the reach of the law and should be left to be worked out by community manners and mores). *But see* Bloustein, *Privacy, supra* note 25, at 984 (arguing that the institutionalization of mass publicity poses a significant and weighty threat to personal dignity, an interest deserving of protection); Melville B. Nimmer, *The Right to Speak From "Times" to "Time": First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968) (arguing that it is possible to have a definitional balancing of privacy interests which is consistent with free speech).

73 *See, e.g.*, Boyd v. Thomson Newspaper, 6 Media L. Rep. 1020 (W.D. Ark. 1980) (holding no liability for printing the name of a child who died while the malpractice defendant was administering anesthesia, as the information disclosed was newsworthy); Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981) (holding that an article which hypothesized that the plaintiff-physician's personal, marital, and psychiatric problems were the cause of two operating room accidents was newsworthy); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (holding no liability for filming and televising a prisoner's parole hearing without his consent, when no private facts were disclosed, and the plaintiff's face and name were not revealed); Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963) (holding that publishing the name of the last person in the state to be publicly whipped nine years earlier was newsworthy when a bill was pending that would make whipping mandatory for certain crimes); Howard v. Des Moines Reg. & Trib. Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980) (finding no liability for

nized that "fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable."[74]

The Supreme Court has never ruled directly on the constitutionality of the private-facts tort.[75] In *Florida Star v. B.J.F.*,[76] the Court acknowledged an inherent tension between First Amendment rights guaranteed the free press and protection afforded by state statutes and doctrines of common law against the dissemination of private facts. *Florida Star* involved a civil suit brought against a newspaper for negligently violating a Florida statute that made it unlawful to publish the name of the victim of a sexual assault. Due to an error, the victim was inadvertently identified in a crime incident report that had been placed in the press room of the Sheriff's department. The reporter covering the story elected to use the victim's full name in his article.[77]

In overturning the jury verdict awarded the plaintiff, the Court relied on three factors. First, there existed less drastic means of guarding against the dissemination of private information, such as the instituting of careful internal procedures that would avoid public documentation or other exposure of private information. Second, where the government has made certain

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newspaper's disclosure that plaintiff had been involuntarily sterilized while a resident in a county home because the disclosure was newsworthy); Brenner v. Journal-Tribune Publishing Co., 76 N.W.2d 762 (Iowa 1956) (newspaper's publication of a photo showing the mutilated and decomposed body of a missing child was protected as newsworthy); Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. Ct. App. 1966) (finding that the publication of an exotic dancer's photograph was not actionable when, prior to the occurence complained of, the same photograph had appeared in other publications with the dancer's consent); Roshto v. Herbert, 439 So. 2d 428 (La. 1983) (no liability for republishing, as part of a regular feature, the original front page of twenty-five year old edition of the paper, which contained an article about the plaintiff's conviction for cattle theft, where no malice was shown); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (holding no liability for publication of a person's face taken in a public place); Jones v. Taibbi, 512 N.E.2d 260 (Mass. 1987) (holding that a person's arrest is not a private fact); Poteet v. Roswell Daily Rec., Inc., 584 P.2d 1310 (N.M. Ct. App. 1978) (granting summary judgment for the defendant, who published the identity of a minor female who was raped, following an open preliminary hearing).

[74] Virgil v. Time, Inc., 527 F.2d 1122, 1128 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Other courts, such as *Briscoe v. Reader's Digest Ass'n*, have expressed similar sentiments: "Acceptance of the right to privacy has grown with the increasing capability of the mass media and electronic devices with their capacity to destroy an individual's anonymity, intrude upon his most intimate activities, and expose his most personal characteristics to public gaze." 483 P.2d 34, 37 (Cal. 1971).

[75] *See infra* note 84.

[76] 491 U.S. 524, 530 (1989).

[77] The reporter for the newspaper admitted that there were signs posted throughout the press room which made it clear that the names of rape victims were not matters of public record and were not to be published. At the time of publication, there were no criminal proceedings pending, as the attacker remained at large and had not been identified. *Id.* at 542, 546.

information available, "it is highly anomalous to sanction persons other than the source of the release."[78] Therefore, once information is in the public domain, there can be no constitutional restraint on its dissemination. Finally, the Court was concerned that imposing liability on a newspaper for printing information released by the government as part of a public record would lead to "timidity and self-censorship" on the part of the press.[79]

In a strong dissent, Justice White criticized the majority for not acknowledging that protecting a rape victim's privacy was a "state interest of the highest order."[80] He noted that the Court's holding threatened to "obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts."[81] He stated forcefully that "[t]here is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime — and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed."[82]

Indeed, the majority decision in *Florida Star* may have seriously limited the scope of the tort by providing a broad exception for information contained in public records.[83] This decision reflected the Court's respect for the role the press plays in conferring public scrutiny on official proceedings. Still, the Court found itself unable to accept the "invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment."[84] By confining its holding to the facts specifically before it, the Court implied that the press is not always accorded absolute protection under the First Amendment for truthful disclosures.[85]

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[78] *Id.* at 535.

[79] *Id.*

[80] *Id.* at 550 (White, J., dissenting). The Court, mindful of the emotional nature of the privacy interest at stake, did not rule out the possibility that such information could be constitutionally withheld from a public record, thereby eliminating the difficulties presented in this case. *Id.* at 537. "We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be . . . necessary to advance [a state interest of the highest order] . . . ." *Id.*

[81] *Id.* at 550 (White, J., dissenting).

[82] *Id.* at 553.

[83] For a discussion of the Court's rationale for providing absolute immunity for information contained in public records, see *supra* note 61.

[84] *Florida Star*, 491 U.S. at 532. The *Florida Star* court explained, "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Id.*

[85] "We do *not* hold that truthful publication is automatically constitutionally protected, or that there is *no* zone of personal privacy within which the State may protect the individual from intrusion by the press." *Id.* at 541 (emphasis added).

A. *Protected Speech Under the First Amendment*

Perhaps the clearest explanation for what constitutes protected speech under the First Amendment has been articulated by the noted legal scholar, Alexander Meiklejohn. He reasoned that the First Amendment provides absolute protection for "those activities of thought and communication by which we 'govern,' " which he construed as covering all activity from which "voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express."[86] Meiklejohn defined these activities as including novels, dramas, paintings, poems, and any other way a citizen educates herself, stressing that self-government requires an educated citizenry.[87] Expanding on this theme, Bloustein has interpreted this definition to exclude information that merely satisfies public curiosity and is unrelated to a governing purpose.[88]

There are others who argue that the value embodied in the First Amendment "is not merely the cultivation of uninhibited expression" that leads to informed self-government, but rather a belief that "the speaker has the right to be let alone in the absence of compelling reason to the contrary."[89] Regardless of the view taken, past Supreme Court decisions "have created a rough hierarchy in the constitutional protection of speech, [in which c]ore political speech occup[ies] the highest, most protected position."[90] Therefore, speech whose expressive content is clearly of de minimis value to society can be regulated upon a showing of compelling need.[91]

Cognizant of the role a free press plays in any democracy,

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86 Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 255.

87 *Id.* at 263.

88 Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 56 (1974).

89 Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1208 (1976). This was essentially the view taken by the Court majority in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). *R.A.V.* held that a St. Paul ordinance that prohibited the display of a symbol "which one knows or has reasonable grounds to 'know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' " violated the First Amendment. *Id.* at 2541. The Court maintained that prior decisions that had held that certain categories of expressions are "not within the area of constitutionally protected speech," or that the "protection of the First Amendment does not extend" to certain kinds of speech, were not meant to be taken literally. *Id.* at 2543. The Court reasoned that these prior cases did not mean that certain categories of speech are "entirely invisible to the Constitution," but rather that certain "areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content.*" *Id.* (emphasis added).

90 *Id.* at 2564 (Stevens, J., concurring).

91 *Id.* at 2551 (White, J., concurring).

the Supreme Court has unequivocally stated that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may be lawfully imposed, if at all, only when narrowly tailored to a state interest of the highest order."[92] The state interest in protecting against invasions of privacy is extremely strong. Without recognized privacy interests, individual autonomy and personal liberty—essential elements to any concept of liberty—are threatened.

The state interest in protecting against unwarranted disclosures of sexual orientation is manifold. First, there is the enormous personal cost to the victim, whose personal relationships may be irreparably harmed[93] and who is thrust unwillingly into the full glare of public bigotry.[94] The state has a real interest in preventing such disruptive invasions of privacy where there is little corresponding benefit to the public. Additionally, such invasions present a real danger to personal liberty, for they take from the individual the "ability independently to define one's identity, that is central to any concept of liberty."[95]

Second, the state has an interest in attracting qualified people to public service.[96] A press that focuses on the sensational and callously intrudes into obviously private areas abuses its role in a democracy. Such abuses "damage the political fabric . . . by cheapening public discourse . . . , breeding cynicism, and discouraging able people from seeking public office."[97]

The state also has an interest in safeguarding the credibility of the press and in preserving the special role the press plays in insuring the integrity of the political process. When the media engages in a relentless pursuit of scandal, it makes it that much harder for a reader or listener to separate news from entertainment, truth from sensationalism, or fact from rumor.[98] As a re-

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92 Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (Scalia, J., concurring).

93 For a discussion of considerations an individual will likely weigh in deciding whether or not he wishes to publicly acknowledge his sexual orientation, see *supra* note 44.

94 See *supra* note 67, for a discussion of the type of discrimination gays and lesbians face in society.

95 Roberts v. United States Jaycees, 468 U.S. 609, 619 (1984). It is generally accepted that "the gender of those to whom one is attracted is a function of personality and identity." *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1511 (1989) [hereinafter *Developments*]. See also *supra* notes 38-42 and accompanying text, for a discussion of the definition of homosexuality.

96 *See infra* note 121 and accompanying text, for a discussion of public figures and media coverage of their activities.

97 SABATO, *supra* note 3, at 23.

98 For example, press accounts of the recent House of Representatives bank affair were inflamatory and misleading. Brooks Jackson of Cable News Network (CNN) ob-

sult, public confidence in the media is significantly lessened.[99] Journalistic excesses tend to "undermine the very credibility of the news profession. This . . . inevitably menaces press freedom and . . . the democratic system that relies greatly on the check provided by the news media."[100]

Finally, the press plays a vital role in helping to create an informed citizenry. The public has a right to be informed about candidates and their views on important political questions. Unfortunately, the media frenzy spawned by sexual scandal means sparse coverage is devoted to an informed exploration of the more significant issues facing the electorate. An exaggerated focus on a candidate's alleged sexual indiscretions, no matter how minor or unsubstantiated, makes it that much harder for the public "to judge a candidate on important questions—his or her stability, judgment, decency, intelligence, ethics, strength of will, experience, [and] truthfulness."[101] Under these circumstances, the press fails miserably in its appointed function. Such distorted coverage deprives the public of more substantive and accurate information needed for educated decision-making.[102]

Moreover, such abuses lead to a sense of defeatism on the part of the public, which manifests itself in the form of voter apathy. A recent Cable News Network "CNN" Special Report predicted that

> [f]or the first time in our history, less than half of those Ameri-

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served that nearly all reports of the incident used language conveying the impression that the Congressmen involved were engaged in criminal activities.

> [The press] described the affair as a scandal. But, in reality, the so-called House Bank wasn't even a bank, just House members covering each other's checks. Nobody was cheated; nobody's taxpayer money misused . . . . Inflammatory reporting gave the public a false picture. In one poll, 63 percent said they thought the House bank drafts were illegal; that the Congressmen were guilty of a crime. Not true.

The Nation's Agenda: A Government for the People (CNN television broadcast, Oct. 4, 1992) [hereinafter CNN].

99 A random-sample telephone survey of 506 adults, conducted on June 1, 1989, by Yankelovich Clancy Shulman for *Time* and *CNN* showed that "[w]hen a random sample of Americans chose the professional group with 'the lowest ethical standards,' journalists placed second, just a percentage point below lawyers. Even congressmen were judged less harshly." SABATO, *supra* note 3, at 202.

100 *Id.* at 23-24.

101 Morrow, *supra* note 2, at 15. This was vividly illustrated by the 1992 Democratic primary in New Hampshire. While the press concentrated on investigating and reporting Gennifer Flower's alleged assignations with front-runner Bill Clinton, the other democratic candidates were virtually ignored. As a result, just about every issue confronting the candidates as they headed into the election year went unexamined. William A. Henry III, *Handling the Clinton Affair*, TIME, Feb. 10, 1992, at 28, 29.

102 A study commissioned by CNN in a recent Arkansas Congressional primary found that less than 40 percent of the newspaper coverage of the race concerned the issues. The rest was about tactics and the mudslinging. CNN, *supra* note 98.

> cans eligible [to] vote will bother to cast their ballots in this presidential election. When fewer than half of the people who can vote do vote, it's no longer government by the people, it's government by a few people. Why are so few people voting?[103]

The report pointed to a number of factors behind the public's growing disenchantment with American politics. "An increasingly tabloid news media" was listed as a major factor.[104] While the media does not bear sole responsibility for this unhappy state of affairs, its lack of restraint contributes to a situation that places our very liberties at risk. For if "only a few people vote, a few people want to lead, a few people care to govern, this democracy cannot survive."[105]

Therefore, when a disclosure invades important privacy interests, it is clear that, under some circumstances, imposing liability on a media defendant for a truthful disclosure will advance compelling state interests.

B. *Fault*

Because of the important First Amendment rights at stake, the standard of fault for imposing liability on media defendants for the disclosure of truthful information can be no less stringent than that imposed for defamatory falsehoods.[106] It has long been established that, at least where public figures are concerned, liability cannot be imposed on the media for publishing falsehoods absent a showing of actual malice.[107] Victims of outings are invariably public figures, and thus liability can be imposed only upon a showing that the publisher invaded the plaintiff's privacy "with reckless disregard for the fact that reasonable men would find the

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[103] *Id.* As it turned out, 55% of the eligible adults voted in the November 1992 presidential election. David C. Savage, *High Voter Turnout Reverses 32-Year Slide*, L.A. TIMES, Nov. 5, 1992, at 36. Experts attributed the record turnout to worry over the economy, a desire to defeat President Bush, concern over abortion rights, and the chance to vote for a "genuine political outsider in Texas billionaire Ross Perot." *Id.*

[104] *Id.* The report also attributed blame to partisan politics, special interests, the federal government's bureaucracy, and political campaign mudslinging.

[105] *Id.* at 8.

[106] *See* Florida Star v. B.J.F., 491 U.S. 524, 539 (1989).

[107] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the Court held that a public official can recover damages for a defamatory falsehood only upon a showing that "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. The Court's holding was prompted by a concern that, without such a rule, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Such a deterrence would "[dampen] the vigor and [limit] the variety of public debate." *Id.* at 279.

invasion highly offensive."[108]

Accordingly, once a plaintiff has proven that all three elements of the private-facts tort have been satisfied, he must then demonstrate that the defendant published a disclosure with malice or with a conscious disregard of his rights. Ordinarily, a media defendant would always have reason to know whether a person prefers to keep her sexual orientation private, and could easily discover whether the plaintiff had waived her right to privacy either expressly or by her conduct.[109] Consequently, establishing malice in the context of an outing is not difficult once a plaintiff shows the three elements of the private facts tort have been satisfied. A defendant can hardly argue he was unaware of the private and offensive nature of the information he disclosed and, absent some newsworthy purpose for printing the information, publication of the facts amounts to reckless or knowing disregard of the plaintiff's rights.

C. *The Means Employed*

Finally, once it is established that the state is seeking to advance a compelling interest when it places restrictions on speech, the state must then demonstrate that the means employed are "reasonably necessary" to achieve that compelling interest.[110] Outings are generally based on information known only by private individuals. Because of the uniquely private nature of these facts, the state has little control over their dissemination. This is

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[108] Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 44 (Cal. 1971). However, if the plaintiff is a purely private figure, then liability can be imposed upon a showing of ordinary negligence. *Florida Star*, 491 U.S. at 539.

[109] Civil Rights Attorney Thomas Stoddard argues that sexuality should generally be off limits to the public unless "there is an obvious or significant connection to a person's job performance or fitness for office." Thomas Stoddard, *Public People's Private Lives*, NEWSDAY, Mar. 22, 1989, at 64. But, Stoddard suggests that a person under some circumstances can be deemed to have "waived" his or her rights to privacy on a topic. He gives as an example a famous New York politician who had declared in an interview, "I am heterosexual." In this situation, the politician himself brought the issue of his sexuality into the public arena, and thus the veracity of his statement became a genuine issue properly before the public. *Id.*

[110] R.A.V v. City of St. Paul, 112 S. Ct. 2538 (1992). The majority opinion in *R.A.V* held that "the dispositive question in this case . . . is whether content discrimination is '*reasonably necessary*' to achieve St. Paul's compelling interest." *Id.* at 2550 (emphasis added). Justice White took issue with the majority's assertion that to survive a First Amendment attack, a state need merely demonstrate that a regulation is "reasonably necessary" to achieve a compelling state interest rather than comply with a stricter standard requiring the state to make a showing that the regulation was "necessary." Justices Blackmun, O'Connor and Stevens joined in that opinion, which criticized the majority's holding as a clear break with precedent and "a general renunciation of strict scrunity review, a fundamental tool of First Amendment analysis." *Id.* at 2554 (White, J., concurring).

understandable, for any attempt by a state to monitor or restrict private conversations and activities could only be viewed with alarm. Likewise, any attempt to impose statutory restrictions on the reporting of news that categorically denies the press any discretion in deciding which items are of legitimate interest to the public would be equally alarming. The private-facts tort presents the least invasive means of protecting the important privacy interests embodied in the private-facts tort. It operates to curtail press freedom only in the narrowest of circumstances, while providing broad protection to the press under the newsworthiness defense.

Thus, it appears a suit based on outing would survive an attack made on the constitutionality of the private-facts tort. The state has a strong interest in protecting against violations of a citizen's reasonable expectations of privacy where the information disclosed is of no legitimate interest to the public. Hence, if a plaintiff is able to demonstrate that a disclosure of homosexuality constitutes a cause of action under the private-facts tort, there is no constitutional bar to recovery.

IV. THE NEWSWORTHINESS DEFENSE

Much of the controversy surrounding the private-facts tort centers on the vague definition of newsworthiness. A closer examination of the newsworthiness defense reveals that what some commentators refer to as "vagueness" is really a reflection of the fact that newsworthiness can only be determined by an informed weighing of the competing interests involved and not by a resort to hard, inflexible rules. Unfortunately, a certain amount of uncertainty is inevitable in the private-facts tort, since "[a]ny rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case."[111] However, vague standards and uncertainty are not unknown in tort law. The standard of the "reasonable man," for example, is also rife with uncertainty. Yet, vagueness is more troubling in the private-facts tort because it may tempt the media to "skirt 'trouble' by completely avoiding any possibly sensitive area,"[112] rather than risk incurring a significant liability.

One of the central purposes behind the First Amendment is to allow for a full airing of "all issues about which information is

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[111] Warren & Brandeis, *supra* note 20, at 215-16.

[112] Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions On Reporting of Fact*, 16 STAN. L. REV. 107, 142 (1963).

needed . . . to enable the members of society to cope with the exigencies of their period."[113] Proponents of outing claim that by revealing the hidden homosexuality of certain public figures the public will become more aware of the AIDS epidemic and the problems gays and lesbians face in society. Clearly, these are important concerns in today's world, but it is doubtful that a media outing advances to any significant degree an understanding of those issues.

An individual's right to privacy and society's interest in a free press are both interests that "are plainly rooted in the traditions and significant concerns of our society."[114] When the public's right to know and an individual's right to privacy collide, two equally strong interests are at stake. Both are essential in a democracy. Deciding which interest shall prevail involves a balancing of those interests. J. Skelly Wright cautioned that too often the interest of an individual in his privacy is wrongly balanced against the interest of society in the free flow of information, unfairly weighing the equation in favor of the latter.

> What we must weigh is *society's* interest in preserving each individual's right to privacy . . . against *society's* interest in affording each individual full disclosure and commentary. Just as society as a whole is benefited by each individual being knowledgeable, intelligent, and even sensitive and understanding, so too society has a great stake in protecting each individual's reputation and privacy.[115]

Therefore, a suit based on an allegation of homosexuality must weigh society's interest in protecting an individual's right to keep his sexual orientation private against society's interest in knowing these particular facts about that individual.

A. *The Public/Private Distinction*

Victims of outings thus far have all been public figures to some extent — either politicians, celebrities, or persons influential in their fields. As noted earlier, public figures are thought to enjoy less privacy than private individuals.[116] As Alfred Hill observed, with public figures "it is extraordinarily difficult to say where news ends and gossip begins."[117] A closer examination of

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[113] Thornhill v. Alabama, 310 U.S. 88, 102 (1940).
[114] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).
[115] Wright, *supra* note 25, at 634.
[116] See *supra* text accompanying note 46, for Prosser's explanation as to why public figures are afforded less privacy than private figures.
[117] Hill, *supra* note 89, at 1222.

a politican's life is acceptable because voters need such information to make judgments about a candidate's character and ability.[118] As for celebrities, they give up some of their right to lead a private life by inviting others to make them objects of adulation and emulation.[119]

However, there is some authority and strong justification for the notion of a limited public figure. For, as one court noted:

> [I]t does not necessarily follow that it is in the public interest to know private facts about the persons who engage in [some area of] activity. The fact that they engage in an activity in which the public can be said to have a genreal interest does not render every aspect of their lives subject to public disclosure. Most persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.[120]

To insist that by embarking on a public career one waives all claims to privacy is to extract too great a price for public service—a price that only those absolutely obsessed with power would be willing to pay.[121] The public/private distinction is, in

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[118] For instance, when a politician who parades himself as a devoted family man is revealed as a flagrant philanderer, his integrity and trust-worthiness are called into question. Issues of character also arise if the candidate or office holder indulges in sexual activity that is compulsive, or indiscreet, or if he has affairs with staff members or lobbyists in which elements of coercion or conflict of interest clearly exist. But even in those instances, it is hard to see how the public benefits from knowing all of the intimate sexual details. Questions of character can be resolved without any resort to graphic blow-by-blow descriptions of those incidents.

[119] Many celebrities actively seek media attention. Through their agents, they often release information about their private lives to the press, hoping to enhance an image they wish to project. By so doing, they place those areas of their life in the public sphere, and they cannot complain if subsequent investigation reveals they have misled the public.

[120] Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). This notion of a limited public figure is borrowed from the tort of defamation, which recognizes that, except for unusual circumstances, "an individual should not be deemed a public personality for all aspects of his life." Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974). As invasion of privacy claims are relatively new causes of action, it is useful to look to the more established tort of defamation for guidance when imposing liability for speech.

[121] One commentator has observed that

> [a]n individual contemplating a run for office must now accept the possibility of almost unlimited intrusion into his or her financial and personal life. Every investment made, every affair conducted, every private sin committed from college years to the present may one day wind up in a headline or on television. For a reasonably sane and moderately sensitive person, this is a daunting realization, with potentially hurtful results not just for the candidate but for his or her immediate family and friends. To have achieved a nongov-

reality, simply a presumption that private facts about a public person are often of legitimate interest to the public in evaluating whether that person is deserving of the status or office he or she seeks.

B. *Defining Newsworthiness in an Outing*

There are clearly instances where a public person's sexual orientation is pertinent to an issue being addressed. Disclosures of sexual orientation are of legitimate public interest when they are essential to an understanding of a story,[122] or where sexuality relates to an abuse of position,[123] hypocrisy,[124] compulsive or indiscreet behavior,[125] or some other aspect that affects the party's fitness for the status or office he holds.[126]

Hence, the real controversy with regard to the newsworthy defense is not over those who, through their own actions, have caused attention to be drawn to their homosexuality,[127] but rather over those who guard their privacy and are guilty merely of keeping their sexual preference private. Proponents of outing do not recognize this distinction. They argue that powerful gays and lesbians have an inherent obligation to their less powerful brethren. "That obligation is, simply put, to come out."[128] In

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> ernmental position of respect and honor in one's community is a source of pride and security, and the risk that it could all be destroyed by an unremitting and distorted assault on one's faults and foibles cannot be taken lightly. American society today is losing the services of many exceptionally talented individuals who could make outstanding contributions to the commonweal, but who understandably will not subject themselves and their loved ones to abusive, intrusive press coverage.

SABATO, *supra* note 3, at 211.

[122] For instance, R. Foster Winans's homosexuality was disclosed in the course of reporting on his prosecution for insider trading. Winans was a former *Wall Street Journal* reporter who was convicted of disclosing inside information he gained in the course of writing his influential *Heard on the Street* column to others who traded on the information. One of those who allegedly profited from the insider information was Winans' gay lover. Thus, Winans's sexual orientation was essential in understanding his motivation for passing on the inside information. Gup, *supra* note 14, at 32.

[123] For instance, the congressional censure of Gerry Studds for having sex with a teen-aged male page was a newsworthy event. Krier, *supra* note 15, at E23.

[124] The late Roy Cohn and Terry Dolan participated in gay night life, but by day they aligned themselves with those who espoused viciously homophobic rhetoric. Clarence Page, *Should the Closet Be Forced Open*, CHI. TRIB., May 6, 1990, at 3. "Claims to privacy lose their force when individuals attempt to place greater limits on others' private conduct than they accept for themselves." Gup, *supra* note 14, at 31.

[125] One example would be Representative Barney Frank's relationship with a male prostitute. Krier, *supra* note 15, at E1.

[126] Examples include putting a nonworking lover on the public payroll, hiring or promoting on the basis of sexual appeal, and sexually harassing subordinates.

[127] See *supra* notes 122-26 and accompanying text for a discussion of the type of situtation in which an individual's sexual orientation is properly before the public.

[128] Gabriel Rotelle, *Tactical Considerations*, OUTWEEK, May 16, 1990, at 52.

other words, at least for the famous, quiet assimilation within the heterosexual community is no longer acceptable. Silence is equated with hypocrisy and cowardliness that must be exposed for the good of the entire homosexual community. At particular risk for exposure are politicians who have angered gay and lesbian activists by "incorrect" voting.[129] But a victim is not necessarily targeted because he or she is guilty of some particular transgression. Under the guise of providing role models for the gay or lesbian community, one can become a target simply because one has attained some prominence or success in a chosen field. In these situations, outing comes perilously close to being a form of blackmail, retaliation, or psychological terrorism reminiscent of the McCarthy era.[130]

In deciding when the press has a right to invade the private life of a public or semi-public figure, this Note recommends an approach similar to the one taken by some California courts. These courts employ a three-part test for determining newsworthiness. A court will consider the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety.[131]

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[129] Some groups have a low threshold for what triggers an outing. Celebrities can also be adjudged guilty of political incorrectness. Jodie Foster was outed after she starred in the movie THE SILENCE OF THE LAMBS (Orion 1991), which some felt denigrated homosexuals by its depiction of a serial killer transvestite. Heller, *supra* note 67, at 12.

[130] In the 1950's, J. Edgar Hoover employed gossip columnist Walter Winchell to "out" communists in the 1950s. Alexander Cockburn, *Beat the Devil: The Old In/Out*, THE NATION, Aug. 26, 1991, at 220. See also *infra* note 160, for one writer's comparision of tactics used by outers with tacitics employed by totalitarian governments to stifle dissent.

Where a defendant's disclosure of private facts was motivated by malice, some courts have expressed a willingness to take this into account in determining under what circumstances liability for truthful disclosures should be imposed. *See* Taylor v. K.T.V.B, Inc., 525 P.2d 984, 987-88 (Idaho 1974) (holding that if a television station was found to have acted with malice in broadcasting a film clip showing plaintiff being arrested and taken from his home in the nude, protection under the newsworthiness defense was forfeited); Roshto v. Herbert, 439 So. 2d 428, 430 (La. 1983) (no liability for republishing, as part of a regular feature, the originial front page of twenty-five year old edition of the paper that contained an article about the plaintiff's conviction for cattle theft, where no malice was shown); Anderson v. Fisher Broadcasting Co., Inc., 712 P.2d 803, 814 (Or. 1986) (holding that the disclosure of private facts will not give rise to liability "unless the manner or purpose of defendant's conduct is wrongful in some respect apart from causing the plaintiff's hurt feelings.")

[131] Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (1983). In *Diaz*, the court determined that the fact that Diaz was a transsexual did not adversely reflect on her honesty or judgment. *Id.* That determination meant that the defendant could not argue that the disclosure was relevant to an evaluation of Diaz's character. It is clear that in reaching this conclusion, the court looked primarily to the tenor of the article, whose sole purpose was seemingly designed to ridicule Diaz. See *supra* note 64 for a description of the facts in *Diaz*. In balancing the interests involved, the court found there was evidence to support the jury's finding that, because the public arena she entered was

Accordingly, before a court can determine the extent to which an individual has voluntarily acceded to a position of public notoriety, it must first examine the context in which a disclosure of homosexuality is made. Where the disclosure is related to criminal wrongdoing or misconduct in public office, the inquiry ends. In those instances, the individual has clearly thrust himself in the public eye through his own actions and relinquishes any claim to privacy on any matter related to his wrongdoing.

Likewise, where a disclosure of homosexuality relates to compulsive or indiscreet behavior, the status of the individual in society becomes relevant. Where such behavior calls into question the individual's fitness for the position or status accorded her, such disclosures are of genuine interest to the public. Sexual orientation is similarly at issue when an individual engages in hateful rhetoric designed to excite prejudice against homosexuals. There, the press would be performing a legitimate function in exposing any contradiction between an individual's public stance and private conduct.

Once it is clear that an individual has not voluntarily called public attention to his homosexuality, the depth of the intrusion into that individual's private life must be measured. In most instances, an individual will have no trouble demonstrating the extent to which such disclosures interfered with family and personal relationships or disrupted a career. In assessing the depth of the intrusion, a court should not treat the fact that an individual may have disclosed his homosexuality to selected groups or participated publicly in gay marches or rallies as incontrovertible evidence that the facts disclosed were not private.

Gays and lesbians who participate in homosexual marches and rallies are still entitled to a reasonable expectation of privacy with regard to their sexual orientation; their participation in such activities amounts only to an announcement that they wish to lend their support to a certain cause. If a private person later attracts public attention for a reason unrelated to his sexuality, it does not necessarily follow that he waived his right to privacy by openly attending public rallies or marches. Nor does the fact that an individual has disclosed his homosexuality to others mean that any subsequent mass disclosure would simply be "giv[ing] fur-

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concededly small, Diaz was not a public figure with regard to the private aspects of her life. *See also* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 43 (Ca. 1971); Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665, 669-70 (1984).

ther publicity to matters left . . . open to the eye of the public."[132]

In *Sipple v. Chronicle Publishing Co.*,[133] the court had occasion to consider this issue. Oliver Sipple became a national hero on September 22, 1975, when he prevented a deranged woman, Sara Jane Moore, from shooting then-President Gerald Ford. Sipple had been wounded twice in Vietnam and suffered from both psychological and physical disabilities.[134] Following his release from the marines in 1970, Sipple moved to San Francisco, many miles from his home state of Michigan.[135] There, he was an active participant in the movement for gay civil rights. When Sipple's heroism catapulted him to fame, gay groups, intent on changing the public perception of homosexuals, began to clamor for Bay Area newspapers and broadcast stations to acknowledge that Sipple was gay.[136]

Sipple pleaded with the media to respect his privacy, arguing that his sexual orientation had nothing at all to do with his saving the President's life.[137] His pleas went unheeded. Two days after he first emerged into the national spotlight, his family and the country learned simultaneously that he was gay. Sipple subsequently brought suit, alleging that the news media had invaded his privacy and estranged him from his family with their disclosures of homosexuality.[138] The court ruled, however, that the fact of Sipple's homosexuality was already in the public domain and the articles in question did no more than give further publicity to

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[132] *Sipple*, 201 Cal. Rptr. at 669.

[133] *Id.* at 665.

[134] Dan Morain, *Sorrow Trailed A Veteran Who Saved a President and Then Was Cast in an Unwanted Spotlight*, L.A. TIMES, Feb. 13, 1989, § 5, at 1, 6. Sipple was dyslexic, a high school dropout and addicted to drink. He had been wounded twice in Vietnam and supported himself with a 100% veterans' disability. At his death, the coroner's report noted that he had been diagnosed as a paranoid schizophrenic. *Id.*

[135] *Id.*

[136] Fred W. Friendly, *Gays, Privacy and a Free Press*, WASH. POST, Apr. 8, 1990, at B7. Gay groups were anxious to claim this square-jawed ex-marine as one of their own. Sipple's close friend, noted gay activist Harvey Milk, proclaimed his pride in Sipple's courage and expressed the hope that it would "help break the stereotype of homosexuals." *Id.* When the White House did not immediately thank Sipple, there was speculation in the gay community that Sipple was being ignored because he was gay.

[137] *Id.*

[138] Morain, *supra* note 134, at 1. Sipple's mother was so harassed by her neighbors that she eventually stopped speaking to her son. Friendly, *supra* note 136, at B7. His father disowned him, and at his mother's death, he requested that Sipple not visit the funeral home or cemetery while the father was there. Morain, *supra* note 134, at 6.

Sipple complained that the disclosure also increased his nervousness and dependency on alcohol. He claimed he often felt suicidal and thought people were following him. *Id.* at 5. In January of 1989, a friend, worried that he had not seen or heard from Sipple in two weeks, found him sprawled dead in his bed amid the squalor of his cluttered apartment, surrounded by bottles of cheap bourbon.

matters which Sipple had left open to the public eye.[139]

The court based its holding on the fact that Sipple had spent much time in well-known gay sections of San Francisco, that he had frequented gay bars and other homosexual gatherings in both San Francisco and other cities, that he had marched in gay parades, that his friendship with noted gay activist Harvey Milk was well-known and publicized in gay newspapers, and that he often frankly admitted he was gay.[140] Admittedly, had Sipple been a public figure at the time he engaged in these activities, it would not be unreasonable to conclude that Sipple had placed the issue of his sexual orientation in the public domain by his frank admissions and very public participation in the gay community.

However, the same cannot be said of a relatively obscure individual who has no reason to believe that participation in gay marches and friendships with prominent gays will be deemed to cede his right to keep his sexual orientation private. Sipple had no reason to envision that his activities in San Francisco gay life would result in nationwide exposure of his sexual orientation. At the time, there was a tacit understanding in the gay community that one did not reveal a fellow homosexual's identity.[141] Nor did his actions in saving the President's life automatically mean he could no longer claim his sexual orientation as private.[142]

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139 *Sipple*, 201 Cal. Rptr. at 669.

140 *Id.*

141 Tuller, *supra* note 7, at A9. *See generally* Article, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 117-22 (1990).

142 Sipple's heroism made him a public figure. Prosser tells us that those who have not sought publicity but nevertheless get "[c]aught up and entangled in [the] web of news and public interest" lose some part of their right to privacy. KEETON ET AL., *supra* note 17, § 117 at 861. He explained that "[s]uch individuals [become] public figures for a season; and until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains, and victims." *Id.* at 861-62 (quoting from RESTATEMENT (FIRST) ON TORTS § 867 cmt. f (1939)).

Sipple's status as a public figure, however, would not render every aspect of his life public. See *supra* notes 120-21 and accompanying text for a discussion of the privacy interests held by limited public figures. In this instance, though, the court found that the disclosure of Sipple's homosexuality was "prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question of whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals." *Sipple*, 201 Cal. Rptr. at 670.

This writer believes the issue of newsworthiness was wrongly decided in *Sipple*. In reality, Sipple was an individual beset with problems. *See supra* note 134. Those who, in order to dispel the perception that homosexuals are weak and ineffectual, wished to focus upon Sipple's status as an ex-marine who had been wounded in combat, while ignoring the fact that Sipple was an alcoholic suffering from a mental disability, were clearly attempting to manipulate the press into presenting an unbalanced picture. This writer also views with suspicion the newspapers' assertion that revealing Sipple's sexual

In reaching its conclusion, the court paid little attention to the distinction between participation in public causes and a disclosure of sexual orientation. Sipple's public participation in gay causes meant that he could not possibly claim his activities in that regard were private. That participation, however, did not cede his right to privacy about his sexual orientation.

His admissions of homosexuality to fellow gays may or may not have amounted to a waiver of his right to privacy. The fact that a person has disclosed information to select individuals does not necessarily mean such disclosures have fallen into the public domain.[143] The *Sipple* court did not specify to which individuals Sipple had made his disclosures of homosexuality, nor did it refer to the circumstances surrounding those disclosures. However, the court's general discussion of Sipple's activities seemed to imply that mere participation in gay or lesbian events may amount to a waiver of the right of privacy regarding one's sexuality. Such reasoning is dangerous because it would allow for the exposure of one's intimate facts simply because one publicly expressed a particular point of view.[144]

Finally, once it has been established that there has been a significant intrusion into an individual's personal life unrelated to any wrongdoing on the part of that individual, a court must weigh the social value of a disclosure of homosexuality to the

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orientation was necessary for an examination of whether the White House entertained a discriminatory attitude toward homosexuals. There were only two days between the assassination attempt and the disclosure of Sipple's homosexuality—too brief a time to come to any firm conclusions about the reasons for the delay in issuing a public acknowledgment of gratitude to Sipple. At that point, the delay might just as reasonably have been due to the completion of a background check on Sipple in order to be certain that he was not in any way connected with the assassination attempt. Given the invasive nature of the disclosure, Sipple was entitled to at least temporary respite from unwanted publicity about his private life until there was a more solid basis for the belief that Sipple was being ignored because he was homosexual.

It is this writer's belief that the newspapers here were irresponsible and driven by a desire to beat their competitors to a story. Accordingly, their claim that a disclosure of Sipple's homosexuality was necessary in order to present an "important political question" to the public was not supported by the facts. *Sipple*, 201 Cal. Rptr. at 670.

[143] At least one court has held that "[t]alking to selected individuals does not render private information public." Times-Mirror Co. v. Superior Court (Doe), 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988). In *Doe*, the defendant claimed that the plaintiff, by telling selected neighbors, friends, and family members about her discovery of a murder victim, made her role as discoverer of the corpse public. The court disagreed, holding that "we cannot say Doe rendered otherwise private information public by . . . seeking solace from friends and relatives." *Id.*

[144] For example, simply participating in a rally to support abortion rights would not give the press a right to publicize the fact that an individual had undergone an abortion in the past. Allowing such disclosures solely on the basis of participation in a public cause would impossibly hamper public discussion of sensitive subjects, and amount to imposing penalties for expressing particular points of view.

public against the harm done to an individual's expectations of privacy. A defendant who argues that a disclosure was a matter of legitimate public interest must demonstrate more than a tenuous link to a relevant public issue when the disclosure causes a significant invasion to a recognized privacy interest. Where it is highly questionable that a disclosure of a particular individual's sexuality will have more than a minimal impact in forming public attitudes or shedding light on a controversy, society's interest in preserving an individual's privacy clearly outweighs the public's need to know an individual's sexual orientation.[145]

The recent outing of Assistant Secretary of Defense Pete Williams illustrates the type of situation in which society's interest in preserving an individual's right to privacy may outweigh the press's right to disclose an individual's sexual orientation. In his role as Pentagon spokesman, Williams was familiar with the military's policy on gays—a policy he had no real part in implementing or enforcing. Gay and lesbian groups faulted Williams for never once using his position to intercede on behalf of gay and lesbian soldiers. Williams's response to questions about his own sexuality was that he was paid to discuss government policy and not his personal life.[146] This angered many who felt his "silent complicity" served to encourage the continuation of the military's repressive policies towards homosexuals in the armed forces.[147]

There was nothing new about these allegations. Rumors of Williams' homosexuality had been hinted at in Washington circles for years.[148] Those determined to embarrass the Bush Administration for its ban on gays and lesbians saw a way to use

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[145] See *supra* notes 44 and 67 for a discussion of the factors an individual will weigh in deciding whether he or she wishes to publicly disclose sexual preferences. See also *supra* notes 122-26 and accompanying text for examples in which disclosures of sexual orientation are clearly newsworthy.

[146] Firestone, *supra* note 16, at 17.

[147] Even those in the gay community who normally oppose outing felt that Williams's silence was indefensible in the light of the military's relentless persecution of suspected homosexuals within their ranks. See Jane Gross, *For Gay Soldiers and Sailors, Lives of Secrecy and Despair*, N.Y. TIMES, Apr. 10, 1990, at A1. Ms. Gross described how soldiers suspected of homosexuality were subjected to grueling interrogations at the hands of the military:

> [T]hose under suspicion of homosexuality suffer bright lights in their eyes and sometimes handcuffs on their wrists, warnings that their parents will be informed or their hometown newspapers called, threats that their stripes will be torn off and they will [be] pushed through the gates of the base before a jeering crowd . . . . Several people who had children said they had been threatened with loss of custody. A few reported verbal and physical abuse.

Id. at D20. *See also* Nancy Gibbs, *Marching Out of the Closet*, TIME, Aug. 19, 1991, at 14; David S. Jackson, *I Just Don't Want to Go*, TIME, July 6, 1992, at 62.

[148] Cassidy, *supra* note 16, at 19.

these rumors to advance their cause. The *Nation* article that outed Williams pointed to no misconduct or incompetence on his part. In fact, an editorial that accompanied the piece pointed to just the opposite:

> We do not want to ruin Pete Williams's life. We are asking Pete Williams to confirm what is true: that he has security clearance on the highest level; that he is an excellent and effective spokesman; that he has the confidence of the President, the secretary of defense, and his co-workers; and that his sexuality has not interfered with his position. Except when he hides it.[149]

Williams's status as a public figure did not mean that he had given up all claims to privacy.[150] Williams guarded his privacy and did not call attention to his private life. The article that outed Williams had little to substantiate its claims: its main piece of evidence was that several people had reported that in the past Williams had often visited a popular gay bar. There was no mention of compulsive or indiscreet behavior.

Those who outed Williams readily admitted that his alleged homosexuality had no bearing on his ability to do his job. It is also highly unlikely that his superiors were ignorant of his sexual orientation when he was chosen for his position. As Assistant Secretary of Defense, Williams would have gone through an exhaustive security check that would have revealed his sexual orientation. Since Williams was a civilian employee, the military ban against homosexuals did not apply.[151] Therefore, Williams was not in danger of losing his job because of his sexual orientation, nor was a scandal brewing because of his sexual behavior. Consequently, Williams clearly did not put his sexual orientation at issue either voluntarily or through his own misconduct.

Sexual identity is essentially a private matter. Pete Williams chose not to disclose his sexual orientation. There can be no doubt that the publication of these allegations had a profound and disruptive effect on his personal and professional life, and represented a monumental intrusion into his privacy.[152] The pri-

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149 Cockburn, *supra* note 130, at 220.

150 See *supra* notes 116-21 and accompanying text for a discussion of the distinction between public and private figures with regard to claims of privacy.

151 For a discussion of civil service policy regarding gays and lesbians, see *Developments, supra* note 95, at 1556-59. At present, a civil servant may not be dismissed solely on the basis of sexual orientation. *Id.* at 1556.

152 While Defense Secretary Richard Cheney said he would not ask for Williams' resignation, senior Pentagon officials admitted great embarrassment over the incident. Williams' future is now unclear. Cassidy, *supra* note 16, at 19.

vate-facts tort was designed to protect against just such intrusions. The newsworthiness defense to disclosures of homosexuality should be available only where a clear link exists between the official's homosexuality and the issue at hand. Absent such a link, the public is ill-served by such disclosures.

There can be no doubt that the military's policy on gays is a matter of serious public concern. In 1990 alone, the United States spent twenty-seven million dollars to find replacements for gays and lesbians forced out of the uniformed services simply because of their sexual preference.[153] A 1992 report authored by the General Accounting Office (GAO) stated that major psychiatric and psychological organizations disagree with the Department of Defense's policy. These organizations criticized the policy as factually "unsupported, unfair and counterproductive; [having] no validity according to current scientific research and opinions; and [apparently] based on the same type of prejudicial suppositions that were used to discriminate against blacks and women before these policies were changed."[154]

As a result of numerous studies, the Department of Defense (DOD) has been forced to concede that concerns of homosexuals posing an increased security risk are unfounded. Still, the DOD continued to defend its ban by arguing "that allowing homosexuals to serve on ships or in the trenches would undermine the services' order and morale."[155] Until the Clinton Administration reached an agreement in January of 1993 with military leaders and Senate Armed Services Committe Chairman, Sam Nunn, the DOD had successfully resisted any efforts to modify its ban on homosexuals serving in the armed forces.[156]

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[153] John Lancaster, *Hill Study Challenges Military's Exclusion of Gays*, WASH. POST, June 19, 1992, at A1.

[154] *Id.* In January of 1993, U.S. District Judge Terry Hatter Jr., in the highly publicized case of Navy Petty Officer, Keith Meinhold, ruled that the DOD's policy of banning gays and lesbians from service merely on status, and not on conduct, violated the Equal Protection Clause of the Fifth Amendment. Meinhold v. U.S. Dept. of Defense, 1993 WL 15899 *1, *4 (D. Cal. Jan. 29, 1993). He ruled that the Navy had failed to establish that its ban against gays was "rationally related to its goals of maintaining discipline, good order and morale; fostering mutual trust and confidence among servicemembers; the need to recruit and retain servicemembers; and maintaining public acceptability of the Navy." *Id.* at *2. Judge Hatter pointed to numerous reports and studies commissioned by the government, all of which had concluded that there was no data to support the contention that the presence of homosexuals within the armed ranks would adversely affect the military mission. Finding that the DOD's policy was "based on cultural myths and false stereotypes," the court ordered Meinhold reinstated and permanently enjoined the DOD from "discharging or denying enlistment to any person based on sexual orientation in the absence of sexual conduct which interferes with the military mission of the armed forces of the United States." *Id.* at *4.

[155] Gibbs, *supra* note 147, at 15.

[156] Paul Quinn-Judge, *Clinton Acts to Modify Military's Ban on Gays*, BOSTON GLOBE, Jan.

Consequently, there is little validity to the argument that outing Williams was necessary to demonstrate the irrationality of the DOD's policy on gays and lesbians or that the disclosure would further highlight the unfairness of the policy. Criticism and opposition to the policy already existed and had been reported extensively.[157] Invading Williams's privacy was likely to have only a minimal effect on the efforts to amass support for a repeal of the policy. A far more compelling argument for rescinding the ban already existed in the scores of servicemen and women who had been dismissed, despite outstanding service records and years of service, simply because they were gay or lesbian.[158]

There are those who insist that Williams had a moral duty not to stand by silently as fellow gays and lesbians were drummed out of the armed forces solely because of their sexual orientation. But even if such a moral duty existed, it is not at all clear that Williams had to satisfy this duty by publicly condemning his superiors for what many believe are repressive policies. There is evidence that even if Williams had been working quietly behind the scenes to dissuade the military from its policy of discriminating against gays, he would not have been spared this intrusion.[159] This suggests that as long as one can point to a good

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30, 1993, at 1. The agreement between the White House and Sen. Sam Nunn also calls for a draft executive order, abolishing the current policy of expelling homosexuals from the miliary because of their sexual orientation, to be ready by July 15, 1993. *Id.*

As recently as June of 1992, Margarethe Cammermeyer was forced to resign from the Army National Guard after she admitted to being a lesbian during an interview for a top security clearance. Cammermeyer was a highly decorated colonel who had served the National Guard with distinction for 27 years prior to her admission. Jackson, *supra* note 147, at 62.

[157] *See* Elaine Sciolino, *Report Urging End of Homosexual Ban Rejected by Military*, N.Y. TIMES, Oct. 22, 1989, at 1 (noting the numerous legal challenges in recent years to the ban); Jane Gross, *R.O.T.C. Under Siege for Ousting Homosexuals*, N.Y. TIMES, May 6, 1990, at 24 (reporting on opposition to the ban in the nation's college campuses); Jane Gross, *Navy Is Urged to Root Out Lesbians Despite Abilities*, N.Y. TIMES, Sept. 2, 1990, at 24 (pointing out the hypocrisy of the policy); Peter Cary, *The Pentagon's Fight to Keep Gays Away*, U.S. NEWS & WORLD REP., Nov. 20, 1989, at 57 (citing a long suppressed 1957 Navy study, which refuted the Pentagon's assertion that homosexuals pose increased security risks or create "insurmountable problems" in uniform).

[158] See *supra* notes 147, 156-57 for a discussion of the military's treatment of homosexuals in their ranks. *See generally* Kelly Carbetta-Scandy, Case Note, 54 U. CIN. L. REV. 1055 (1986); Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992); Judith Hicks Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992); Phyllis E. Mann, Comment, *"If the Right of Privacy Means Anything": Exclusion From the United States Military on the Basis of Sexual Orientation*, 46 SMU L. REV. 85 (1992).

[159] The *Advocate* article that outed Williams asked several leaders active in the homosexual movement whether it was justifiable to make public the fact that a top government official was gay without knowing how it might affect that individual, either

cause, privacy can be invaded with impunity. Surely, that is a dangerous proposition.

Allowing militant groups to use the press as a means to blackmail and to punish those who disagree with them is a distortion of the press's role in society. The press then becomes a means of repression rather than enlightenment.[160] This is a far more serious threat to free and open discussion than that posed by the private-facts tort, which asks only that reporting be responsible.

C. *'Outing' as News*

Some publications insist that they cannot effectively report on the outing phenomena without explaining what it is the other publications are doing "and who they're doing it to."[161] They claim that an informed airing of the issues involved in outing requires that the reader be informed of those actually subjected to the tactic. Only then will the reader be able to accurately assess the morality and ethics of the practice; only by seeing for themselves the real consequences for the actual victims can the public come to an informed opinion on the issues involved.

In covering the Williams outing, many newspapers and television networks declined to name Williams, electing instead to identify him only as a "high ranking official" in the Pentagon.[162]

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professionally or personally, and without knowing what that person "may or may not be doing on the inside with regard to gay issues." Signorile, *supra* note 16, at 44. Rep. Barney Frank responded in the affirmative, explaining that

> [i]t's relevant to report that a person is gay if that person is involved in an institution that has anti-gay policies, especially if the person is involved in policy making. It may be valid and legitimate that people are working within the system, but I still think, in general, hypocrisy is pretty hard to wash away. It's wrong for gay people to be administering an anti-gay policy.

Id.

160 Threatening to reveal someone's sexuality in order to coerce them into espousing a certain position is reminiscent of tactics used by totalitarian regimes. Andrew Sullivan, in commenting on the similarity between the tactics employed by outers and those utilized by repressive regimes, has written:

> One is also reminded of all those other political movements around the world in which silence is invariably an unacceptable form of conduct. They demand an active, even eager, participation in a particular politics, a mouthing of certain words, a performance of certain actions. Inaction is the same as treachery; weak souls in the ranks are treated with greater viciousness than any putative enemy.

Sullivan, *supra* note 36, at B3.

161 Broeske & Wilson, *Outing*, *supra* note 12, at 6. *Chronicle* City Editor Dan Rosenheim explained that his decision to name names was not done "to intrude into the private lives of people. . . . Our interest was not in spreading rumors but in airing those aspects of a debate that is [sic] growing and important and significant." Krier, *supra* note 15, at E24.

162 Not all were convinced that this was the result of media ethics. One reporter cynically noted that while activists were doing the their best to out Williams,

Those who so declined reflected a belief that while the outing was news, Williams's identity was not. They were able to convey essentially the same information as other news organizations while leaving Williams's privacy intact.

Whether an actor in a newsworthy event is entitled to have his identity kept shielded from the public has arisen in case law in other contexts. Rehabilitated criminals and victims of rape often object to the use of their names, claiming that the public can be equally informed without identifying them by name.

Courts have sometimes accepted the argument that while the facts themselves are newsworthy, the identity of the actor is not.[163] This argument is most compelling where the plaintiff is the victim of, or a witness to, a violent crime.[164] However, the defendant can often counter this argument by claiming that it was essential to "buttress the force of their evidence by naming names."[165] While there are undoubtly cases in which this claim

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> the mainstream press has been resolutely inning Williams, attending but not reporting press conferences held by gay outers, writing and then killing stories about the whole Williams affair. There is something bizarre about the hyenas virtuously strapping on their muzzles, but not so surprising when you think about it, since the mainstream press thrives by exposes contrived on its terms and not the terms set by people like Signorile or Rouilard.

Cockburn, *supra* note 130, at 220.

[163] *See* Times-Mirror Co. v. Superior Court (Doe), 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988) (see *infra* note 164 for a description of the facts in *Times Mirror*); Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971) (see *supra* note 60 for a discussion of the facts in *Briscoe*).

[164] In *Times-Mirror Co.*, the defendant newspaper had published the name of the only witness to a brutal murder while the murderer was still at large. This led the plaintiff to complain that the defendant's identification of her had, in effect, told the suspected murderer the name of person who had confronted him at the murder scene and was the sole witness who could identify him. 244 Cal. Rptr. at 559. The court ruled that the "individual's safety and the state's interest in conducting a criminal investigation may take precedence over the public's right to know the name of the individual." *Id.* at 560.

[165] Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 303 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980). *See also* Ross v. Midwest Communication, Inc. 870 F.2d 271 (5th Cir. 1989). In *Ross*, the defendant was the producer of a documentary which argued that the man convicted of the plaintiff's rape could not have been guilty. During the course of the documentary, the plaintiff-victim was identified by her first name, and a picture of her residence at the time of the rape was broadcast. The court here accepted the defendant's contention that the use of Ross's name and the picture of her residence provided "a personalized frame of reference that fosters perception and understanding." *Id.* at 274. The court reasoned that indentifying facts will often "strengthen the impact and credibility of [an] article. They obviate any impression that the problems raised in the article are remote or hypothetical, thus providing an aura of immediacy and even urgency that might not exist had plaintiff's name and photograph been suppressed." *Id.* (quoting Gilbert v. Medical Economics Co., 665 F.2d 305, 308 (10th Cir. 1981))

As support for this contention, the court recalled the infamous Janet Cooke controversy in which it was admitted that the child addict, Jimmy, in the Pulitzer-Prize winning *Washington Post* series, was an invention. The court reasoned that such incidents suggest that there is "legitimate ground for doubts that may arise about the accuracy of a documentary that uses only pseudonyms." *Id.* at 275.

has validity, the reporting of an outing is not one of them. There would simply be no reason for the public to suspect that a publication has created or manufactured news in an attempt to enhance circulation when the entire industry is reporting basically the same facts.

Other arguments commonly advanced to defend the newsworthiness of a disclosure similarly have no applicability in an outing case. When an outing is simply a disclosure for its own sake, the victim did nothing to call attention to herself. The press can point to no statement issued by the victim that calls into question her veracity or character. Nor is the victim involved in legal proceedings or some other controversy which would legitimize making her sexual preference subject to public scrunity.

Likewise, the right of the press to revive matters of public history with regard to the victim is not at issue.[166] These are clearly not cases in which some newsworthy event in the victim's past is properly a subject of present public interest. The simple fact is that no event, past or present, precipitates an outing, when a victim is selected merely to advance the political agenda of some group seeking to generate media interest in their cause.[167]

Since only those personally acquainted with the victim truly see the effects such disclosures have on the victim, the argument that the disclosure allows the public to witness the consequences of an outing collapses. Naming names under these circumstances does nothing to further an understanding of the issues and serves only to satisfy mere public curiosity.

V. CONCLUSION

A person's sexuality is private. Media disclosures of a person's sexuality serve the public interest only where such disclo-

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166 Plaintiffs sometimes argue that the passage of time has eroded the newsworthiness of the events reported. However, courts are reluctant to accept that argument as "[t]here can be no doubt that one quite legitimate function of the press is that of education or reminding the public as to past history . . . . [T]he revival of past events that once were news, can properly be a matter of present public interest." Werner v. Times-Mirror Co., 14 Cal. Rptr. 208, 212 (9161) (quoting Prosser, *Privacy*, 48 CAL. L. REV. 383, 418) (newspaper report of plaintiff's marriage, naming parties and recounting events from plaintiff's past did not invade the his right to privacy because he had the status of a public personage). *See also* Barbieri V. News-Journal Co., 189 A.2d 773 (Del. 1963); Roshto v. Hebert, 439 So. 2d 428 (La. 1983).

167 Gay and lesbian activists often stage a media event to enhance their chances of getting news coverage. For example, Michael Petrillis, a gay activist with the group Queer Nation, threw a drink into the face of a prominent Wisconsin politician at a gay bar in an attempt to generate media coverage. He then called the papers who reported the incident to demand that the politician "come out of the closet." Howard Kurtz, *Gay Activist Seeks Coverage of an 'Outing,'* WASH. POST, July 10, 1991, at F1.

sures are important to an understanding of the story being reported, where the person's sexuality is related to an abuse of position or power, or where it affects some aspect of the person's public life.[168]

However, when the sexual orientation of an individual is revealed simply to inform the public of just whom among them is secretly homosexual, there is little justification for invading recognized privacy interests. There is no real evidence to support the contention that the systematic disclosure of the identities of prominent homosexuals actually changes public attitudes. Individual attitudes and perceptions are much more likely to be changed when an individual discovers that someone he has come to respect and care about is homosexual, rather than by the knowledge that some distant public figure is secretly gay or lesbian.

Nor can it be demonstrated that such disclosures are effective in focusing attention on the AIDS crisis. Those who feel that AIDS is God's punishment for homosexuality are unlikely to change their attitudes when they discover that the famous, too, are gay.[169] The sad reality is that as long as AIDS is viewed as someone else's disease—gays, drug addicts, and people who receive blood transfusions—the public is likely to remain complacent about its danger.[170] Hence, the damage to an individual's

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[168] See *supra* notes 122-26 and accompanying text for a discussion of the circumstances that justify a media disclosure about an individual's sexual preference.

[169] Some right-wing conservatives, such as Patrick Buchanan, claim that people who are afflicted with AIDS bring the disease on themselves by engaging in "perverted sex." *Magic Johnson; The New Face of AIDS*, ECONOMIST, Nov. 16, 1991, at 59. Others distinguish between "innocent" victims of the AIDS virus (such as Kimberly Bergalis, who contracted AIDS after a visit to an infected dentist) and homosexuals or intravenous drug users, expressing concern for the former and condemnation for the latter. Don Aucoin, *Testing Debate Is Still Raging*, THE BOSTON GLOBE, Dec. 9, 1991, at 1, 9.

[170] In fact, not until sports hero Magic Johnson who insisted he was *not* a homosexual, announced he had tested positive for the HIV virus, did public awareness and concern for the growing AIDS problem begin to manifest itself. Prior to Johnson's announcement, new government actions against the epidemic had ground to a halt. President Bush had shown little interest in the issue since his presidency began nearly three years before. Similarly, financing levels for the research and treatment of AIDS had "remained virtually flat" during his term. Randy Shilts, *Johnson Disclosure Renews the Focus on AIDS Epidemic*, S.F. CHRON., Nov. 8, 1991, at A22.

In September of 1991, a report by the National Commission on AIDS decried the lack of Federal AIDS prevention programs and pleaded for White House leadership, but to no avail. In addition, both the press and the public displayed a growing apathy toward the subject. *Id.*

In February of 1993, a report released by the National Research Counsel, a private non-profit organization created by Congress to advise the federal government, examined the impact of AIDS on health care delivery, public health infrastructure, clinical research, prisons, voluntary and community-based organizations, and religious groups. Dolores Kong, *National Study Faults Social Institutions on Response to AIDS*, BOSTON GLOBE, Feb. 5, 1993, at 3. The report warned that the AIDS epidemic "is becoming increasingly

sense of autonomy and personal dignity clearly outweighs the minimal value of the disclosure to the public.

There is simply no justification for exposing another's private sexuality under the guise of providing role models for the homosexual community. The fact that one has successfully overcome some adversity in life—be it child abuse, rape, or anti-gay discrimination—does not give others the right to invade that individual's privacy. The private-facts tort can act as an effective deterrent to such unwarranted invasions of privacy. It provides incentives for the press to more thoroughly investigate factually suspect stories for relevance to some public issue. The knowledge that revelations of an intensely private nature can expose a publication to significant liability will help insure more responsible reporting and act as a check on the competitive urge to be the first to break a story. The private-facts tort does not in any way restrain the press's ability to report sexual orientation when a genuine controversy exists.

Nor does it interfere with the public's right to be fully informed on any issue. The First Amendment protects most strenuously only that information which is of legitimate public interest.[171] When the "news" is simply that someone is homosexual, no legitimate public interest is being served by that disclosure. On the contrary, by allowing the press to intrude into such intimate areas, the press becomes a tool of oppression and threatens the liberty of us all.

Barbara Moretti

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concentrated in groups with little economic or political clout and may eventuallly drop from general public awareness." *AIDS To Fall From Public Awareness? Groups Affected Have Little Clout, Report Concludes*, HOUSTON CHRON., Feb. 5, 1993 at A17. Because those affected by AIDS are, for the most part, the "socially invisible," the report concluded that "[m]any of [AIDS'] most striking features will be absorbed in the flow of American life, but, hidden beneath the surface, its worst effects will continue to devastate the lives and cultures of certain communities." *Id.*

171 See *supra* text accompanying notes 84-91 for a discussion of what constitutes protected speech under the First Amendment.

APPENDIX

At present, thirty-six jurisdictions appear to recognize a common law right to privacy that embraces interests protected by the private-facts tort. *E.g.*, Norris v. Moskin Stores, Inc., 132 P.2d 321, 323 (Alaska 1961) (adopting the four distinct categories of wrongs incorporated in the invasion of privacy tort as set out in PROSSER, LAW OF TORTS (1955)); Luedtke v. Nabors Alaska Drilling, Inc., 768 P.2d 1123, 1133 (Alaska 1989) (noting that "[w]hile we have not expressly considered the application of [the private-facts] tort in Alaska, we have recognized its existence"); Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 785 (Ariz. 1989) (holding that while Arizona recognizes the four-part classification for invasion of privacy in the RESTATEMENT (SECOND) OF TORTS, a plaintiff may not recover without also showing that the elements of the tort of intentional infliction of emotional distress were met); Dodrill v. Arkansas Democrat Co., 590 S.W.2d 840, 844 (Ark. 1979) (suggesting that Arkansas would follow the RESTATEMENT (SECOND) OF TORTS, § 652A (1977)); Pasadena Star-News v. Superior Court, 249 Cal. Rptr. 729 (Cal. Ct. App. 1988) (finding no liability for the publication of the name of a young mother who had abandoned her newborn child, as the facts disclosed were newsworthy); Gilbert v. Medical Economics Co., 665 F.2d 305 (10th Cir. 1981) (applying Colorado law to hold that an article hypothesizing that the plaintiff-physician's personal, marital, and psychiatric problems were the cause of two operating room accidents was newsworthy); Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (holding no liability for filming and televising a prisoner's parole hearing without his consent when no private facts were disclosed and the plaintiff's face and name were not revealed); Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 711 (Del. Super. Ct. 1967) (recognizing the four classic privacy torts); Vassiliades v. Garfinckel's Brooks Bros., 492 A.2d 580 (D.C. Cir. 1985) (finding a patient's right to privacy outweighed a surgeon's right to inform the public about the ways in which plastic surgery can improve an individual's appearance); Cape Publications, Inc. v. Hitchner, 549 So. 2d 1374, 1379 (Fla. 1989) (finding no liability for a publication where information of legitimate public concern was lawfully obtained and freely given by government officials); Cabaniss v. Hipsley, 151 S.E.2d 496, 501 (Ga. Ct. App. 1966) (listing the necessary elements to establish an invasion of privacy by the public disclosure of embarrassing private facts about the plaintiff); Taylor v. K.T.V.B, Inc., 525

P.2d 984 (Idaho 1974) (holding that if a television station was found to have acted with malice in broadcasting a film clip showing plaintiff being arrested and taken from his home in the nude, protection under the newsworthiness defense was forfeited); Leopold v. Levin, 259 N.E.2d 250, 254 (Ill. 1970) (asserting "that there should be recognition of a right of privacy, a right many years ago described in a limited fashion by Judge Cooley with utter simplicity as the right 'to be let alone' "); Continental Optical Co. v. Reed, 86 N.E.2d 306, 308 (Ind. Ct. App. 1949) (holding that the right of privacy is an established doctrine in Indiana); Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980) (upholding summary judgment in favor of media defendant where the disclosed facts were a matter of public record); Rawlins v. Hutchinson Publishing Co., 543 P.2d 988, 990-91 (Kan. 1975) (noting that Kansas has adopted the right of privacy analysis found in the RESTATEMENT (SECOND) OF TORTS); McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882, 887 (Ky. 1981) (adopting the principle of the private-facts tort as enunciated in the RESTATEMENT (SECOND) OF TORTS § 652A (1976)); Roshto v. Hebert, 439 So. 2d 428, 430 (La. 1983) (holding that "a person may subject himself to liability for damages for invasion of privacy . . . by giving publicity to a matter concerning the private life of another, when the publicized matter would be highly offensive to a reasonable person and is not of legimate concern to the public"); Nelson v. Maine Times, 373 A.2d 1221 (Me. 1977) (holding no liability for the publication of a photograph of the plaintiff taken in a public place); Beaumont v. Brown, 257 N.W.2d 522, 527 (Mich. 1977) (noting that since 1948 Michigan has recognized the right of an individual to privacy); Deaton v. Delta Democrat Publishing Co., 326 So. 2d 471, 473 (Miss. 1976) (noting that "Mississippi has by implication judically recognized the common law right to privacy" and citing with approval the reformulation in the RESTATEMENT (SECOND) OF TORTS); Y.G. v. Jewish Hospital of St. Louis, 795 S.W.2d 488, 498 (Mo. Ct. App. 1990) (holding that "[t]he elements of an action for publication of a private matter are (1) publication or 'publicity,' (2) absent any waiver or privilege, (3) of private matter in which the public has no legitimate concern, (4) so as to bring shame or humiliation to a person of ordinary sensibilities"); Montesano v. Don Rey Media Group, 668 P.2d 1081, 1084 (Nev. 1983) (holding that "[t]o maintain a cause of action for public disclosure of private facts one must prove that a public disclosure of private facts has oc-

curred which would be offensive and objectionable to a reasonable person of ordinary sensibilities"); Buckley v. W.E.N.H., 5 Media L. Rep. 1509, 1510 (N.H. 1979) (holding that "[i]f [a] publication reports a matter concerning which the public has no proper interest, then publication thereof may create a cause of action for [invasion of] privacy"); Devlin v. Greiner, 147 N.J. Super. 446, 462 (1977) (recognizing the four classical privacy torts); McNutt v. New Mexico State Tribune Co., 538 P.2d 804, 807 (N.M. Ct. App. 1975) (noting that "New Mexico recognizes the tort of invasion of the right to privacy, i.e. the right to be let alone, as it is sometimes characterized"); Killilea v. Sears, Roebuck Co., 499 N.E.2d 1291, 1294 (Ohio Ct. App. 1985) (indicating that Ohio recognizes the "publicity" tort); McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okla. 1980) (recognizing the tort of invasion of privacy in all four categories as set out in the RESTATEMENT (SECOND) OF TORTS); Harris v. Easton Publishing Co., 483 A.2d 1377, 1383 (Pa. Super. Ct. 1984) (holding that the four categories of invasion of privacy set out in the RESTATEMENT (SECOND) OF TORTS "most ably defines the elements of invasion of privacy as that tort has developed in Pennsylvania"); Meetze v. Associated Press, 95 S.E.2d 606, 609 (S.C. 1956) (concluding that an action for invasion of privacy may be maintained in South Carolina); Montgomery Ward v. Shope, 286 N.W.2d 806, 808 (S.D. 1979) (recognizing that unreasonable publicity given to another's private life may constitute a cause of action for an invasion of privacy); Industrial Found. v. Texas Indust. Accident Bd., 540 S.W.2d 668, 683, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (holding that the disclosure of "highly intimate or embarrassing facts about a person's private affairs, such that its publication would be highly objectionable to a person of ordinary sensibilities" gives rise to a claim for invasion of privacy if the the information publicized is not of "legimate concern to the public"); Cox v. Hatch, 761 P.2d 556, 563-64 (Utah 1988) (implicitly adopting Section 652A-E of the RESTATEMENT (SECOND) OF TORTS); Dubree v. ATLA, 6 Med. L. Rep. 1158, 1159 (D. Vt. 1980) (predicting that the Vermont courts will eventually recognize a tort based on the invasion of privacy as set out in RESTATEMENT (SECOND) OF TORTS); Roach v. Harper, 105 S.E.2d 564, 568 (W. Va. 1958) (holding an action for invasion of privacy may be maintained and defining the right of privacy "as the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity")

Several other states have constitutional or statutory provi-

sions which seemingly protect interests embodied in the private-facts tort. For example, HAW. CONST. art I, § 6 provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." While there are no Hawaiian cases which deal specifically with the right to be free of unreasonable publicity given to one's private life, at least one court has noted that "the right of privacy protects at least two different kinds of interests. One is the individual's interest in avoiding disclosure of personal matters." McCloskey v. Honolulu Police Dep't, 799 P.2d 953, 956 (Haw. 1990) (citing Nakano v. Matayoshi, 706 P.2d 814, 818-19 (Haw. 1985)).

In Massachusetts, it has been held that "the establishment of the right to privacy in this Commonwealth has a statutory basis." Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (Mass. App. 1979), *appeal dismissed and cert. denied*, 444 U.S. 1060 (1980). MASS. GEN. L. ch. 214, § 1B (1992) provides that "[a] person shall have a right against unreasonable, substantial or serious interference with his privacy."

R.I. GEN. LAWS § 9-1-28.1 (3) (1991) creates the "right to be secure from unreasonable publicity given to one's private life," and provides that in order to recover for a violation of this right, it must be established that there has been some publication of a private fact, and that the fact which has been made public was one which would be offensive or objectionable to a reasonable man of ordinary sensibilities. Additionally, the fact which has been disclosed need not be of any benefit to the discloser of such fact.

WIS. STAT. § 895.50(2)(c) (1989-90) states that Wisconsin recognizes the right of privacy. It provides that "[p]ublicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed," constitutes an invasion of privacy.

MONT. CONST. art. II, § 10, provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." While to date there is no case law in Montana that explicitly recognizes tort actions for the invasion of privacy, such actions are likely progeny. *See* Missoulian v. Bd. of Regents of Higher Educ., 675 P.2d 962, 971 (Mont. 1984) (holding that the public's right to know is not absolute and calling for a balancing

of the "demands of individual privacy" against the "merits of public disclosure" when determing whether liability should be imposed for a truthful disclosure).

It is unclear whether states such as Oregon, Tennessee, Washington, or Wyoming will recognize a cause of action for invasion of privacy by the public disclosure of private facts. No case law exists in either Washington or Wyoming on this issue. In Tennessee, the state courts have not ruled on whether they will recognize the private-facts tort; however, the federal courts have assumed its existence in applying Tennessee law. *See, e.g.*, Beard v. Akzona, Inc., 517 F. Supp. 128 (E.D. Tenn. 1981). In Oregon, one court has held that "the truthful presentation of facts concerning a person, even facts that a reasonable person would wish to keep private and that are not 'newsworthy,' does not give rise to common-law tort liability" absent wrongful conduct on the part of the defendant. Anderson v. Fisher Broadcasting Co., Inc., 712 P.2d 803, 814 (Or. 1986).

The following states do not recognize a cause of action for the publication of private facts: Minnesota, Nebraska, New York, North Carolina, North Dakota, and Virginia. *See, e.g.*, Stubbs v. North Memorial Medical Ctr., 448 N.W.2d 78, 80 (Minn. Ct. App. 1989) (holding "Minnesota has never recognized a cause of action for invasion of privacy"); Brunson v. Ranks Army Store, 73 N.W.2d 803, 806 (Neb. 1955) (holding that Nebraska has not "in any form or manner adopted the doctrine of the right of privacy"); Kiss v. County of Putnam, 398 N.Y.S.2d 729 (N.Y. App. Div. 1977) (holding that no common-law right to privacy is recognized in New York); Hall v. Post, 372 S.E.2d 711 (N.C. 1988) (holding that no cause of action exists in North Carolina for invasion of privacy by publication of embarrassing private facts); City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 579 (N.D. 1981) (finding "no statutory or constitutional right of privacy . . . has as yet been recognized under the North Dakota Constitution"); Falwell v. Penthouse Int'l, 521 F. Supp. 1204, 1206 (W.D. Va. 1981) (holding that "[t]he courts of Virginia simply do not recognize such a common law cause of action. Indeed, Virginia recognizes no right of privacy other than that specifically conferred by Virginia Code . . . .").