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From the Closet to the House-Tops: the Law and Ethics of Media "Outing"

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I. Introduction

"Outing" is no picnic. The new Webster's College Dictionary defines "outing" as "the intentional exposure of a secret homosexual."[1] The new usage is attributed to William A. Henry III in his 1990 Time article, "Forcing Gays Out of the Closet."[2] The word may be new, but the practice is not.

This paper examines the law and ethics of media outing. First, it explains the history of outing and the arguments for and against it. Next, it evaluates the potential causes of action for an outing victim and proposed changes in the law. Third, this paper explores the possibility that the best response to outing may be a non-legal one: better ethics in journalism.

II. Background/History

The term "gay community" is somewhat of an oxymoron. Unlike most other minorities, gay people come from every possible background, representing every race, ethnicity, religion, and economic status. Not surprisingly, then, gay people have differing views on almost every issue affecting them. Perhaps the most widely argued issue of the day is that of being "out."

Some gay people are completely "in the closet;" others are completely "out." But there are several levels in between. For example, some gay people are out to their straight friends, but

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[1] Webster's College Dictionary 960 (1992).

[2] William A. Henry III, Forcing Gays Out of the Closet, Time, Jan. 29, 1990, at 67.

not to their parents or employers. For many people, who they reveal their sexual orientation to and how they do so is very important. Outing robs them of this personal control.

Outing takes many forms. It can be anything from an anonymous note slipped under an employer's door to a media event reaching thousands or even millions of people. Outing in one form or another has probably existed as long as people have had secrets. But outing gained national attention in the early 1990s when some gay activists, fed up with the lack of response to the AIDS crisis, began outing "closeted" public figures.[3]

Groups like ACT-UP (AIDS Coalition to Unleash Power) and Queer Nation argue that gay people perpetuate their own oppression by remaining "in the closet," and that visibility is an important and necessary step toward equality.[4] They believe that outing removes the stigma of homosexuality by making it more common.[5] Activists hope these increased numbers will help create a more tolerant society, more sympathetic civil rights legislation, and increased funding for AIDS research.[6]

Those who support outing also believe that outing combats negative stereotypes about homosexuality by providing positive

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[3] See generally Larry Gross, Contested Closets: The Politics and Ethics of Outing (1993).

[4] Mathieu J. Shapiro, When is a Conflict Not a Conflict? Outing and the Law, 36 B.C. L. Rev. 587, 588 (1995).

[5] John P. Elwood, Outing, Privacy, and the First Amendment, 102 Yale L.J. 747, 748 (1992).

[6] Id.

examples of gay people. They feel that outed celebrities will serve as role models to gay youth and "ambassadors" to mainstream America.[7] Finally, these groups "out" to expose the illogic of governmental policies that discriminate against gay people and the hypocrisy of gay public officials who support these policies.[8]

But outing can be harmful. It robs people of the personal autonomy to come out in their own way.[9] Pushing people out of the closet before they are ready may cause psychological damage.[10] Victims can lose their friends, jobs, and custody of their children.[11] They are exposed to hate crimes and gay-bashing.[12] Outing victims are also poor role models. As playwright Harvey Fierstein puts it, "I think it would be wonderful if [they] came out and admitted it--if they were gay--because it would help so many kids feel good about themselves. But what good does it do anyone to watch someone kicking and screaming that they're straight?"[13]

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[7] Id.

[8] Id.

[9] Shapiro at 615.

[10] David H. Pollack, Forced Out of the Closet: Sexual Orientation and the Legal Dilema of "Outing," 47 U. Miami L. Rev. 711, 721 (1992).

[11] Susan Becker, The Immorality of Publicly Outing Private People, 73 Or. L. Rev. 159, 206-07 (1994).

[12] Id.

[13] Peter Castro, "Chatter," People, Sept. 23, 1991, at 126 (emphasis in original).

Perhaps the most serious consequence of outing is the public's mistaken connection between homosexuality and AIDS. Despite the increasing spread of HIV infection into the heterosexual population, many people still view AIDS as a gay disease.[14] Most disturbing is the erroneous conclusion that a gay male is automatically an HIV carrier.[15] Thus, "the outed person may be viewed as unacceptable to certain portions of society not only because he is viewed as 'morally' deficient but also because he is perceived as a contagious pariah."[16]

Most of the outings in the early 1990s took place in relatively unknown--and now defunct--gay magazines and newspapers.[17] But sometimes the mainstream press picked up the stories, which were often based on gossip and rumors. Targets included a high-ranking Pentagon official, a national politician with a wholesome image and a "mixed" voting record on gay rights, a governor who voted against a proposal supported by gay activists, and an actress who starred in an Oscar-winning film that some people found homophobic.[18]

The outing fad of the early 1990s appears to be over, but the underlying issues of outing remain unresolved and are bound

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[14] John F. Hernandez, Outing in the Time of AIDS: Legal and Ethical Considerations, 5 St. Thomas L. Rev. 493, 493 (1993).

[15] Id.

[16] Hernandez at 505.

[17] Opens Closets, Closes Doors, Time, July 8, 1991, at 47.

[18] Eleanor Randolph, "The Media, at Odds Over 'Outing' of Gays," Wash. Post, July 13, 1990, at C1.

to resurface. For example, in 1977, eight men died in a fire at a Washington, D.C., X-rated gay theater.[19] The editors of the Washington Post and the late Washington Star had to decide how far they would go in identifying the men who died. The Star published the men's names, the Post did not.[20] Journalists will always have to make tough decisions like this one.

Also, outing encompasses much more than just sexual orientation. It can apply to any private fact. For example, in 1992, USA Today reported that tennis star Arthur Ashe had AIDS when Ashe had wished to keep his HIV-status a secret.[21] Although Ashe was heterosexual, many people nonetheless considered the publication of his illness to be an outing.[22] Thus, outing is likely to be a long-term, far-reaching concern.

What causes of action are available to an outing victim, and with what results? The two most likely causes of action are defamation and invasion of privacy, but in their current states, will they be enough to enable an outed plaintiff to recover? What changes in the law, if any, need to be made, and with what repercussions? How should we respond to this problem?

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[19] H. Eugene Goodwin, Groping for Ethics in Journalism 234 (1987).

[20] Id.

[21] Michelangelo Signorile, Queer in America: Sex, the Media, and the Closets of Power 91 (1994).

[22] Id.

III. Defamation

A. Background/History

The first potential cause of action for an outing victim is defamation. Defamation is "communication which exposes persons to hatred, ridicule, or contempt, lowers them in the esteem of others, causes them to be shunned, or injures them in their business or calling."[23] As demonstrated above, this definition seems tailor-made for an outing case. But on closer examination, the cause of action starts to unravel.

Truth is now a complete defense to a defamation suit, but this was not always the case. At the end of the seventeenth century and throughout the eighteenth century, malice was the basis for recovery.[24] Courts did not impose liability for false, benign speech, but could impose liability for truthful speech, if promulgated with a malicious intent.[25] Thus, when the First Amendment was drafted, truth was not a defense to defamation. It is, therefore, doubtful that the Framers intended to make all truthful speech immune from liability.[26]

Later, when truth was reinstated as an affirmative defense to defamation, the common law burden of proof for the truth of

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[23] Dwight L. Teeter, Jr. and Don R. LeDuc, Law of Mass Communications: Freedom and Control of Print and Broadcast Media 100 (1992).

[24] Jon E. Grant, "Outing" and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence, 77 Cornell L. Rev. 103, 109-10 (1991).

[25] Id.

[26] Id.

the statement rested on the defendant.[27] However, constitutional concerns regarding freedom of speech have shifted the burden to the plaintiff to show the falsity of the statement.[28]

In 1964, the Supreme Court subjected defamation, traditionally a state question, to First Amendment analysis. This case, New York Times v. Sullivan[29], is the most important defamation case in American jurisprudence. The decision clearly established falsehood as a threshold requirement for recovery.[30]

In 1960, L.B. Sullivan was the police commissioner in Montgomery, Alabama.[31] When an advertisement placed in the New York Times by Martin Luther King's civil rights movement charged the Montgomery police with brutality, Sullivan brought a defamation action against the New York Times Company.[32] The defendants failed to prove the truth of their claims, and the jury found for the plaintiff.[33] But the Supreme Court reversed, holding that in the case of public officials, the plaintiff must prove that the statement was made with knowledge that it was

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27 Laurence Eldridge, The Law of Defamation 323 (1977).

28 Id.

29 376 U.S. 254.

30 Grant at 111.

31 Sullivan, 376 U.S. at 256.

32 Id.

33 Id.

false or with reckless disregard of whether or not it was false.[34] The Court reasoned that the First Amendment's guarantee of a free press required protecting some erroneous statements.[35]

Private persons--that is, people who are not classified as public officials or public figures by a court--have to meet a lessor, easier standard of proof.[36] They only have to prove that the defamatory statement was negligently published, or published without the "due care" that would be used by an "average person with ordinary sensibilities."[37] But as discussed in greater detail below under the private facts tort, courts have not clearly established just who constitutes a "private" or "public" figure.

Second, a plaintiff in a defamation action must prove that the statement actually damaged that person's reputation. A presumption of damages, at least as it applies to media defendants, no longer exists.[38] The Restatement (Second) of Torts states, "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or

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[34] Sullivan, 376 U.S. at 279-80.

[35] Id.

[36] Grant at 105.

[37] Id.

[38] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).

dealing with him."[39] Defamation law is designed to protect two concepts of reputation: dignity and property.[40] Dignity may be the plaintiff's standing in the community and property may be the plaintiff's goodwill.[41]

B. Problems with Current Status

1. Must Be False

To prevail in a defamation suit, an outed plaintiff must prove 1) a false statement that 2) damaged that person's reputation. Under these requirements, the outing victim will usually fail. The first problem for the plaintiff is the requirement that the statement be false. To recover, plaintiffs will have to prove that they are not gay. This is a difficult, if not impossible, task even for someone exclusively heterosexual.

What makes a person "gay"? Psychologists and sociologists have researched this question for decades without a definitive answer.[42] Is homosexuality based on sexual activity? If so, what behavior and how much? What about the person whose only homosexual experience was during adolescence? What about people who have had sexual experiences with both men and women? What

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[39] Restatement (Second) of Torts § 559 (1977).

[40] Randy M. Fogle, Is Calling Someone "Gay" Defamatory?: The Meaning of Reputation, Community Mores, and Free Speech, 3 Law & Sex, 165 (1993) 170-71.

[41] Id.

[42] See Alfred C. Kinsey et al., Sexual Behavior in the Human Male 610, (1948).

about the person who hasn't had sex but only has "gay" feelings? Are these people "gay"?

The difficulty in answering the above questions demonstrates how the true/false dichotomy of defamation law is inadequate to categorize the broad spectrum of human sexual orientation. But judges continue to classify people as "either homosexual or heterosexual," often on the weakest of evidence. In Dew v. Halaby, the court labeled a husband and father a "homosexual" because he had engaged in same-sex acts as an adolescent.[43] In Bennett v. Clemens, the court described a woman as living "the gay life" merely because she associated with bisexuals.[44] In Kerman Restaurant Corp. v. State Liquor Authority, the court labelled one man a homosexual simply because he had the "stereotypical" features of a gay man.[45] Thus, courts are unlikely to recognize that sexual orientation can't be easily categorized.

2. Must Damage Reputation

The second problem facing an outing victim under current defamation law is the requirement that the statement identifying the person as homosexual damage that person's reputation. Is calling someone "gay" defamatory?

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[43] 317 F.2d 582 (D.C. Cir. 1963).

[44] 196 S.E.2d 842 (Ga. 1973).

[45] 278 N.Y.S.2d 951 (N.Y. App. Div. 1967), rev'd, 233 N.E.2d 833, (N.Y. 1967).

Not that long ago, the answer to the above question would have been a resounding yes. But changing views of homosexuality have made the answer less clear. For example, the 1971 edition of Prosser's On the Law of Torts suggests that homosexuality be added to the list of categories for slander which are actionable without proof of actual damage.[46] The 1984 edition drops this suggestion.[47] These changing attitudes about homosexuality, while benefiting gay people in numerous areas, only provide another obstacle for the outing victim.

A statement is defamatory only if it prejudices a person in the eyes of a substantial number of "right-minded" people.[48] In Ledsinger v. Burmeister, a court held that calling someone a "nigger" is not defamatory because it merely imputes that someone is of African heritage.[49] Although this holding clearly discounts the racism that still exists in our society, the court did not wish to promote racism by holding otherwise.[50]

An imputation of homosexuality may produce the same result. As Harvard law professor Alan Dershowitz put it: "No court is going to say that calling someone gay is legally defamatory, because to say that is to buy into the notion that being gay is

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[46] William L. Prosser, On the Law of Torts, § 112 at 760 (4th ed. 1971).

[47] W. Page Keeton et al., Prosser and Keeton on the Law of Torts, (5th ed. 1984).

[48] Fogle at 173.

[49] 318 N.W.2d 558, 564 (Mich. App. 1982).

[50] Id.

somehow bad. On the other hand, you and I both know that being exposed as gay can be harmful to a person."[51]

Thus, the outing victim in a defamation suit will most likely fail. Although outing exposes people to hate crimes and discrimination, the otherwise limited progress made by the gay rights movement prevents them from recovering.

IV. Invasion of Privacy

A. Background/History

The second potential cause of action for an outing victim is invasion of privacy. But the private facts tort, like defamation, frequently fails the outed plaintiff.

The origins of the private facts tort can be traced to a 1890 Harvard Law Review article, "The Right to Privacy."[52] At the end of the nineteenth century, "yellow journalism" was at its peak, and the press "took particular delight in detailing with lurid sensationalism the comings and goings of the socially prominent".[53] Samuel D. Warren and his wife were among the elite of Boston society, and they were greatly annoyed by newspaper accounts of their parties.[54] Fed up with the gossip

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[51] Pat H. Broeske & John M. Wilson, Outing Targets Hollywood, L.A. Times, July 22, 1990, at 6.

[52] Samuel D. Warren and Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[53] Barbara Moretti, Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation, 11 Cardozo Arts & Ent. 857, 861 (1993).

[54] Id.

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[53] Barbara Moretti, Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation, 11 Cardozo Arts & Ent. 857, 861 (1993).

[54] Id.

and snooping, Warren 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."[55]

The Warren-Brandeis article argues that the right "to be let alone," which ought to protect people from having their lives invaded by the media, is implicit in common law.[56] They wrote, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[57] Warren and Brandeis specifically listed gossip about sexual matters as an example of their concern: "To satisfy a prurient taste the details of sexual relations are broadcast in the columns of the daily papers."[58]

Today, almost all jurisdictions have a cause of action for invasion of privacy.[59] Most follow Professor Prosser's four-part scheme, which allows recovery for intrusion upon solitude or seclusion, public disclosure of private facts, publicity that places another in a false light, or appropriation of name or

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[55] Id. at 862.

[56] Warren and Brandeis at 205.

[57] Id. at 195.

[58] Id. at 196.

[59] Pollack at 723.

likeness for the actor's benefit.[60] The second category, known as the private facts tort, was the focus of the Warren-Brandeis article.[61]

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

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[62]

Unlike defamation, the private facts tort requires neither falsity nor damage to reputation. Nonetheless, the tort has many shortcomings when applied to an outing case.

B. Problems with Current Status

1. "Newsworthiness" Defense

The greatest limitation facing a plaintiff under the private facts tort is a constitutional one. Since the tort is based on the publication of truthful information, it is necessarily bounded by the First Amendment.[63] When the First Amendment is applied over the structure of the private facts tort, it limits

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[60] William L. Prosser, Privacy, 48 Cal. L. Rev. 389 (1960).

[61] Moretti at 863.

[62] Restatement (Second) of Torts § 652D (1977).

[63] John P. Elwood, Outing, Privacy, and the First Amendment, 102 Yale L.J. 747, 754 (1992).

the tort's protection of individuals while maintaining protection of the press.[64]

The private facts tort internalizes free speech concerns in the form of the common law "newsworthiness" test.[65] The Restatement (Second) of Torts articulates this test:

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he has no concern.[66]

Newsworthiness is determined by weighing the public's "right to know" against the individual's right to keep private facts from the public gaze.[67] This test limits the media's liability to statements that are not of legitimate concern to the public. A finding that a statement is "newsworthy" is a complete defense to the private facts tort.[68]

Most courts follow the approach outlined in Sidis v. F-R Pub. Corp.[69] In 1910, William James Sidis was a well-known child prodigy.[70] At the age of eleven, he lectured to distinguished mathematicians on Four-Dimensional Bodies, and at

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[64] Shapiro at 601.

[65] Elwood at 754.

[66] Restatement (Second) of Torts § 652D, cmt. h (1977).

[67] Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Ct. App. 1983).

[68] Elwood at 754.

[69] Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir.1940).

[70] Teeter at 283.

sixteen, he graduated from Harvard.[71] In 1937, the New Yorker ran an article and cartoon about Sidis with the captions "Where Are They Now?" and "April Fool."[72] The article detailed how Sidis lived in a "hall bedroom of Boston's shabby south end," worked as an "insignificant" clerk, and passed his time collecting streetcar transfers and studying the history of American Indians.[73] Sidis sued for invasion of privacy.

The Second Circuit held that truthful comments about everyday aspects of a person's life could not be considered so private as to justify liability. The court stated, "[W]e are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the individual interest in obtaining information becomes dominant over the individual's desire for privacy...."[74] The court concluded that the First Amendment protected the story.[75]

2. "Private" Fact Requirement

Sidis also raises the second obstacle facing an outing victim in an invasion of privacy suit: the requirement that the disclosed fact be private. But what is a "private" fact?

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71 Id.

72 Id.

73 Id.

74 Sidis, 113 F.2d 806.

75 Id.

In 1975, Oliver Sipple thwarted an assassination attempt on President Ford by striking the arm of the assailant as she was about to fire her gun.[76] Two days later, the San Francisco Chronicle published a column revealing that Sipple was gay.[77] Newspapers across the country picked up the story, including the News in Detroit, where Sipple's parents lived.[78]

The next day, the News published a follow-up story on the reaction of Sipple's relatives and friends to the revelation that he "was a prominent figure in San Francisco's gay community."[79] The story reported that his mother, Ethyl Sipple, "said her motherly pride is tarnished by the stories about her hero son" and quoted her as saying, "We were very proud of Oliver, but now I won't be able to walk down the street without somebody saying something."[80]

Sipple filed an invasion of privacy suit against the newspapers that ran the stories.[81] But the California Court of Appeals held that Sipple's sexual orientation was not a private fact since Sipple had participated in the gay rights movement in San Francisco, even though he had not "come out" to his parents

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[76] Elwood at 757.

[77] Id.

[78] Goodwin at 247.

[79] Id.

[80] Id.

[81] Sipple v. Chronicle Pub. Co., 201 Cal. Rptr. 665 (Ct. App. 1984).

and friends in Detroit.[82] The court found that because information about Sipple's homosexuality was "already in public domain," the articles "did no more than to give further publicity to matters which [Sipple] left open to the eye of the public...."[83]

Most people consider their sexuality to be a private--perhaps the most private--aspect of their lives. But sexual orientation can never be entirely private. While sex itself ordinarily occurs behind closed doors, most sexual acts necessarily involve more than one person. Anyone with a sexual history has people who know that person's sexual orientation.

Furthermore, sexual relationships cannot be confined to the bedroom. The dating process requires that people reveal their sexual orientation to others before they can entirely trust them. And dates, especially in the beginning of a relationship, are expected to take place in public places like restaurants, dance clubs, and movie theaters.

But sexuality is much more than relationships. "Our clothes, our way of speaking, and our manner of interacting with others all make up our sexuality and how we choose to express

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[82] Id. at 669.

[83] Id.

it."[84] Sexual orientation may also influence where people live and the bookstores and bars they patronize.[85]

Finally, requiring sexuality to be entirely private limits our ability to establish trusting friendships.[86] Part of what makes people feel close to each other is the sharing of information about significant relationships.[87] This doesn't necessarily mean the details of their sexual acts, but it does include their sexual orientation.[88] "When we cut off significant parts of ourselves--perhaps the most significant part of ourselves--we rob not only ourselves, but also others, of the opportunity to connect."[89]

Thus, forcing gay people to be entirely "closeted" in order to keep the details of their private lives out of the news is not only unrealistic, but may also be socially and psychologically harmful. And as in any private facts case, the fact can't be entirely private or the press would never discover it.[90]

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[84] Pollack at 730.

[85] Ronald F. Wick, Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort, 80 Geo. L.J. 413, 427 (1991).

[86] Pollack at 730.

[87] Id.

[88] Id.

[89] Id. at 731.

[90] Wick at 422.

3. "Private" Person Requirement

Related to the question whether a person's sexual orientation is a public or private fact is the third problem raised in an outing case: whether the plaintiff is a "public" or "private" figure. Should there even be a distinction?

In "The Right to Privacy," Warren and Brandeis wrote, "Some things all men alike are entitled to keep from popular curiosity, whether in public life or not...."[91] The Restatement (Second) of Torts states, "There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself."[92]

But courts have freqently ignored these suggestions. Many jurisdictions have expressly found that public figures may not maintain a cause of action for comments published about their private lives.[93] Acknowledging broad popular interest in the life of celebrities, they have established a "constitutional privilege" to report "facts, events, and information relating to public figures."[94]

In Ann-Margret v. High Society Magazine, Inc., the court denied recovery to the actress who had been pictured nude in the

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91 Warren & Brandeis at 216.

92 Restatement (Second) of Torts S 652D, cmt. h (1977).

93 Elwood at 759-60.

94 Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980).

magazine Celebrity Skin without her consent.[95] The decision was made in part because the photograph was of "a woman who has occupied the fantasies of many moviegoers over the years" and its publication thus concerned "a matter of great interest to many people."[96]

The rationale for denying privacy rights to public figures is that celebrities, "by attaining notoriety," have consented to publicity and thus waived their right to privacy.[97] Some commentators have stated that this doctrine of "implied assumption of risk" should be more accurately termed "constructive waiver."[98] "It is merely a way of restating the conclusion that First Amendment considerations trump any privacy rights claimed by public figures."[99]

However, the courts have made a distinction between "general purpose" public figures and "limited purpose" public figures. The former category consists of celebrities who have actively sought out publicity, while the latter includes "people who have voluntarily injected themselves or been drawn into a particular public controversy."[100] Stories about general-purpose public figures are considered ipso facto newsworthy, while limited-

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95 498 F.Supp. 401 (S.D.N.Y.1980).

96 Id. at 405.

97 Elwood at 760.

98 Id. at 762.

99 Id.

100 Id. at 759.

purpose public figures have only forfeited their privacy "with respect to events that made them famous."[101]

In 1978, the Oakland Tribune published the following truthful--yet highly private--information:

> 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.[102]

As student body president, Diaz was "a public figure for some purposes."[103] She had previously made news for charging the administration with misuse of funds.[104] However, Diaz had kept her sex-change surgery a secret from all but her immediate family and closest friends.[105] Since her transsexuality was unrelated to her public status, the court found that she had not forfeited her sexual privacy. The court explained, "The fact that she is a transsexual does not adversely reflect on her honesty or judgment. Nor does the fact that she was the first woman student body president, in itself, warrant that her entire private life be open to public inspection."[106]

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101 Id. at 759-60.

102 Diaz v. Oakland Tribune, Inc., 188 Cal.Rptr. 762, 766 (Ct. App. 1983).

103 Id. at 773.

104 Id.

105 Id. at 765.

106 Id.

But the distinction between general-purpose and limited-purpose public figures seems somewhat arbitrary. Diaz's transsexuality was held to be irrelevant to her status as student body president, but Sipple's sexual orientation somehow became newsworthy when he saved the president's life. A closeted "celebrity" wouldn't be protected at all.

4. "Highly Offensive" Requirement

An outed plaintiff's final concern with the private facts tort is whether being exposed as homosexual would be "highly offensive to a person with reasonable sensibilities." The publicity of the private fact must be offensive, not private fact itself.[107]

Saying that the publication of a person's homosexuality is highly offensive is not the same as saying that homosexuality is highly offensive. If courts can make the distinction, this should be the easiest element for an outing victim to prove.[108] Nothing in the case law suggests that outing would be anything less than highly offensive publicity, and the courts in both Sipple and Diaz refused to challenge the plaintiff on this prong.[109]

But the confusion generated by this element of the private facts tort may still hurt gay people. A well-intentioned judge

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[107] Restatement (Second) of Torts § 652D (1977).

[108] Wick at 424.

[109] Id.

might refuse to label the publication of a person's homosexuality as "highly offensive" out of concern that it would reinforce "wrong-thinking" behavior. The "highly offensive" label might also negatively influence the public's perception of homosexuality and damage gay people's self-esteem.[110]

V. Constitutional Concerns with Proposed Changes

As demonstrated above, the current requirements for defamation and invasion of privacy will usually prevent an outing victim from prevailing in a suit against the media. But proposed changes to better enable an outing victim to successfully sue may ultimately cause more harm than good.

Several suggestions have been made to expand the private facts tort to specifically include outing victims. But these changes would likely violate free speech. The Supreme Court has never ruled directly on the constitutionality of the private facts tort, but even in its current state, the tort appears to be unstable. One commentator has stated that the newsworthiness privilege, a product of New York Times v. Sullivan, may well have "swallow[ed] the tort."[111] Another has characterized the tort as "pernicious" because it cannot coexist with the First Amendment.[112] The status of the private facts tort is so

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[110] Pollack at 732.

[111] Harry Kalven, Jr., Privacy in Tort Law--Were Warren and Brandeis Wrong?, 31 Law & Contemp. Probs. 326, 341 (1996).

[112] Diane Zimmerman, Requiem for a Heavyweight: A Farwell to Warren and Brandeis's Privacy Tort, 68 Cornell L. Rev. 291, 293 (1983).

precarious that trying to enlarge it to encompass outing might be "the straw that broke the camel's back." Expanding defamation law to include "true" speech would raise the same First Amendment issues.

Even if expansion of defamation and invasion of privacy law were allowed, the consequences might be more problematic to gay people than beneficial. Tampering with the First Amendment is a dangerous practice that could backfire. The same restrictions on free speech that would prevent outing might also create an additional barrier in the struggle for gay rights.

Legal remedies currently fail outing victims, and changes in the law would create new problems that might be worse than the current ones. Thus, the best response to outing might be to look at the source of the problem rather than the result--in other words, the journalists.

VI. Better Ethics in Journalism

As the defamation and invasion of privacy cases demonstrate, the First Amendment gives the media an enormous amount of power. But journalists are left without much direction on how to handle this tremendous responsibility. Reporters usually look to the law for guidelines, but in the area of outing, the law fails.

The written standards for journalists in regard to privacy are vague. The American Society of Newspaper Editors' Statement of Principles reads, "Journalists should respect the rights of people involved in the news."[113] The Associated Press and

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[113] Bruce M. Swain, Reporter's Ethics, 66-70 (1978).

Managing Editor's Code of Ethics states that "[The newspaper] should...respect the individual's right of privacy."[114] These words provide little help in deciding how far to go in gathering and writing news involving private issues like sexual orientation.

A. Personal Biases

Here are some considerations on how to handle the difficult questions of who, what, when, where, and why to "out" someone. First, ethical journalists, regardless of their sexual orientation, examine their personal biases concerning homosexuality before writing stories on gay issues.

All reporters put a part of themselves into their work--there's no such thing as objectivity. When reporters write stories, space and time restraints require that some information be left out. Even within the story, some information must come first, other information last. But reporters should nonetheless strive to be fair, and they can't be fair without first questioning their point of view.

When the Contra Cosa Times in Walnut Creek, California, gave front-page coverage to the 1989 gay freedom parade, copy editor Bill Walter wrote in a memo, "Bad things, disgusting things, inhuman things happen....But we don't have to describe every naked person, or show a photo of every dead body."[115] Walter's

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[114] Id.

[115] Ellis Cose, Newsroom Homophobia, Time, Apr. 16, 1990, at 76.

message was clear: "disgusting" things are best kept out of the paper.[116] This attitude is far from fair, but it typifies much of the media's coverage of gay issues.

What some journalists find wrong with current reporting is that it focuses on the wild extremes of gay life at the expense of the domesticity of the lives led by the majority of gay men and women. James Saslow, New York editor of The Advocate, says, "Always what captures the public's mind are the sexual or sensational aspects, rather than the full picture of the lives we lead. Nothing else gets through. It's as if there's a filter on the city editor's brain."[117] Reporter Ransdell Pierson's survey of gay coverage indicated that, while papers frequently present gay people in a crime or drag-queen context and sporadically report on their political activities, they almost never treat the wider issues of how gay people live, the problems a gay adolescent faces, or the psychological and social aspects of being gay.[118] Columnist Randy Alfred observes, "If the gay angle is essentially irrelevant to the story's news value, it will be mentioned only in the negative. An alleged arsonist who claims to be gay is a 'gay arsonist,' but a humanitarian doctor who's smartly closeted is a 'bachelor.'"[119]

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116 Id.

117 Ransdell Pierson, Uptight on Gay News, Colum. Journ. Rev., Mar./Apr. 1982, 25-33.

118 Id.

119 Id.

Thus, while journalists "out" some gay people, they "cover" for others. Editors and reporters need to review their past coverage of gay issues and ask themselves: Have their attitudes concerning homosexuality affected their ability to perceive and report reality?

B. Who Suffers and Who Benefits?

Next, journalists should consider the consequences of their stories. Outing hurts people. Do the goals accomplished by outing justify the victims' pain?

While working for columnist Jack Anderson in the 1970s, reporter Brit Hume wrote that the vice president's 24-year-old son had separated from his wife and was living with a male hairdresser in Baltimore.[120] Hume said he ran the story because "the vice president was lecturing America at the time on parenthood" and "anything that bore on his family was worth telling to the public."[121] Later, Hume admitted to having written a "cheap shot." Anderson agreed the story was a mistake. "We went after the kid to expose the father," he said. "It was not fair."[122] (However, a decade later, Anderson outed a top Pentagon official. A substantial number of Anderson's 850

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120 Swain at 70.

121 Id.

122 Id.

subscribers--including his own paper, The Washington Post--refused to run the story.[123])

In addition to looking at who suffers from being outed, journalists also need to look at who benefits. The gay activists who outed public figures in the early 1990s had a political agenda. But when they held news conferences to out people, curious reporters attended.[124] Reporters often depend on sources for stories, but relying on sources without first questioning their motives is sloppy journalism. Journalists should not allow themselves to become the puppets of the left or the right.

C. News or Gossip?

Third, committed journalists question whether their stories are truly newsworthy. The revelation that a famous person is secretly homosexual might pique our curiosity, but is this news or gossip? The New Republic states,

> The press ought to resist publishing details of private life, especially sexual details, unless the activity of the public personages in question clearly impinges on their ability to perform their public offices, or their hypocrisy has become so extreme that it has called flagrant attention to itself. Flagrant, by the way, does not mean consenting adults behind closed doors who are trying to be discreet.[125]

Reporters should be wary of using vague concepts like "character" to justify outing. It's easy to see how the

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[123] David Firestone, "Outing" and the Mainstream Press, Newsday, Aug. 13, 1991, at 19.

[124] Moretti at 860.

[125] Predators, New Republic, Aug. 19 & 26, 1991, 9-10.

homosexuality of an anti-gay politician is relevant, but what about the sexual orientation of an actress who stars in a film that some people, but not all, find homophobic? If we extend the logic, any closeted person could be seen as furthering homophobia.

If the disclosure is truly newsworthy, journalists must decide if naming names is really necessary. "Top-ranking Pentagon official" probably has the same effect as printing the person's name. This approach won't stop gossip about the person's identity, but it can limit the disclosure's damage to the victim. Names lend credibility to stories, but reporters frequently use unnamed sources. How would this be so different?

Of course, there may be instances when revealing the person's identity is necessary. This is a difficult determination, and journalists should carefully weigh the pros and cons before proceeding. Charles Seib, ombudsman for the Washington Post, regrets that the Post did not name the men who died in the Cinema Follies fire.[126] He says the paper's motivation in not using the names was "compassion for the wives and children of the men."[127] But Seib feels that by concealing the men's identities, the paper may have taken this reasoning too far. "We were saying that some things are so stigmatizing that

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[126] Goodwin at 248-49.

[127] Id. at 235.

we declared those eight men to be non-persons," he said. "It was demeaning to the men who died."[128]

D. Profits or Integrity?

Finally, reporters and editors should consider how outing will impact their credibility as journalists. Sex sells, and stories that reveal the secret gay lives of celebrities will increase circulation. But at what cost? Short-term profits may increase, but the paper begins to lose its integrity. Will readers trust their reporting on more important issues? Indiscriminate outing drags so-called respectable publications down with the supermarket tabloids. As The New Republic explains,

> The press has devised an elaborate system for privacy-raiding. Rumors are circulated; off-the-record quotes are pursued. Once a certain level of controversy has been stirred up, the controversy itself becomes the story, in which all the details of a private life are 'incidentally' revealed. In the last resort, the prestige press and the tabloids enter into a parasitic relationship, where the former reports the reporting of the latter.[129]

For example, a New York group, Outpost, outed public figures by pasting posters throughout the city.[130] Journalists reported the group's activities and named the celebrities who had been

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[128] Id. at 249.

[129] Predators at 9-10.

[130] John Gallagher, Actor's Libel Lawsuit Leaves Media Asking How to Cover Outing, Advocate, Aug. 13, 1991.

outed, but they tried to avoid liability by not calling the victims gay themselves.[131]

VII. Conclusion

Outing is harmful, and in most cases, unnecessary. But current defamation and invasion of privacy law fail to help the outing victim. In suits against the media, the press will usually win. I suggest that instead of trying to limit the media's First Amendment power, we should encourage journalists to use their power more responsibly.

This paper has focused on the outing of gay people, but all people should be concerned with this issue. As with Oliver Sipple, anyone who happens to be in the right (or wrong) place at the right (or wrong) time can suddenly be thrust into the limelight. And when Andy Warhol's prophecy that "in the future everyone will be famous for fifteen minutes" comes true, all aspects of our private lives will be fair game.

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[131] Id.