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Privacy Torts: Unreliable Remedies for LGBT Plaintiffs

Anita L. Allen[†]

INTRODUCTION

In the United States, both constitutional law and tort law recognize the right to privacy, understood as legal entitlement to an intimate life of one's own free from undue interference by others and the state.¹ Lesbian, gay, bisexual, and transgender ("LGBT") persons have defended their interests in dignity, equality, autonomy, and intimate relationships in the courts by appealing to that right.

In the constitutional arena, LGBT Americans have claimed the protection of state and federal privacy rights with a modicum of well-known success.²

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1. The right to privacy is also recognized by federal statutes. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (2006). *See generally* Anita L. Allen, *Privacy Law and Society* (2007) (textbook of common law, constitutional, and statutory privacy and data protection law, including chapters that focus on federal internet, communications and surveillance statutes). Federal statutes whose bare titles do not suggest privacy protection nonetheless function to create medical, financial, and other privacy rights federal agencies are empowered to enforce. Implicated in a recent controversy concerning LGBT youth, the Federal Trade Commission Act is an apt example. In a July 1, 2010 letter, David Vladek, Director of the Federal Trade Commission's Bureau of Consumer Protection, warned that plans pursuant to a bankruptcy proceeding to sell personal information of defunct XY Magazine subscribers and XY.com site users (as an asset belonging to magazine and site founder Peter Ian Cummings) could violate the Federal Trade Commission Act's prohibition against "unfair or deceptive acts or practices." *See* Letter from David C. Vladek, Dir. of the Bureau of Consumer Prot., U.S. Fed. Trade Comm'n, to Peter Larson & Martin E. Shmagin (July 1, 2010), *available at* <http://www.ftc.gov/os/closings/100712xy.pdf>. XY.com had expressly promised privacy and anonymity to its site users, most of whom were teenagers interested in gay lifestyles and issues. *Id.* Mr. Vladek requested that "to avoid the possibility that this highly sensitive data" revealing the sexual orientation of young men and teens "fall into the wrong hands," the data "be destroyed (along with any credit card data still being retained) as soon as possible." *Id.*

2. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down laws criminalizing consensual sexual acts between same-sex adults); *see also* *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (recognizing right to same-sex marriage in Commonwealth of

Holding that homosexuals have the same right to sexual privacy as heterosexuals, *Lawrence v. Texas* symbolizes the possibility of victory in the courts for LGBT Americans seeking privacy in intimate life. “Liberty,” wrote Justice Anthony Kennedy in *Lawrence*, “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”³ In another important decision, *Goodridge v. Massachusetts Department of Public Health*, the Massachusetts Supreme Judicial Court held that state prohibitions on same-sex marriage lacked a rational basis and violated the state constitution’s affirmation of “the dignity and equality of all individuals,” with a concurring justice explaining that the “right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference.”⁴

In the U.S. tort arena, as in the state and federal constitutional arenas, LGBT plaintiffs have claimed violations of their privacy rights and have sometimes won.⁵ In common law privacy tort cases, the defendants charged with privacy violations typically have included private-sector employers,⁶ the professional media,⁷ retailers,⁸ or private individuals.⁹ As detailed throughout this Article, LGBT plaintiffs have accused such defendants of prying, spying, insulting or harassing them, or disclosing their birth sex, sexual orientation, or medical information without authorization. Lawsuits have framed the violations experienced by LGBT claimants as one or more of the four privacy torts Dean William L. Prosser distinguished¹⁰ and subsequently enshrined in the American Law Institute’s Second Restatement of Torts.¹¹ Several authors have argued

Massachusetts).

3. *Lawrence*, 539 U.S. at 562.

4. *Goodridge*, 798 N.E. 2d at 948.

5. *See, e.g.*, *Simpson v. Burrows*, 90 F. Supp. 2d 1108 (D. Or. 2000) (lesbian businesswoman alleging locals invaded her common law privacy rights, inflicted emotional distress, and defamed her in concerted campaign to oust her and her partner from Christmas Valley community).

6. *See, e.g.*, *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1034 (Ohio Ct. App. 1995) (whether law firm invaded a gay employee’s privacy by disclosing his sexual orientation within the firm after he named his male partner as his pension beneficiary was a question of fact for a trial court).

7. *See, e.g.*, *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002) (gay lifestyle magazine not liable for invasion of privacy for having acquired and published photographs of partly closeted gay model without his consent).

8. *See, e.g.*, *Elmore v. Atl. Zayre, Inc.*, 341 S.E.2d 905, 905 (Ga. Ct. App. 1986) (plaintiff not entitled to recover for privacy invasion where retail store employees called police after peeping through a ceiling crack to view him in a toilet stall where he was allegedly engaging in “sodomy”).

9. *See, e.g.*, *Plaxico v. Michael*, 735 So. 2d 1036, 1038 (Miss. 1999) (lesbian plaintiff not entitled to recover for privacy invasion after lover’s ex-husband spied on her, photographed her partially nude in her bedroom, and then distributed photographs to gain advantage in a child custody dispute).

10. William L. Prosser, *Privacy*, 48 *Calif. L. Rev.* 383, 423 (1960).

11. The *Restatement (Second) of Torts* provides that the right of privacy is invaded by “(a) unreasonable intrusion upon the seclusion of another . . . or (b) appropriation of the other’s name

that the invasion of privacy torts, especially Prosser's "unreasonable publicity given to the other's private life," are potentially useful remedies for LGBT plaintiffs.¹² But LGBT plaintiffs relying on Prosser's common law tort remedies have not been as successful as some would have predicted based on a general understanding of the torts and their superficial appeal. The common law of torts has yet to generate its *Goodridge* or *Lawrence*.

In this Article I analyze about three dozen cases, mostly published appellate cases, in which LGBT plaintiffs have alleged one or more of Prosser's four common law privacy tort offenses on facts that expressly involve their sexual orientations or gender identities.¹³ The aims of my analysis are twofold.

First, I wish to contribute to the understanding of the legacy of Prosser's four-fold taxonomy of privacy tort claims—intrusion, appropriation, publication of private fact, and false light publication. As noted, the taxonomy appeared in Prosser's 1960 article.¹⁴ Serving as its lead reporter, Prosser later incorporated his taxonomy into the Restatement (Second) of Torts.¹⁵ I argue

or likeness . . . ; or (c) unreasonable publicity given to the other's private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public" Restatement (Second) of Torts § 652A(2) (1977).

12. See, e.g., 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. L.J.* 857, 896–98 (1993) (the private facts tort should be available as remedy for persons whose sexual orientation is exposed without consent by others seeking to combat AIDS, identify secret homosexuals, or provide homosexual role models); Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 *Tul. J.L. & Sexuality* 119, 127 (2003) (the private facts tort offers a potential "route to recovery for the individual who is accused of or revealed as being a homosexual"); cf. Keith J. Hilzendeger, Comment, *Unreasonable Publicity: How Well Does Tort Law Protect the Unwarranted Disclosure of a Person's HIV-Positive Status?*, 35 *Ariz. St. L.J.* 187, 188 (2003) (courts should offer broader protection to plaintiffs suing under privacy facts torts than the *Restatement of Torts* currently calls for); Ronald F. Wick, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 *Geo. L.J.* 413, 427 (1991) (same).

13. For this Article, I attempted to gather all of the reported privacy tort cases to date in which plaintiffs self-identified as lesbian, gay, bisexual, or transsexual or transgender. (In the attempt I uncovered a number of pending and unpublished LGBT-plaintiff privacy tort cases, along with cases in which persons have sued under privacy tort theories for misattribution of gender-nonconforming traits, see *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944), homosexuality or being transgender. I have incorporated all of these interesting cases into the Article.) Extrapolating from my findings and the empirical results reported by William McLaughlan, see William McLaughlan, *Why People Litigate: An Examination of Privacy Tort Cases* (Apr. 3, 2008) (paper presented at the annual meeting of the Midwest Political Sci. Ass'n Annual Nat'l Conference, Palmer House Hotel, Hilton, Chicago, IL), available at http://www.allacademic.com/meta/p266091_index.html, I estimate that reported appellate cases brought by LGBT persons alleging LGBT-related offenses probably account for no more than 3 percent of the total number of appellate privacy cases decided since 1906. McLaughlan offers 350 as the total number of appellate privacy tort cases decided in forty-seven states between 1906 and the year 2000. *Id.* at 27.

14. Prosser, *supra* note 10.

15. Restatement (Second) of Torts § 652A(2) (1977).

that although most courts adopting the Restatement have not questioned the accuracy of Prosser's distinctive formal taxonomy,¹⁶ plaintiffs' lawyers in LGBT issues-related cases implicitly challenge the taxonomy by alleging that a single encounter with defendants resulted in violations encompassing two, three, or all four of Prosser's invasion of privacy torts. I conclude that the frequent practice of characterizing a single privacy invasion as an instance of multiple privacy torts calls into question the integrity of Prosser's framework of formal categories. Although I do not claim that LGBT issues-related cases strain Prosser's taxonomy any more than other privacy tort cases, I do believe this body of cases exposes the limitations of Prosser's distinctions on particularly poignant and compelling facts.

Second, I wish to assess the efficacy of existing privacy tort remedies for persons alleging wrongs tied to sexual orientation and gender identity. In this regard, I maintain that the theoretically promising invasion of privacy torts have too often been practical disappointments for LGBT plaintiffs in the courts.¹⁷ To provide real, consistent remedies for LGBT plaintiffs, courts must refashion their understandings of how critical elements of privacy torts can be met and withstand defenses.

The post-1960 cases tentatively support three main conclusions about the efficacy of privacy tort remedies. First, in the past half century, the invasion of privacy tort has not been especially useful to LGBT plaintiffs seeking monetary and injunctive relief in cases related to their sexual orientations or identities. Second, as applied, the invasion of privacy tort has not reliably vindicated the complex interest LGBT plaintiffs understandably assert in what I term "selective disclosure" of their sexual orientations or identities. Third, recent success in the LGBT population's historic quest for equality and inclusion potentially undercuts the already tenuous practical utility of the invasion of privacy tort. Courts may fail to discern that sexual orientation and sexual identity-related privacy protection is warranted for LGBT individuals if, on the societal level, there has been a significant reduction in violence, social stigma, and discrimination associated with open LGBT status. Wins in *Lawrence* and *Goodridge* signal such a reduction, as does pending legislation to abolish the

16. Even the courts that have rejected the false light tort or the private fact tort have not done so on the ground that the taxonomy itself is flawed. See generally James B. Lake, *Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort"*, 61 Fed. Comm. L.J. 625, 639-48 (2009) (stating courts reject false light tort because they believe it overlaps the defamation tort and the publication of private fact tort because they believe it impairs freedom of speech).

17. Cf. Hilary E. Ware, Note, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 Harv. C.R.-C.L. L. Rev. 449, 468, 488 (1997) (arguing that privacy torts are "unpromising" remedies against unwanted disclosure of homosexuality and need to be "reconceptualiz[ed]"). My broader contention is that the torts are unpromising remedies against not only unwanted disclosure, but also against unwanted intrusion, false light publicity, and appropriation.

nation's policy against homosexuals in the military.¹⁸

Part I briefly recites the history and background of the invasion of privacy tort, an indispensable highlight of which is the seminal 1890 *Harvard Law Review* article by Samuel D. Warren and Louis D. Brandeis. I then organize my substantive analysis to mirror the structure of Prosser's classic 1960 article. Prosser's article devoted separate sections to each of the four torts comprising his descriptive taxonomy of privacy claims. Part II examines LGBT plaintiffs' "intrusion" claims. I group plaintiffs' intrusion claims into subcategories Prosser did not identify, and suggest why even seemingly strong intrusion claims brought by LGBT parties have failed. Part III examines LGBT plaintiffs' "public disclosure of private facts" claims. I explain why courts are unreceptive to the notion that a person should be legally entitled to disclose selectively—that is, disclose in some contexts to some persons but not others—sexual orientation, same-sex relationships, and birth sex. Part IV assesses false light publication claims by LGBT plaintiffs and persons inaccurately depicted as such. Plaintiffs alleging they are not LGBT, but that they have been publicly described as such, appear to have an easier time with the false light tort than plaintiffs who are LGBT alleging that their lives and identities have been wrongfully distorted due to prejudice and intolerance. Part V examines LGBT plaintiffs' commercial appropriation claims, and the doctrinal reasons they generally fail, unrelated to sexual orientation, gender, or birth sex. Tort doctrines afford remarkable freedom to those who make unauthorized use of photographs in "newsworthy" and other publications. The case law illustrates that implications of this doctrinal latitude are especially serious for LGBT people.

After defending his descriptive taxonomy, Prosser devoted the final sections of his article to "common features,"¹⁹ "public figures and public interest,"²⁰ "limitations,"²¹ and "defenses."²² These sections reflected skepticism about the privacy tort and revealed concerns that unbridled expansion of the privacy torts could interfere with First Amendment freedoms of speech and press and crowd the proper domains of the defamation and infliction of emotional distress torts. Responding with hindsight to some of these jurisprudential concerns, Part VI notes judicial observations about the

18. See National Defense Authorization Act for Fiscal Year 2011, H.R.5136, 111th Cong. (2010) (received and read twice in Senate, June 28, 2010); see also *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP EX, 2010 WL 3960791 (C.D. Cal. Oct. 12, 2010) (holding DADT unconstitutional and issuing an injunction to stop the enforcement of the policy); accord, *Witt v. U.S. Dept. of Air Force*, No. 06-5195RBL, 2010 WL 3732189 (W.D. Wash. Sept. 24, 2010) (holding that the application of DADT violated the plaintiff's due process rights, and ordering to restore her military service).

19. Prosser, *supra* note 10, at 407.

20. *Id.* at 410.

21. *Id.* at 415.

22. *Id.* at 419.

interplay and possible redundancy of privacy invasion and defamation remedies. Rounding out my account of the experience of LGBT privacy plaintiffs, I conclude with an assessment of the fate of intentional infliction of emotional distress claims brought alongside LGBT plaintiffs' privacy claims.

I

HISTORY AND BACKGROUND OF THE PRIVACY TORT

The privacy tort is a modern cause of action that has been recognized in most states.²³ The concept of a common law right to privacy took flight in 1890. The prominent lawyer and affluent businessman Samuel D. Warren was unhappy about attention the press paid to his lavish social life.²⁴ Warren pressured his reluctant friend and law partner Louis D. Brandeis into coauthoring a law review article urging recognition of an invasion of privacy tort.²⁵ The tort would deter and redress publication in newspapers of gossip and photographs that "invaded the sacred precincts of private and domestic life" and thereby injured "inviolable personality."²⁶ A rhetorical tour de force, the article inspired the judiciary. Courts soon began citing the article with approval, eventually expanding the understanding of the kinds of litigable privacy wrongs to include violations of modesty and genteel refinement.²⁷ In 1906, relying on

23. The first use of the word "privacy" in a state court case may have been in *State v. Mann*, 13 N.C. (2 Dev.) 263 (1829), where the court declined to consider punishment for battery against a slave "by reasons of its privacy"—a privacy which permits the master to exact "bloody vengeance" in response to unruly disloyalty. *Id.* at 267; see also Frederick S. Lane, *American Privacy: The 400-Year History of Our Most Contested Right* 59 (2009). The term cropped up again in 1830 and 1868 in the voices of judges describing the proper realm of women (privacy life) and the rationale for the authority of husbands to physically discipline their spouses (domestic privacy). *Id.* at 60. The state of Washington in 1889 became the first to "explicitly codify a right to privacy in its state constitution: 'No person shall be disturbed in his private affairs, or his home invaded, without authority of law.'" *Id.* (citation omitted).

24. See generally Melvin I. Urofsky, *Louis D. Brandeis: A Life* 46–104 (2009). In his influential article on privacy, Dean Prosser stated that the invasion of privacy tort was "a most marvelous tree to grow from the wedding of the daughter of Mr. Samuel D. Warren." Prosser, *supra* note 10, at 423. But it is doubtful that Warren had a daughter of marriageable age in 1890, a mere seven years after his own marriage. Warren married his wife Mabel Bayard in 1883, a wedding from which the bride banned the groom's best friend, Louis D. Brandeis, because he was Jewish. See Urofsky, *supra* note 24, at 97.

25. Urofsky, *supra* note 24, at 98 ("Naturally the penny press of the era wanted to report on the doings of [Warren's circle of family and friends] . . . men and women who seemed to party constantly, had homes in the city and the country, rode to the hounds, sailed, and had money to support such a lifestyle. For reasons not altogether clear, at some point Sam began to resent what he saw as press intrusion into his private life, and turned to Louis. Brandeis did not really want to get involved (he said he would have preferred to write on the duty of publicity than on the right to privacy) but, at his friend's importuning, agreed to look into the issue.").

26. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193, 195, 205 (1890).

27. See, e.g., *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 252 (1891) (holding that a female plaintiff could not be forced to undergo a medical examination and thereby "lay bare the body," citing "[t]he inviolability of the person" and the right "to be let alone," and thus echoing

natural law to bypass the limitations of positive law that kept New York's Court of Appeals from recognizing a privacy right in a famous 1902 decision,²⁸ the Supreme Court of Georgia became the first state high court to allow a plaintiff to sue under the privacy tort theory.²⁹ According to the unanimous opinion by Justice Cobb, "The right of privacy has its foundation in the instincts of nature."³⁰ The victim of a privacy invasion is "in reality a slave, without hope of freedom, held to service by a merciless master."³¹ Other courts followed Georgia's lead, and tort actions premised on invasion of privacy soon proliferated.³²

A. Prosser's Influential Taxonomy

Prosser's historic 1960 article assessing the proliferation of privacy tort actions had a major impact on subsequent scholarly understanding of the early history of the invasion of privacy tort. Moreover, Prosser's descriptive taxonomy of a half century of cases would govern the subsequent doctrinal development of the invasion of privacy tort in the courts.

Prosser framed his article as an original analysis of about three hundred published court opinions in privacy-related tort cases.³³ Prosser's thesis was that the invasion of privacy tort, then recognized by what he called an

Warren and Brandeis); *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (N.Y. Sup. Ct. 1891) (family of deceased woman could block the erection of a bust in her honor, on the ground that she was not a "public character" but "a woman of great refinement and cultivation" who preferred privacy and had a right to it).

28. See *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (N.Y. 1902) (holding that the right to privacy tort had not yet been adopted and therefore could not provide a remedy for a woman whose photograph had been used on packaging for baking flour without her consent).

29. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80–81 (Ga. 1905) ("So thoroughly satisfied are we that the law recognizes within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . .").

30. *Id.* at 69.

31. *Id.* at 80.

32. In his 1960 article, Prosser comprehensively cited and sorted the cases spawned by *Pavesich*, notable examples of which are *Sidis v. F-R Publishing*, 113 F.2d 806 (2d Cir. 1940) (New York not liable for publishing unflattering story about former child prodigy); *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931) (privacy of ex-prostitute and acquitted murder defendant invaded by unauthorized film about her life); and *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944) (memoir writer liable to woman repelled by portrayal of her as a woman with masculine virtues).

See also *McLauchlan*, *supra* note 13. According to *McLauchlan*, about ten privacy tort cases are decided each year on appeal in the United States (excluding, Alaska, Hawaii and Utah) and there have been a total of about 350 such cases through the year 2000, most losses for their plaintiffs. *Id.* at 25, 27 fig.1. He places the odds of winning a privacy appeal as no better than three to one. *Id.* at 28 fig.2. He speculates that people litigate privacy wrongs due to an emotional attachment to their claims. *Id.* at 25.

33. Prosser, *supra* note 10, at 388.

“overwhelming” majority of state courts, was in reality four distinct torts.³⁴ Prosser labeled them: (1) intrusion; (2) public disclosure of private fact; (3) false light in the public eye; and (4) appropriation.³⁵ To defend his thesis, Prosser cited numerous cases illustrating each of the four categories of his four-part taxonomy.³⁶

Prosser did not stop with a bare taxonomy. He also outlined the critical elements of proof courts required for each of the four torts. For example, Prosser observed that proof of conduct “which would be offensive or objectionable to a reasonable man” was required in the case of intrusion;³⁷ and proof of publication or broadcast to more than a few persons was required in the case of public disclosure.³⁸ In addition, Prosser ventured to characterize the different interests at stake in the recognition of each tort. He associated mental repose with intrusion, good reputation with false light in the public eye, and property with appropriation.³⁹ Prosser further noted common features of the torts, such as the “personal” nature of the rights conferred⁴⁰ and the availability of typical tort damages.⁴¹ Recognizing a “head-on collision with the constitutional guaranty of freedom of the press,”⁴² Prosser argued that liability and recovery in invasion of privacy cases were significantly affected by the plaintiffs’ celebrity or public office and the news interest in the plaintiffs’ lives.⁴³ Finally, Prosser identified common defenses to invasion of privacy claims, starting with consent.⁴⁴

In the conclusion to his article, Prosser distilled an array of skeptical concerns about the privacy tort. It troubled him, first, that the courts had created so complex a series of four torts from the “use of a single word”⁴⁵ in the Warren and Brandeis article; second, that the right’s existence narrows the constitutional freedoms of speech and press; and, third, that privacy actions crowd the established territory of other, more limited tort actions—chiefly,

34. *Id.* at 386.

35. *Id.* at 389.

36. Though it would become the most influential, the 1960 article was not the first to introduce Prosser’s taxonomy. Prosser may have debuted it in articles written in the mid-1930s. See Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. (forthcoming 2010). Suggestive of his influence even before 1960, the taxonomy appears, minus the false light tort, in the 1956 case *Housh v. Peth*, in which the state of Ohio first recognized the right to privacy. *Housh v. Peth*, 133 N.E.2d 340, 343 (Ohio 1956). There the court distinguished three causes of action: (1) “the unwarranted appropriation or exploitation of one’s personality”; (2) “the publicizing of one’s private affairs with which the public has no legitimate concern”; and (3) wrongful intrusion into one’s private activities.” *Id.* at 341.

37. Prosser, *supra* note 10, at 391.

38. *Id.* at 393–94.

39. *Id.* at 392.

40. *Id.* at 408.

41. *Id.* at 408–09.

42. *Id.* at 410.

43. *Id.* at 410–15.

44. *Id.* at 419.

45. *Id.* at 422.

infliction of emotional distress and defamation.⁴⁶ He was also troubled that the privacy torts were unbounded enough to encourage suits over trivialities or intrusions brought on oneself: “a lady who insists upon sun-bathing in the nude in her own back yard” invites “neighbors [to] examine her with appreciation and binoculars.”⁴⁷

As Reporter for the American Law Institute’s Restatement (Second) of Torts, Prosser enshrined his descriptive taxonomy as positive law.⁴⁸ The same four invasion of privacy torts Prosser identified in the 1960 article were included in the Restatement. Through the Restatement, Prosser may have achieved the ultimate aim of his landmark 1960 article: he made it more likely the bar and bench would “realize what we are doing, and give some consideration to the question of where, if anywhere, we are to call a halt.”⁴⁹ In the fifty years since Prosser’s article, additional state high courts have embraced the invasion of privacy tort. A few, however, have heeded Prosser’s cautions and declined to embrace privacy actions premised on publication of private facts or false light, citing First Amendment limitations,⁵⁰ or citing the adequacy of remedies in defamation and other torts.⁵¹

B. LGBT Issues in Privacy Tort Litigation

Prosser has been described as “anti-gay.”⁵² Yet there is nothing in principle “anti-gay” about the privacy torts he helped mold. Indeed, relying on the promise of the Prosser’s four privacy torts, LGBT claimants and their attorneys have sought monetary and injunctive relief. As the cases I discuss here will reveal, LGBT plaintiffs have brought privacy claims because they were spied on, insulted, disparaged, and whispered about. They have alleged that the tortious publication of their sexual orientation has destroyed their jobs, professions, businesses, families, and intimate personal relationships. The proliferation of public lawsuits exposing the private lives of LGBT individuals has illuminated the unfortunate reality that members of the LGBT community

46. *Id.*

47. *Id.* A real life version of this scenario unfolded in 2002 when television celebrity Jennifer Anniston sued and eventually settled with various media defendants who published photographs of her sunbathing at her home with her breasts exposed. The photographs were taken by professional paparazzi. *See Anniston Snaps Case ‘Is Settled’*, *Birmingham Post*, July 4, 2002, at 9.

48. *See* Restatement (Second) of Torts § 652A(2) (1977).

49. Prosser, *supra* note 10, at 423.

50. *See e.g.*, *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988) (rejecting public disclosure of private facts tort on constitutional free speech grounds).

51. *See e.g.*, *Denver Publ’g Co. v. Bueno*, 54 P. 3d 893 (Colo. 2002); *Lake v. Wal-Mart Stores*, 582 N.W.2d 231 (Minn. 1998); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (all rejecting the false light tort as duplicative of the older defamation tort).

52. Professor Stephen Sugarman, Opening Remarks at the California Law Review Symposium: Prosser’s *Privacy* at 50 (Jan. 29, 2010), available at <http://www.californialawreview.org/information/prosser-info>.

do not fully benefit in everyday life from the rules of “deference and demeanor” that otherwise govern civil relationships.⁵³

For example, common private places are not reliably private for the LGBT community. Neither a restroom stall⁵⁴ nor a bedroom⁵⁵ is free from intrusion. Members of a society that once told gays and lesbians to closet themselves have, in effect, crept into the closet with them to peep at and punish what goes on inside.⁵⁶ Straight husbands and wives have publicized their gay, lesbian, or bisexual spouses’ sexual orientation,⁵⁷ sometimes hoping to prevail in a child custody battle.⁵⁸ Even more unfortunate, the cases surveyed in this Article reveal that the history of the privacy tort is not a simple “us versus them” story. The LGBT community has invaded the privacy of its own members. For instance, in 2002 a gay model sued a well-meaning gay lifestyles magazine for using his photographs to illustrate a story about the dangers of unprotected sex and excessive drug use in a narrow segment of gay culture to which the model did not belong.⁵⁹ In 1997, a closeted gay man sued his vindictive ex-lover who had revealed his sexual orientation to his employer, mother and neighbors.⁶⁰

In Parts II–V below, I examine privacy tort suits brought by LGBT plaintiffs (and by persons accurately or inaccurately characterized as LGBT by others). These plaintiffs have been willing to bring lawsuits, knowing that

53. Erving Goffman *The Nature of Deference and Demeanor*, 58 *Am. Anthropologist* 473, 475–99 (1956). According to Goffman,

In all societies rules of conduct tend to be organized into codes which guarantee that everyone acts appropriately and receives his due. In our society the code which governs substantive rules and substantive expressions comprises our law, morality, and ethics, while the code which governs ceremonial rules and ceremonial expressions is incorporated in what we call etiquette.

Id. at 476–77.

Nor do persons perceived as belonging to the LGBT population get the benefits of civility. *See* Complaint for Libel, False Light, Intentional Interference with Business Relations, Intentional Infliction of Emotional Distress, and Injunctive Relief, *Thompson v. Doe*, No. 2010CV183037 (Ga. Super. Ct. Mar. 19, 2010) [hereinafter *Complaint for Thompson*] (Atlanta adult entertainment dancer “Nairobi” sued rapper/comedian whose derogatory Twitter message suggested she was a man in drag).

54. *See Elmore v. Atl. Zayre, Inc.*, 341 S.E.2d 905, 905 (Ga. Ct. App. 1986).

55. *See Plaxico v. Michael*, 735 So. 2d 1036, 1038 (Miss. 1999) (lesbian photographed partially nude by lover’s peeping Tom ex-husband).

56. *See Elmore*, 341 S.E.2d 905.

57. Ex-husbands have also uncloseted ex-wives. *See, e.g., Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284 (D. Utah 1998) (holding that school district’s restrictions on lesbian teacher’s right to express her sexual orientation outside the classroom impermissibly infringed teacher’s First Amendment rights in case where school teacher’s ex-husband revealed her lesbian sexual orientation to others); *see also Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124 (Tex. App. 2001) (affirming summary judgment in favor of television station on First Amendment ground that the publication of private fact was of “legitimate public concern” in case where gay HIV positive father and police officer in custody battle with ex-wife who revealed his status to media).

58. *See Plaxico*, 735 So. 2d 1036.

59. *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002).

60. *Doe v. S.B.M.*, 488 S.E.2d 878, 880 (S.C. Ct. App. 1997).

litigation would render hidden details of their personal lives more public. Like most privacy tort plaintiffs, LGBT plaintiffs ironically suffer publicity in order to use the tort system to remedy perceived invasions of their privacy. Occasionally, privacy plaintiffs manage to sue anonymously,⁶¹ but most file publicly available lawsuits under their own names alleging one or more of Prosser's four torts: intrusion, publication of private fact, false light, and appropriation. I begin with LGBT intrusion cases.

II

INTRUSION

"Intrusion" is the name Prosser gave to the first of the four invasion of privacy torts discussed in his 1960 article.⁶² "It appears obvious," Prosser wrote, "that the interest protected by this branch of the tort is primarily a mental one."⁶³ The intrusion tort has arisen, he stated vaguely, "chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."⁶⁴ According to Prosser, physical trespass into private domains is the paradigm of intrusion, but non-trespassory wiretapping and harassing debt-collection phone calls can be privacy intrusions too.⁶⁵ Prosser pointed out that courts had found attempts to access private documents, such as bank records or work papers, to constitute intrusion.⁶⁶ But Prosser detected reluctance on the part of the courts to view either noise nuisances or insulting words and gestures as intrusions.⁶⁷ Moreover, "[o]n the public street, or in any other public place, the plaintiff has no right to be alone."⁶⁸ It is "clear that the intrusion must be something which would be offensive or objectionable to a reasonable man."⁶⁹

This Part examines these aspects of the intrusion tort, and concludes that, in operation, the tort has proven to be an unreliable remedy for LGBT plaintiffs. This Part also identifies what I describe as four different categories or types of intrusion offenses that LGBT intrusion tort plaintiffs have alleged:

61. See, e.g., *Doe v. Templeton*, No. 03 C 5076, 2004 WL 1882436 (N.D. Ill. Aug. 6, 2004) (lesbian plaintiff tricked into being photographed with imposter posing as famous skateboarder Tony Hawk sued for publication of photograph with caption she believed revealed to others her sexual orientation for the first time).

62. See Prosser, *supra* note 10, at 389. The rule is stated in the *Restatement (Second) of Torts* as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement (Second) of Torts* § 652B (1977).

63. Prosser, *supra* note 10, at 392.

64. *Id.* at 392.

65. *Id.* at 389–90.

66. *Id.* at 390.

67. *Id.*

68. *Id.* at 391.

69. *Id.* at 390–91.

(1) physical intrusion and surveillance; (2) verbal intrusion and prying; (3) verbal insult and disparagement; and (4) intrusive publication of private fact. Non-LGBT plaintiffs could theoretically experience—and have in fact experienced—all four categories of intrusion offenses. But the facts behind the case law suggest that an LGBT sexual orientation or identity can provoke especially thoughtless and egregious intrusion offenses, reflective of a social context of prejudice, homophobia, and discrimination.

A. Intrusion: Physical Intrusion and Surveillance

Given its surface potential, the intrusion tort has been surprisingly unhelpful to several LGBT plaintiffs in the years since Prosser's 1960 article defined its parameters. In cases of physical intrusion and surveillance of LGBT persons, courts have all too often deemed the defendants' conduct reasonable.

In *Elmore v. Atlantic Zayre, Inc.*,⁷⁰ the plaintiff-appellant unsuccessfully appealed a summary judgment order entered on behalf of a retail store at which he was arrested and charged with sodomy. Following a customer's complaint that homosexual activity was taking place in a restroom, store employees peeked through a crack in the restroom ceiling and observed Mr. Elmore in a toilet stall.⁷¹ Elmore filed a complaint for intrusion upon seclusion alleging that the defendants spied on him "in a private place."⁷² Plaintiff-appellant Elmore argued that private citizens do not have the right to spy and should leave law enforcement surveillance to the police.⁷³ Elmore also denied that he was engaged in sodomy. The trial court granted summary judgment in favor of the retail defendants; the Court of Appeals of Georgia affirmed.⁷⁴

The Court of Appeals found that "[a]n individual clearly has an interest in privacy within a toilet stall."⁷⁵ However, the court found the defendants' intrusion reasonable—not highly offensive to a reasonable person as the tort requires. The right to privacy in a public restroom stall is not absolute, the court stressed.⁷⁶ The restroom in question was for the use of customers, and the defendant had a duty to keep its restrooms free of crime.⁷⁷ Moreover, the spying activity was ignited by the store's loss-prevention manager's observation and complaint of "highly suspicious"⁷⁸ activity in the restroom.

70. 341 S.E.2d 905, 905 (Ga. Ct. App. 1986).

71. *Id.*

72. *Id.*

73. *Id.* at 906.

74. *Id.* at 907.

75. *Id.* at 906.

76. *Id.* (citing *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1906)); see also Anita L. Allen, *Driven Into Society: Philosophies of Surveillance Take to the Streets of New York*, Amsterdam L. F. (2009), available at ojs.ubvu.vu.nl/alf/article/download/92/157 (noting that there is a privacy interest in conduct in public places that has limits and is not absolute).

77. *Elmore*, 341 S.E.2d at 906.

78. *Id.* at 905.

Although a typical restroom open to the general public of all ages in a department store is not an appropriate place for sexual activity, the conduct of the defendants was reprehensible. Measures to abate sexual activity in toilet stalls do not have to include peeping at individuals through concealed openings. The defendant employees easily could have investigated their suspicions of merchandise theft or of sexual activity in a way that respected the privacy and dignity of persons inside the stall. If suspicious activity seemed to be occurring, for instance, they might have knocked on the door of the stall and asked anyone inside to come out. Instead, they engaged in surreptitious peeping, which, on these facts, a reasonable person could view as intrusion.

Carlos Ball has argued, with respect to the Supreme Court, that “the Court’s geographization of sexual liberty has resulted in the protection of sexual conduct that takes place in the home (and, presumably, in analogous sites such as hotel rooms) while leaving unprotected sexual conduct that occurs in public sites” such as restrooms.⁷⁹ However, gays, lesbians and bisexuals have a problem whether sexual liberty is formally “geographized” or not. The geographization of sexual liberty alone cannot ensure adequate legal protection for the compliant LGBT population that discretely limits sex to approved domestic and similar sites. The holding of *Lawrence v. Texas* leaves lower courts free to refuse the protection of the intrusion tort to lovers who are members of the same sex even when their consensual adult sexual activity has occurred in a private bedroom.⁸⁰

Plaxico v. Michael illustrates that the private home is not a sanctuary for intimate sex for LGBT individuals where courts view homosexual relationships as illicit.⁸¹ Glenn Michael was divorced, and his ex-wife had custody of their six-year-old daughter.⁸² Michael learned his ex-wife was involved in a lesbian relationship with Rita Plaxico.⁸³ Michael drove to his ex-wife’s cabin, crept up to a window, peered inside, and watched the couple having sex.⁸⁴ He returned to his vehicle, retrieved a camera, and photographed Plaxico half-naked on the bed.⁸⁵ Michael then filed for a modification of child custody, using the surreptitiously snapped photos of Plaxico during the trial.⁸⁶ The court granted

79. Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 Colum. J. Gender & L. 1, 4 (2008). *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), indeed tie sexual privacy to the bedroom. *But see Katz v. United States*, 389 U.S. 347 (1967) (holding that a man engaged in illegal activities in a phone booth on a public street has a legitimate expectation of privacy for Fourth Amendment purposes).

80. *Lawrence* struck down criminal prohibitions on gay sex. It does not dictate that private intrusions into the bedrooms of gay persons must be ruled “highly offensive to a reasonable person” in state court tort actions. Restatement (Second) Torts § 652B (1977).

81. 735 So. 2d 1036 (Miss. 1999).

82. *Id.* at 1038.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

him custody of his minor child.⁸⁷ Subsequently Plaxico filed suit for intrusion upon seclusion and solitude.⁸⁸ The Circuit Court of Tippah County rejected the suit, and the Mississippi Supreme Court affirmed.⁸⁹

Like the plaintiff in *Elmore*, Plaxico lost because the court found secret, illegal surveillance of suspected homosexual activity justified due to the suspected activity's illicit and possibly illegal character.⁹⁰ The majority held that Plaxico failed to prove that Michael's actions were "highly offensive to the ordinary person."⁹¹ Although he spied and photographed sexual intimacies, he was prompted to do so to protect his daughter from exposure to an "illicit lesbian sexual relationship."⁹² The court concluded that most people would find the purpose of the defendant's spying "justified."⁹³

The court emphasized, curiously and perhaps disingenuously, that it was not Michael's ex-wife's homosexuality that made her a suspect custodial parent. According to the court, the result in Plaxico's case would have been the same if the ex-wife had had an "illicit" affair with a man.⁹⁴ The court did not define "illicit." It left it to readers of its opinion to speculate about what would make a particular affair illicit. The court may have been alluding to the fact that certain heterosexual sex acts were illegal or had legal implications (e.g., sex with a married person, sex with an animal, sex with a minor, sex with a first-degree relative, oral sex, or anal sex), but the court neglected to provide explicit clarification.

A dissenting judge agreed with Rita Plaxico that "peeping into the bedroom window of another is a gross invasion of privacy," and that the end did not justify the means.⁹⁵ A second dissenting opinion described defendant Michael's act as "voyeuristic"⁹⁶ and suggested that because Plaxico was not party to the custody dispute, Michael did not have a right to take her picture. His ex-wife's picture might have been sufficient. One could argue, though, that on the facts of the case Michael's ex-wife would have had an intrusion claim as strong as her lover's.

87. *Id.*

88. *Id.*

89. *Id.* at 1040.

90. Prior to *Lawrence v. Texas*, oral sex and anal sex could be criminalized. Many states kept on the books rarely enforced laws criminalizing these acts when performed by heterosexuals and/or homosexuals. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) ("In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.").

91. *Plaxico*, 735 So. 2d at 1040.

92. *Id.* at 1039.

93. *Id.* at 1040.

94. *Id.* at 1040.

95. *Id.* at 1040 (Banks, J., dissenting).

96. *Id.* at 1041 (McRae, J., dissenting).

B. Intrusion: Verbal Intrusion, Prying

Asking inappropriate personal questions and demanding personal information are common forms of what I call “verbal intrusion.” Asking invasive questions about sex and sexual orientation can amount to offensive verbal intrusion. Given the history of employment discrimination and violence targeting LGBT persons, a gay or lesbian employee could be expected to find even casual inquiries about sexual orientation in the workplace “highly offensive.” By contrast, a heterosexual employee might be offended by intrusive questions, but would not expect to risk injury or lose his or her job or social status for providing truthful answers.⁹⁷

In *Madsen v. Erwin*, Christine Madsen was fired from her writing post at the church-affiliated *Christian Science Monitor* when her lesbian sexual orientation became public.⁹⁸ Madsen had no luck persuading some members of the Massachusetts high court that her supervisor tortiously intruded into her privacy by asking about her sexual orientation.⁹⁹ Madsen sued the supervisor, the newspaper, the church, and several key officials in the church in a complaint alleging wrongful discharge, defamation, invasion of privacy, intentional infliction of mental distress, and other claims.¹⁰⁰ Among her privacy claims, Madsen argued that the defendants disclosed information about her personal life to the public and placed her in a false light.¹⁰¹

The *Christian Science Monitor* defendants lost their motion to dismiss and summary judgment motions, but the Supreme Judicial Court of Massachusetts reversed in their favor on a key issue. The main question presented in the case was whether the First Amendment free exercise principle allowed the Christian Science Church to terminate Madsen’s employment on account of her sexual orientation.¹⁰² The court held that the church had a right of religious freedom under both federal and state constitutions to discharge Madsen.¹⁰³ Yet, while the court noted that Madsen’s allegations in her complaint “do not survive attack by motion to dismiss,” it allowed the plaintiff to amend her complaint with regard to the tort claims.¹⁰⁴ The court did not fully discuss the merits of those claims. In his separate opinion, Justice Francis Patrick O’Connor hinted that her privacy claims were likely to fail on privacy tort theories. The justice

97. *Cf. Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524 (11th Cir. 1983) (heterosexual married woman lost job after refusing to provide oral sex and answers to employer’s intrusive questions about her sex life).

98. *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985).

99. *Id.* at 1167.

100. *Id.* at 1161.

101. *Id.* at 1172.

102. *Id.* at 1163–66; *cf. Gunn v. Mariners Church*, 84 Cal. Rptr. 3d 1, 7 (Cal. Ct. App. 2008) (holding that “the ministerial exception . . . bars courts from reviewing employment decisions by religious organizations affecting employees who have religious duties of ministers”).

103. *Madsen*, 481 N.E.2d at 1165–66.

104. *Id.* at 1167.

reasoned that since the church could lawfully discharge the plaintiff because of her sexual orientation, by implication it could also question her about her sexual orientation.¹⁰⁵

In another verbal intrusion case, *Morenz v. Progressive Casualty Ins. Co.*, an employee similarly argued that being asked about his homosexual identity at work was intrusive.¹⁰⁶ However, a coworker rather than a supervisor asked plaintiff Ralph Morenz about his sexual orientation, and the alleged prying was not accompanied by the threat of termination. Soon after Morenz's company transferred him to a new office, a fellow employee there asked him whether he was gay.¹⁰⁷ The coworker apparently asked the question because he wanted to make sure that Morenz knew his sexual orientation would not be a problem on the job.¹⁰⁸

In his suit Morenz complained of intrusion, isolation, and emotional distress due to his employer's cruel lack of responsiveness to his inability to cope with gruesome aspects of his responsibilities as an accident claims adjuster.¹⁰⁹ The court concluded that under the circumstances of the case the question, "Are you gay?" was not "highly offensive to a reasonable person, and indeed, not offensive at all."¹¹⁰

The conclusion that the question is not offensive at all cuts off fact-finding and analysis concerning whether non-maliciously intended questions about sexual orientation could be offensive to a reasonable person. They might be highly offensive to a reasonable person because they are personal, patronizing, or presumptuous. They may be highly offensive because they enable potentially sensitive data to be shared with others in the workplace who may be less open-minded and well-intended than the person who first posed the question. Unless courts consider factors such as gossip and discrimination vital to understanding the full context of the LGBT workplace experience, they will continue to conclude—often erroneously—that verbal intrusions against LGBT individuals are not "highly offensive to a reasonable person."

C. Intrusion: Verbal Insult and Disparagement

Courts have often asserted that the privacy torts protect feelings and sensibilities.¹¹¹ Plaintiffs have brought intrusion claims because they have felt

105. *Id.* at 1172.

106. *Morenz v. Progressive Cas. Ins. Co.*, No. 79979, 2002 Ohio App. LEXIS 2474 (Ohio Ct. App. May 23, 2002).

107. *Id.* at **5.

108. *Id.* at **5.

109. *Id.* at **11–12. Morenz did not like his new post, which required him to handle insurance claims stemming from very serious accidents. *Id.* at **4–5. His employer was unresponsive to his requests for reassignment, and Morenz experienced symptoms of post-traumatic stress disorder. *Id.* at **5.

110. *Id.* at **5.

111. Hence courts have repeatedly held that corporations, as fictitious entities without

insulted or disparaged by the use of unkind words.

In *Logan v. Sears*, for example, a gay salon owner was speaking to a Sears employee by telephone when he overheard her describing him as “queer as a three-dollar bill.”¹¹² Because the offensive language came to him over his own private phone line, he felt the unkindness constituted an intrusion.¹¹³ The court agreed that the statement made by Sears’s representative “was an intrusion upon Logan’s solitude or seclusion,”¹¹⁴ but found that it was not so extreme or outrageous as to offend an ordinary person. The word “queer,” according to the court, has been used for a longer time than the new term “gay.”¹¹⁵ Thus, the use of the word “queer” could not be described as “atrocious and intolerable in civilized society.”¹¹⁶ The court concluded that, because the plaintiff was truly gay, the use of the word “queer,” even though discouraged by the homosexual community at the time, did not cause humiliation.¹¹⁷ The court opined that in order to create a cause of action, the tortious conduct needed to cause mental suffering, shame, or humiliation to a reasonable person, “not [be] conduct which would be considered unacceptable merely by homosexuals.”¹¹⁸ It is unclear and never explained why the perspectives of a “reasonable” homosexual should be discounted in applying the standard “highly offensive to a reasonable person.”

Unkind epithets have a greater chance of leading to actionable tort claims—either emotional distress claims or privacy invasion claims—when the epithets are combined with unlawful deeds. In *Leibert v. Transworld Systems*, a California man disparaged as “effeminate” and “a fag” alleged that he was discharged because of his homosexual orientation.¹¹⁹ The court concluded that his suit stated a claim for intentional infliction of emotional distress when viewed in the context of a pattern of workplace harassment and loss of employment in violation of state law.¹²⁰ Similarly, but under privacy theories, a

feelings and sensibilities, can have no common law right to privacy. See Restatement (Second) of Torts § 652I cmt. c (1977). See generally Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandaries for the Common Law*, 20 J. Marshall L. Rev. 607 (1987).

112. *Logan v. Sears, Roebuck & Co.*, 466 So. 2d 121, 122 (Ala. 1985).

113. *Id.* at 123.

114. *Id.*

115. *Id.* at 123–24.

116. *Id.* at 123.

117. *Id.* at 124.

118. *Id.*

119. *Leibert v. Transworld Sys., Inc.* 39 Cal. Rptr. 2d 65, 66 (Cal. Ct. App. 1995) (appellant alleged that he suffered discrimination based on his sexual orientation, violations of privacy rights protected under California’s state constitution, and intentional infliction of emotional distress).

120. *Id.* at 73 (“Employment discrimination, whether based upon sex, race, religion or sexual orientation, is invidious and violates a fundamental public policy of this state. . . . We conclude that he stated viable claims for wrongful discharge in violation of public policy and intentional infliction of emotional distress.”).

lesbian businesswoman successfully alleged in *Simpson v. Burrows* that “Concerned Citizens of Christmas Valley” intentionally destroyed her business and personal life by distributing threatening and false anti-lesbian diatribes, including a letter attacking her as a “fag.”¹²¹ It is doubtful Simpson would have prevailed on a privacy theory had she complained of being called a fag but had not also lost her partner and livelihood.

D. Intrusion: Intrusive Publication of Private Facts

To establish a prima facie case of “intrusion,” plaintiffs must allege a highly offensive intrusion that may or may not lead to a publication of any information obtained as a consequence of intrusion. To establish a prima facie case of “publication of private fact,” plaintiffs must allege that defendants disseminated private facts to others, whether orally or in writing. Intrusion claims have sometimes been accompanied by claims for publication of private fact. Blurring the distinction between two of Prosser’s torts, LGBT plaintiffs experience unwanted publicity as a kind of intrusion. We might call the offense “intrusive publication of private facts.” The essence of these cases is not an allegation of physical intrusion, prying, or disparagement, but instead an allegation that it is intrusion into private life for others to reveal one’s secrets or to dredge up embarrassments.

1. Secrets Revealed

In *Prince v. Out Publishing*, gay actor and model Tony Sabin Prince lost a case in which he claimed numerous privacy torts, including publication of private fact and intrusion.¹²² As I will elaborate in Part III, defendant *Out* magazine published photos of the plaintiff in an article entitled “Dirty Dancing.”¹²³ The article described various improprieties at gay men’s “circuit parties,” including abuse of illicit drugs and unsafe sexual practices.¹²⁴ The article included three photographs of Mr. Prince.¹²⁵ The first photograph occupied two pages of the magazine and pictured Prince shirtless, dancing with another man.¹²⁶ The second pictured Prince’s torso and face, and the third pictured his face alone.¹²⁷ The photographs of the plaintiff were taken without his permission at a party in Los Angeles, where cameras were supposedly not permitted.¹²⁸

Prince alleged that the photos implied he was gay, a drug user, and a

121. *Simpson v. Burrows*, 90 F. Supp. 2d 1108 (D. Or. 2000).

122. *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002).

123. *Id.* at *1.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

person who engaged in unsafe sex.¹²⁹ Prince was in fact gay.¹³⁰ But he did not abuse drugs, did not engage in unsafe sex, and did not attend the parties described in the article.¹³¹ In response to Prince's request, *Out* later published a clarification, stating that the pictures accompanying the article in question were taken at a different sort of party than the one described in the article, and that "the appearance of any specific individuals in those photographs is not intended to imply that they engage in any specific behaviors discussed in the article."¹³² Still, Mr. Prince maintained that the photographs in *Out* exposed for the first time his homosexual orientation to his family, professional associates, and some of his friends.¹³³

On his intrusion claim, the court determined that Prince did not have an objective expectation of seclusion or solitude at the party he had attended, because the public at large had been invited to purchase a ticket by phone, at the door, or from the club, and approximately one thousand people attended the party.¹³⁴ If a person can be unlawfully stalked or sexually harassed in a crowded public place,¹³⁵ it is unclear why a person cannot be a victim of a privacy intrusion while at a party. The courts could easily construe the targeting of a person in a public place for a photograph intended for publication without his consent as an unwelcome intrusion, as indeed they have in the past.¹³⁶ But arguably the relevant intrusion at issue was the magazine's interference with the plaintiff's partially secret personal life through the inadvertent "outing" and potential character distortion.

2. Embarrassments Dredged Up

The memorable "Boys of Boise" case, *Uranga v Federated Publications*, commenced when plaintiff Fred Uranga sued an Idaho newspaper for privacy invasion (including intrusion) and infliction of emotional distress. The *Idaho Statesman* published a photographic copy of a forty-year old statement made to authorities by a man named Melvin Dir, who implicated Uranga in homosexual activities. Mr. Dir had been prosecuted for sex felonies, including forcing teenager Frank Jones to submit to oral sex. Dir claimed the sex was consensual and that Jones had led him to believe he had had earlier homosexual encounters with his cousin Fred Uranga and a high school classmate.¹³⁷

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *2.

133. *Id.* at *2.

134. *Id.* at *8.

135. *Cf. Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (popular former First Lady Jacqueline Kenney Onassis sought and obtained an injunction requiring photographer to keep a safe distance from her and her children John and Carolyn Kennedy).

136. *See, e.g., id.*

137. *Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29, 31 (Idaho 2003) (aftermath of infamous scandal in which hundreds of people were suspected of involvement in soliciting homosexual

Uranga's failed claim of intrusion was modeled on claims made in what are generally considered "private fact" cases such as *Melvin v. Reid* and *Briscoe v. Reader's Digest*.¹³⁸ But there was a difference: Uranga did not admit to the dredged-up embarrassing (to him) ascription of homosexuality, whereas Melvin admitted prostitution and criminal prosecution, and Briscoe admitted to hijacking.¹³⁹ The court noted Uranga's claim for intrusion, but said it had not been clearly articulated in the lawsuit.¹⁴⁰ Attempting to make sense of it, the court speculated that the only possible intrusion at issue was an "intrusion" into public court records that related to the plaintiff.¹⁴¹ Following the precedent of two landmark Supreme Court cases, *Florida Star v. B.J.F.* and *Cox Broadcasting Corp. v. Cohn*,¹⁴² the *Uranga* court held that neither the examination of public records nor their publication could be the basis for an intrusion claim.¹⁴³

And yet publication of allegations about one's past sex life that one regards as embarrassments can certainly feel like what in colloquial terms we could describe as an intrusion. *Uranga* and *Prince* reflect a gap between the broad, ordinary, informal conceptions of intrusion and the narrow formal legal conception of the intrusion tort. The design of formal doctrine precluded hybrid "intrusive publication" claims by Fred Uranga and Tony Sabin Prince. These plaintiffs were forced separately to plead intrusion upon seclusion and publication of private fact, losing on both causes of action.

E. Limited Utility

Overall, LGBT plaintiffs have not had much luck with the intrusion tort, whether alleging surveillance, prying, insult, disparagement, or publicly revealing partly hidden aspects of private life. Rita Plaxico's memorable case

activity from minors associated with the YMCA in Boise, Idaho).

138. *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971).

139. Cf. Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. Chi. L. Rev. 1407, 1414 (2009) (quoting Lawrence Friedman, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy* 218 (2009) (claiming that Melvin may have been an active prostitute at the time she sued those responsible for calling attention to her history of homicide acquittal and prostitution)).

140. *Uranga*, 67 P.3d at 32.

141. *Id.* at 32–33.

142. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that First Amendment bars press liability in case where, in violation of state law, newspaper published name of woman who survived a rape after inexperienced reporter copied her name from police reports inadvertently made available to press); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that First Amendment bars media liability in case where, in violation of state law, television station broadcast name of murdered rape victim obtained from police records). The court also cited *Baker v. Burlington Northern, Inc.*, 587 P.2d 829 (Idaho 1978), where the court found no privacy invasion where defendant has accessed court records. *Uranga*, 67 P.3d at 32.

143. *Uranga*, 67 P.3d at 35.

against Glenn Michael is illustrative. Ms. Plaxico's case did not survive a motion to dismiss despite the fact that Mr. Michael had driven his truck to the secluded cabin where she lived with his ex-wife, watched her through a window having sex with his ex-wife, and photographed her partly nude and seated on her bed.¹⁴⁴ The appeals court found that this egregious invasion was not "highly offensive to a reasonable person," since "a reasonable person would not feel Michael's interference with Plaxico's seclusion was a substantial one that would rise to the required level of gross offensiveness."¹⁴⁵ Along with Plaxico, other disappointed privacy tort plaintiffs were Prince, Uranga, Logan, Madsen, Morenz, and Elmore.

Based on the cases I analyzed, the intrusion tort has not been, nor promises to be, a useful a remedy for LGBT plaintiffs seeking monetary or injunctive relief. One would draw a different conclusion upon discovery of a cache of intrusion claims favorably settled by LGBT plaintiffs prior to pretrial motions, judgments, and appeals. One would also draw a different conclusion with strong empirical evidence of the intrusion tort's deterrent effect. But in the absence of evidence either of a strong deterrent effect or a history of favorable settlements, I conclude based on the available evidence that the intrusion tort is a tort of minimal practical utility to LGBT plaintiffs.

III

PUBLICATION OF PRIVATE FACT

Prosser's publication of private fact tort¹⁴⁶ is a favorite with privacy litigants. Ill-fated publication actions have even been brought on behalf of the dead.¹⁴⁷ New technologies and contemporary lifestyles add to the avenues through which actionable publication offenses can occur. In a recent case, a lesbian sued the popular online movie-rental company Netflix, alleging that it collected information on subscribers' rental histories from which their sexual orientations could be inferred and disclosed.¹⁴⁸

144. *Plaxico v. Michael*, 735 So. 2d 1036, 1037 (Miss. 1999).

145. *Id.* at 1039.

146. The *Restatement (Second) of Torts* provides:

Publicity Given to Private Life

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

Restatement (Second) Torts § 652D (1977).

147. See e.g., *Justice v. Belo Broad. Corp.*, 472 F. Supp. 145 (N.D. Tex 1979) (parents' publication of private fact suit against media defendant who reported that their murdered son had had a homosexual affair with his employer dismissed). The general common law rule applicable to all of the privacy torts is that right to privacy actions survive death, but new privacy claims for post death offenses are not actionable. See e.g., *Flynn v. Higham*, 197 Cal. Rptr. 145 (Cal. Ct. App. 1983) (adult children's false light privacy suit against media defendant who reported that their deceased father was a homosexual and Nazi spy dismissed).

148. *Valdez-Marquez v. Netflix Inc.*, No. C09-05903-JW-PVT (N.D. Cal. dismissed Mar.

The LGBT community has had mixed luck with the publication of private tort. On its face, a doctrine of civil liability for disclosures of private facts could deter and redress unwanted revelations and “outing.” The tort has served well several plaintiffs whose closeted gender traits, sexual orientation, or birth sex were revealed to the public without their consent.¹⁴⁹ But it failed to provide a remedy for others.¹⁵⁰ In many cases, plaintiffs’ failure to establish a “publication” or “private fact” to the satisfaction of the court precluded recovery. Instead or in addition, the First Amendment precluded a tort remedy in some cases, effectively privileging media defendants eager to construe nearly everything that preoccupies or vexes daily life as matters of legitimate public interest.¹⁵¹

When Prosser addressed the public disclosure tort fifty years ago, he volunteered no sidebar on how a public facts tort could deter or remedy unwanted attention to the fact that someone is homosexual, bisexual or transgender. But Prosser did reference *Cason v. Baskin*,¹⁵² a noteworthy public disclosure of private fact case in which a woman sued a writer whose best-selling memoir portrayed her as having a striking mix of masculine and feminine traits.¹⁵³ Although Prosser mentioned in passing the celebrated *Cross Creek*¹⁵⁴ case and seemed to grasp that it concerned unwanted attention to unconventional, culturally transgressive gender traits and sex roles, he nowhere noted a distinct feature of the body of case law that included and surrounded it: gender norms played a role in the development of the right to privacy and its recognition by the courts.¹⁵⁵ In its first decades, the right to privacy was often

29, 2010).

149. *Borquez v. Ozer*, 923 P.2d 166 (Colo. App. 1995) (disclosure of HIV status by employer was wrongful publication of private fact), *rev’d on other grounds*, 940 P.2d 371 (Colo. 1997).

150. *See, e.g., Cinel v. Connick* 15 F.3d 1338, 1345 (5th Cir. 1994) (information contained in public record is not “private”).

151. *See, e.g., Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App. 2001) (television station story regarding a custody proceeding where one parent raised concerns for the child’s safety is of legitimate public interest a protected by First Amendment, and facts about sexual orientation and HIV status revealed in court are no longer private and may be published with impunity by media).

152. *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944). *Cason v. Baskin* was the Florida courts’ first opportunity to embrace or to reject the right to privacy, and it embraced it. *Id.* at 244 (“The first and the main question presented here is whether an action may be maintained in this State for an invasion of the right of privacy.”). The papers concerning the trial and its defendant are archived at U. Fla., George A. Smathers Libraries, *A Guide to the Cross Creek Trial (Cason v. Baskin) Papers*, <http://web.uflib.ufl.edu/spec/manuscript/guides/CasonvBaskin.htm>.

153. *See generally* Patricia Nassif Acton, *Invasion of Privacy: The Cross Creek Trial of Marjorie Kinnan Rawlings* (1988).

154. *Marjorie Kinnan Rawlings, Cross Creek* (1942).

155. *See generally* Anita L. Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. Ill. U. L. Rev. 441 (1990) (arguing that concerns about the need to protect women’s privacy spirited the early development of privacy law); *cf.* Robert E. Mensel, *The Anti-Progressive Origins and Uses of the Right to Privacy in the Federal Courts 1860–1937*, 3 Fed.

asserted by women—and on women’s behalf—to vindicate the women’s perceived interest in modesty, seclusion, propriety, and genteel refinement.¹⁵⁶ *Cason v. Baskin* fits the pattern of privacy suits brought to vindicate female character: “You have made a hussy out of me” was the plaintiff’s accusation to her defendant.¹⁵⁷

A. *Public Attention to Unconventional Gender Traits and Sex Roles*

In *Cason v. Baskin*, quaintly designated “feme sole” Zelma Cason, a rural Alachua County social worker and census-taker, sued to recover \$100,000 from her friend and neighbor, the Pulitzer Prize-winning author Marjorie Kinnan Baskin (pen name Marjorie Kinnan Rawlings).¹⁵⁸ In 1942, Baskin published *Cross Creek*, an autobiographical work containing character portraits of her friends and neighbors, including her friend Zelma Cason.¹⁵⁹ One chapter of the memoir recounted Baskin’s observations as she accompanied Cason on horseback on her census-taking duties in Florida’s backwoods. Baskin depicted Cason colorfully as “an ageless spinster resembling an angry and efficient canary.”¹⁶⁰ She described her as competent in the management of her orange groves, nurturing, and at ease among Negroes.¹⁶¹ “I cannot decide whether she should have been a man or a mother [as she] combines the more violent characteristics of both,”¹⁶² Baskin wrote. Never using her subject’s surname, Baskin quoted Cason’s use of salty expressions such as “sons of [bitches],” “those [bastards],” and “It’s a [goddamn] blessing.”¹⁶³

Cason denied the accuracy of Baskin’s portrayal and alleged defamation as well as privacy invasion. The court framed Cason’s complaint as one about the defendant’s publication of sensitive private facts, even though Baskin’s “vivid and intimate character sketch” did not reveal much of anything about Cason that was not already generally known or believed true in her community.¹⁶⁴ As weak as her privacy claim may have been, Cason’s libel claims were weaker. Trial witnesses affirmed that Cason had a temper, cursed frequently, and generously provided charitable succor to the poor, as Baskin

Cts. L. Rev. 109, 112 (2009) (citing 19th-century federal court cases in which judges rendered opinions “valuing female privacy more than male” and reflecting “prevailing bourgeois understandings of gender and race”).

156. See generally Allen & Mack, *supra* note 155.

157. Acton, *supra* note 153, at 24.

158. *Cason*, 20 So. 2d at 244–45.

159. Rawlings, *supra* note 154. See the blog devoted to the Cross Creek Trial, which includes discussion of the woman-as-man discourse, <http://crosscreektrial.com/2009/12/a-bunch-of-mannish-hussies/>.

160. *Cason*, 20 So. 2d at 245.

161. *Id.* at 245–46 (quoting passages from Rawlings, *supra* note 154).

162. *Cason*, 20 So. 2d at 245.

163. *Id.* at 245–46.

164. *Id.* at 247. The memoir was offensive to Cason more because of what it called attention to than because of what it revealed.

described.¹⁶⁵ Moreover, “it was hard to ignore Zelma’s masculine leanings.”¹⁶⁶

Cason won at trial. On appeal, the Florida Supreme Court held that “in spite of the fact that the publication complained of, considered as a whole, portrays the plaintiff as a fine and attractive personality,” Cason had stated a cause of action potentially worthy of at least nominal damages for invasion of her private life.¹⁶⁷ The court speculated that Cason might be one of those people who “do not want their acts of charity publicized” in a book’s “vivid and intimate character sketch.”¹⁶⁸ The Florida high court pointed to Cason’s “acts of charity”¹⁶⁹ as the facts she preferred to downplay, bringing to mind *Schuyler v. Curtis*.¹⁷⁰ By contrast, Prosser stressed Cason’s “masculine characteristics” as the private facts she had wished to downplay. Prosser summarized Cason’s injury as publication of “embarrassing details of a woman’s masculine characteristics, her domineering tendencies, her habits of profanity, and incidents of her personal conduct towards friends and neighbors.”¹⁷¹ Prosser got closer to the truth than the Florida court. Cason reportedly felt angry and betrayed by a friend rather than embarrassed about any specific public disclosures.¹⁷² Cason was furious when she read what Baskin wrote about her.¹⁷³ When they met after the book’s publication, Cason accused Baskin of making a “hussy” out of her.¹⁷⁴ Cason, who sat knitting demurely throughout her trial,¹⁷⁵ was offended that by writing about her as she did, her friend Baskin portrayed her as a cultural abomination, a morally transgressing female.¹⁷⁶

B. Gay, Straight or Bisexual: Public Attention to Sexual Orientation

Efforts to reinforce gender norms are a recognized dimension of privacy case law, including the publication of private fact cases of which *Cason* is an

165. *Acton*, *supra* note 153, at 31, 92–94.

166. *Id.* at 30 (“She wore pants at every possible opportunity, taught her niece and nephew to shoot, and enjoyed an occasional boxing match. And she was not above a show of violence if it suited her purposes.”).

167. *Cason*, 20 So. 2d at 247.

168. *Id.*

169. *Id.*

170. *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (N.Y. Sup. Ct. 1891) (family sought to prevent the public display of a bust created in the image of a woman philanthropist who was a “woman of great refinement and cultivation”).

171. Prosser, *supra* note 10, at 393.

172. *Acton*, *supra* note 153, at 144. *But see id.* at 144 (“Though she was never completely happy with her portrayal in *Cross Creek*, Zelma found it in her heart to forgive Marjorie . . .”).

173. *Id.* at 24, 25.

174. *Id.*

175. *Id.* at 80–81 (“As Zelma knitted, her ball of yarn—through intent or accident—repeatedly fell from her lap and rolled under the table. [The defendant’s husband, Norton] Baskin, being the gentleman that he was, stooped down each time to retrieve it.”).

176. *Id.* at 24; *see also id.* at 115 (counsel for plaintiff arguing rhetorically that defendant Baskin might be unaware that in the deep South “‘old maid’ is a fighting term”).

especially interesting early example. What of sexual orientation and sexual identity related norms? Has the privacy tort been deployed to reinforce them as well? The answer is that to an extent LGBT plaintiffs (of both sexes) have sought through the publication of private fact tort to preserve the problematic convention of lives sheltered in layers of inaccessibility and reserve. Courts have sometimes gone along, asserting that sexual orientation is private in nature, as in *Borquez v. Ozer*.¹⁷⁷

Robert P. Borquez was a successful associate in a law firm, terminated after informing his employer that his male partner had recently received an HIV-positive diagnosis.¹⁷⁸ Before the disclosure Borquez hid his homosexual orientation at work.¹⁷⁹ After losing his job, he sued for wrongful discharge and for wrongful publication of his sexual orientation and possible HIV status.¹⁸⁰ The jury awarded \$30,841 in lost wages for wrongful discharge, \$20,000 for embarrassment on the publication of private facts claim, and \$40,000 in exemplary damages.¹⁸¹ The appellate court affirmed,¹⁸² holding that sexual orientation and exposure to HIV are private matters.¹⁸³ Disclosing these details is offensive to a reasonable person because both homosexuality and AIDS are stigmatized.¹⁸⁴ Further, the court held that disclosing information regarding HIV was not in this instance disclosure of a matter of legitimate concern to the public.¹⁸⁵

Courts have not been uniform in their willingness to allow a tort recovery when information or allegations about sexual orientation have come out.¹⁸⁶ For example, in *Crumrine v. Harte-Hanks Television* the court held that even if homosexual identity is a private matter, the plaintiff policeman's homosexual identity and HIV positive status did not remain so once revealed during judicial proceedings, such as a child custody proceeding.¹⁸⁷

A similar outcome greeted a gay priest man in an earlier case, *Cinel v. Connick*.¹⁸⁸ Authorities found homosexual pornography in the residence of Dino Cinel, a Roman Catholic priest, along with a videotape of him engaging in consensual homosexual sex with two adult men.¹⁸⁹ The defendants in the case included several state officials who released the videotape to a reporter

177. 923 P.2d 166 (Colo. App. 1995), *rev'd on other grounds*, 940 P.2d 371 (Colo. 1997).

178. *Id.* at 169.

179. *Id.* at 169–70.

180. *Id.* at 170.

181. *Id.* at 171.

182. *Id.* at 179.

183. *Id.* at 172.

184. *Id.*

185. *Id.* at 173.

186. *See, e.g.*, *Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29, 33 (Idaho 2003).

187. *Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124 (Tex. App. 2001); *see generally* Hilzendeger, *supra* note 12.

188. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994).

189. *Id.* at 1340.

and a television network. The television network broadcasted excerpts from the tape.¹⁹⁰ Plaintiff Cinel subsequently brought a Section 1983 claim against the state officials for violating his constitutional privacy rights by disclosing the names of the people who were taped having sex with him; by revealing their identities to unrelated third parties; and by releasing the materials to private litigants, including the church and the other participants in the sex acts.¹⁹¹ The court rejected the claim, stating that the identities of the people and their addresses were not part of the plaintiff's private life.¹⁹² In addition, the church and the participants in the sex acts had previous knowledge about the materials, so the information was not private as to them.¹⁹³ The state officials were similarly shielded from liability, as they acted lawfully in disclosing materials pursuant to a valid subpoena.¹⁹⁴

Plaintiff Cinel also claimed a publication of private facts tort under Louisiana Civil Code.¹⁹⁵ The trial court rejected this claim, finding that the materials were a matter of legitimate public concern since sodomy was a crime at the time.¹⁹⁶ In addition, the court concluded that identification of the participants by state officials was a matter that needed to be reviewed by the public.¹⁹⁷ This public need was strengthened by the fact that plaintiff Cinel had engaged in the private activity while he was a priest.¹⁹⁸ Finally, the court rejected the plaintiff's claim that broadcasting the videotape added no value to the story, even if it was not newsworthy.¹⁹⁹ According to the court, it may have been insensitive to publish the videotape, but the judiciary could not make decisions for the media as to what should be published.²⁰⁰

The *Uranga* case introduced in Part II is reintroduced here alongside *Crumrine* and *Cinel*, as another example of the failure of a publication of private fact tort claim where concealments have come to light as a consequence of public records and media reports.²⁰¹ Fred Uranga brought an action against the publisher of the *Idaho Statesman* daily newspaper.²⁰² The newspaper published an article accompanied by a photograph of a handwritten statement by an accused sex offender implicating Uranga in youthful homosexual activity.²⁰³

190. *Id.* at 1341.

191. *Id.*

192. *Id.* at 1342–43.

193. *Id.*

194. *Id.* at 1343.

195. *Id.* at 1345.

196. *Id.* at 1346.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29 (Idaho 2003).

202. *Id.* at 31.

203. *Id.* at 30.

Uranga filed a complaint for intrusion, publication of private facts, false light, and intentional and/or reckless infliction of emotional distress.²⁰⁴ The trial court granted a motion to dismiss in favor of the newspaper.²⁰⁵ The court of appeals affirmed. The Supreme Court of Idaho vacated the judgment of the trial court, but upon the newspaper's petition for rehearing, the court reversed itself.²⁰⁶ The court dismissed the publication of private facts claim on the ground that the offending statement was on public record.²⁰⁷ The court held that a statement implicating an individual in homosexual activity that happened forty years earlier is not a private fact because the statement was part of a court record available to the press.²⁰⁸

In distinguishing his claim from *Cox Broadcasting Corp. v. Cohn*,²⁰⁹ Uranga argued that in *Cox* the information concerned a current criminal prosecution, while the statement to which he was objecting had been made to police forty years earlier.²¹⁰ The court rejected this distinction, stating that freedom of speech does not have a timeline.²¹¹ Uranga also argued that his name was not newsworthy.²¹² The court rejected this argument as well, citing the Supreme Court decision in *Smith v. Daily Mail Publishing Co.*,²¹³ which held that determination of whether a publication is a matter of public concern is based upon an examination of the publication as a whole.²¹⁴ Even if Uranga's name was not newsworthy, the article about the Boys of Boise scandal was newsworthy for First Amendment purposes.²¹⁵ The dismissal of Uranga's intentional infliction of emotional stress claim was affirmed because the newspaper enjoyed First Amendment protection.²¹⁶

While the above cases show that the private fact theory has not guaranteed victory for closeted homosexuals,²¹⁷ they also show that courts are prepared to

204. *Id.* at 31.

205. *Id.*

206. *Id.* at 30. The high court rejected the intrusion claim because Uranga did not state any kind of intrusion into a place, or any uncomfortable investigation. The newspaper only investigated what was in the public record and did not intrude on Uranga's seclusion. *Id.* at 32. Uranga abandoned the false light claim, perhaps because he believed the court would find a duty of verifying every court document quoted or reproduced to be an unreasonable burden on newspapers.

207. *Id.* at 33.

208. *Id.*

209. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (First Amendment bars media liability for broadcasting the lawfully obtained identity and photograph of a rape and murder victim despite a Georgia statute prohibiting the publication of the identities of rape victims).

210. *Uranga*, 67 P.3d at 35.

211. *Id.*

212. *Id.*

213. 443 U.S. 97 (1979).

214. *Uranga*, 67 P.3d at 35.

215. *Id.*

216. *Id.*

217. Uranga's actual sexual orientation is unclear. He denied the sexual involvement he felt was implied by the statement and its republication in the *Idaho Statesman*.

voice the ideal that sexual orientation is *prima facie* private. *Simpson v. Burrows*, though its facts are extreme, reveals the possibility of complete victory for a gay woman relying on the public disclosure or privacy fact tort.²¹⁸ Jo Anne Simpson brought claims of intimidation, intentional infliction of emotional distress, invasion of privacy, and libel against the defendant couple Howard and Jean Burrows.²¹⁹ Ms. Simpson and her female partner moved to the small town of Christmas Valley, Oregon, where they purchased a restaurant.²²⁰ Soon after their arrival and purchase of the restaurant, threatening and offensive letters warning people against the lesbian couple were circulated around town.²²¹ Letters were sent to Simpson and her partner with threatening content, such as “NO FAGS IN C.V. [Christmas Valley]” and “IT’S YOUR TURN TO GO[,] HEAD FIRST OR FEET FIRST.”²²² Letters were also sent to other people and business owners in the town.²²³ They called on citizens to boycott the restaurant due to the “perverts” who owned it, and they threatened that the restaurant would turn into “a mecca for Queers, Lesbians, Perverts & other degenerates.”²²⁴ The Burrows’ letters had a greatly adverse effect on Simpson’s life²²⁵ and were among the principal reasons Simpson’s partner left her and fled Christmas Valley.²²⁶ Simpson testified that she felt threatened and lost trust in people, and even bought a gun for protection.²²⁷ In support of her claim for economic damages, Simpson pointed out that as soon as the letter distribution commenced, fewer people patronized her restaurant business and she was forced to sell it at a loss.²²⁸

After finding the Burrowses responsible for sending the hateful letters that ruined Simpson’s personal life and destroyed her livelihood,²²⁹ the court held in favor for Simpson on her claims of intentional infliction of emotional distress, intimidation, and publication of private facts. The court concluded that the defendants intended to cause the plaintiff emotional distress and that their behavior was virtually criminal.²³⁰ Though the Burrowses had the constitutional right to dislike homosexuality and to express their views, those rights did not grant them immunity from liability for direct threats.²³¹

218. *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1125 (D. Or. 2000).

219. *Id.* at 1112.

220. *Id.* at 1113.

221. *Id.* at 1114.

222. *Id.*

223. *Id.* at 1115.

224. *Id.* at 1114.

225. *Id.*

226. *Id.* at 1121.

227. *Id.*

228. *Id.*

229. *Id.* at 1120.

230. The court rejected Simpson’s libel claims because they were barred by the statute of limitations and because defendants were entitled to their offensive opinions about the plaintiff’s lesbian sexual orientation. *Id.* at 1124.

231. *Id.*

With respect to the disclosure of private facts claim, the court found that sexual orientation is a private fact that the defendants publicized to a large number of people.²³² The disclosure contained in the letters was “extremely outrageous” and thus was of the “highly objectionable kind.”²³³ Based on her valid privacy claims the court awarded Simpson \$200,000 in noneconomic damages, \$52,500 in economic damages, and \$5,000 in punitive damages.²³⁴

The *Burrows* case illustrates that privacy invasions are actionable not only when unknown secrets are disclosed, but also when information is moved without consent from one social network into another. The case thus represents Professor Lior Strahilevitz’s theory in action:²³⁵ facts can be private, not merely because they are secrets, but also because they are sensitive and have been released into new social networks with malicious intent. *The Burrows* court therefore implicitly endorsed an important point of view other courts have not—that LGBT persons have a right to selective disclosure of their sexual orientations.

C. Publication of Birth Sex of Transgender Persons

In an important California case in the tradition of *Melvin v. Reid*,²³⁶ the court in *Diaz v. Oakland Tribune, Inc.* reasoned that a transgender person’s birth sex is a private matter and not newsworthy per se, even if she has become a public figure.²³⁷ Plaintiff-respondent Toni Diaz was a transgender woman born as a biological male.²³⁸ She underwent a sex-corrective procedure in 1975.²³⁹ The surgery was a success, and society perceived Diaz as a woman. She kept her former sex a secret, except to her immediate family and closest friends.²⁴⁰ Selective disclosure to a small group enabled her to break with the past, avoid constant scrutiny, and move on to enjoy a new life. She legally changed her name, social security card, and driver’s license.²⁴¹ After the surgery, Diaz enrolled in the College of Alameda, and was eventually elected as the student body president.²⁴² She was the first woman to hold this office.²⁴³

232. *Id.* at 1125.

233. *Id.*

234. *Id.* at 1131.

235. See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. Chi. L. Rev. 919 (2005).

236. *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931) (filmmakers violated privacy of woman whose past life as a prostitute and accused murderer was resurrected and turned into a motion picture using her real name); see also *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34 (Cal. 1971). But see *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940).

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

238. *Id.* at 765.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

Diaz did not reveal her birth sex to the student body at College of Alameda.²⁴⁴ A columnist from the *Oakland Tribune* found out about her gender reassignment surgery from confidential sources.²⁴⁵ In the process of seeking to verify facts provided by those sources, the columnist discovered that before surgery Diaz had been arrested as a male for soliciting an undercover policeman but was never convicted of the crime.²⁴⁶ With proof of Diaz's birth sex in hand, the columnist published a mocking article revealing that Diaz had been born a male.²⁴⁷

Diaz brought an action for publication of private facts.²⁴⁸ Diaz maintained that the publication caused her depression, interrupted her college education, and led to insomnia, nightmares, and memory lapses.²⁴⁹ The jury found that the defendant newspaper and columnist who disclosed the plaintiff's transsexual identity had publicly disclosed private facts, that the facts were private and not newsworthy, that the disclosure was highly offensive to a reasonable person, that the defendants knew the disclosure was highly offensive, and that the disclosure caused injury to the plaintiff.²⁵⁰ The jury awarded Diaz \$250,000 in compensatory damages and \$525,000 in punitive damages.²⁵¹

The defendants appealed, challenging the jury's findings that the plaintiff's birth sex was a private fact and not newsworthy.²⁵² The appeals court reversed and ordered a new trial on two grounds: instructional error and failure to meet the burden of proof of newsworthiness.²⁵³ While the trial court instructed the jury that the defendant needed to present a "compelling public need" in order to abridge the plaintiff's privacy right,²⁵⁴ it should have instructed that the defendant needed to show "legitimate interest" in exposing the private facts.²⁵⁵ In addition, the trial court improperly instructed the jury that the burden of proof was on the defendant to prove newsworthiness, when it was actually the plaintiff who needed to prove that the publication was not privileged.²⁵⁶

Although the appellate court ordered a new trial, it reflected on the merits of the arguments and sided with plaintiff Diaz. This court, like the Oregon court in the *Simpson* case, implicitly endorsed an interest in selective disclosure. The court found that Diaz's "sexual identity," meaning her birth sex

244. *Id.*

245. *Id.* at 766.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 762.

252. *Id.* at 766.

253. *Id.* at 768.

254. *Id.*

255. *Id.* at 762.

256. *Id.* at 769.

and transgender status, was a private matter even though it was not a complete secret. The court distinguished its determination from the Supreme Court ruling in *Cox Broadcasting Corp. v. Cohn*.²⁵⁷ In *Cox*, the Supreme Court ruled that the father of a deceased rape victim could not file a publication of private facts tort claim against the media outlets that disclosed his daughter's name in connection with the incident.²⁵⁸ The Supreme Court mainly based its decision on the fact that the daughter's name already appeared in the indictment.²⁵⁹ In contrast, the court in *Diaz* found that the plaintiff's birth information was not part of the public record.²⁶⁰ Diaz took affirmative steps to alter the public record to indicate her female identity.²⁶¹ According to the public record of her life, she was a female.²⁶² The police record concerning the solicitation of an officer did not even mention Diaz's new female name²⁶³—the journalist made the connection based on confidential sources rather than public records.²⁶⁴ The court reasoned that even if the plaintiff's original birth certificate could be viewed as a public record, the defendants had not seen it before the article published.²⁶⁵

The court then rejected the defendants' argument that since plaintiff Diaz was a public figure as the first female student body president of a public college, the article they wrote and published was newsworthy.²⁶⁶ While the court conceded that, as a matter of law, a person who seeks out a public position waives his or her right to privacy, the court held that Diaz was at best a "limited-purpose" public figure who did not abandon all privacy interests.²⁶⁷ The plaintiff's status as the first female student body president did not mean she was not entitled to keep her "domestic activities and sexual relations private."²⁶⁸ And the court found the plaintiff's gender transformation would not affect her honesty or judgment so as to render her publicly accountable for her private life.²⁶⁹ Finally, the court rejected the defendant's argument that the case was newsworthy because it reflected a change in women's positions in society.²⁷⁰ In the court's view, the columnist had no academic news intent.

257. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

258. *Id.*; see also *Diaz*, 188 Cal. Rptr. at 771 (discussing the holding in *Cox*).

259. *Cox*, 420 U.S. at 496.

260. *Diaz*, 188 Cal. Rptr. at 771.

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* It is worth noting that original birth certificates are commonly sealed and not available even to the people they concern; in most U.S. jurisdictions, adults adopted as infants and seeking their "true" identities are for that reason alone not granted access to their original birth certificates.

266. *Id.* at 766.

267. *Id.* at 773.

268. *Id.*

269. *Id.*

270. *Id.*

Rather, his clear attempt to mock the plaintiff undercut any claim that he was trying to educate the public.²⁷¹

The court also rejected the argument that awarding punitive damages was improper because the plaintiff did not prove that the defendant acted with malice or intent to injure.²⁷² The court held that the defendant did not just publish the article but had exacerbated Diaz's injury by making her the "brunt of a joke."²⁷³ The columnist did not even bother to ask Diaz for her consent prior to publishing the article (despite the lack of a deadline) but instead threw his energies into efforts to acquire sensitive information about her.²⁷⁴ A reasonable jury could have taken this disparity of effort as evidence of malice.²⁷⁵ The court also found the newspaper liable for punitive damages because it approved and published the columnist's article.²⁷⁶

The court rejected the argument that the compensatory damages awarded were excessive.²⁷⁷ The defendants argued that the special damages presented by Diaz were only \$800 for psychotherapy.²⁷⁸ The court concluded that the damages were not limited to out-of-pocket losses, but included personal suffering and humiliation.²⁷⁹ The court also ruled that the damages were not easy to evaluate and should be left for the jury to decide.²⁸⁰ The *Diaz* case sends a message that invading the privacy of a transgender woman is a serious offense that can lead to liability in the form of substantial compensatory and punitive damages.

In stark contrast to Diaz's broad success with the merits of her privacy claims, another court was less willing to view information dredged up about a transgender person's birth sex as private and not newsworthy. In *Schuler v. McGraw-Hill Cos.*, the plaintiff Eleanor Schuler, the CEO of Printron Inc., was a male-to-female transgender woman.²⁸¹ Schuler sued the publisher of *Business Week* and its employees for publishing an article that allegedly defamed her, interfered with her business relations, invaded her privacy, and caused her emotional distress.²⁸² Published in 1994, the article criticized the American Stock Exchange (AMEX) for failing to examine the registration statements of Printron and other Emerging Company Marketplace firms.²⁸³ The article referred to Schuler's status as a transgender woman and mentioned a lawsuit

271. *Id.*

272. *Id.* at 773–74.

273. *Id.* at 774.

274. *Id.*

275. *Id.* at 774.

276. *Id.*

277. *Id.* at 774–75.

278. *Id.* at 774.

279. *Id.*

280. *Id.* at 775.

281. *Schuler v. McGraw-Hill Cos.*, 989 F. Supp. 1377 (D.N.M. 1997).

282. *Id.* at 1382.

283. *Id.* at 1383.

that had been filed against her when she was still a man.²⁸⁴ According to Schuler, the article implied that she had “changed her sex in order to conceal an SEC filing rather than to cure her gender dysphoria syndrome.”²⁸⁵ Schuler’s complaint alleged several torts, three of which were from Prosser’s four categories: publication of private fact, intrusion, and false light.²⁸⁶ The court granted *Business Week’s* motion to dismiss on all counts. Without strongly siding with Schuler, it bears pointing out that her suit was not without a tinge of merit.

The *Diaz* court and the *Schuler* court reached dramatically different assessments of the merits of the private fact claims of their respective plaintiffs. Although both cases involve a private fact claim brought by a transgender woman, the primary difference between the two cases was the degree of secrecy the women accorded to their birth sex. *Diaz*, the woman elected class president, had not made her transgender status public to the world at large, but *Schuler* had. Rejecting *Schuler’s* publication of private facts claim, the court appropriately pointed out that in the 1970s she had given interviews to *The Washington Post* and *People Magazine* recounting her sex change, making the facts a matter of public record.²⁸⁷ It could be argued, however, that those interviews had lapsed into practical obscurity.²⁸⁸

Schuler’s intrusion claim, which the court rejected, struck the court as pro forma because all *Schuler* had done to support it was to restate the same facts and arguments used to support her weak publication of private facts tort claim.²⁸⁹ Unsurprisingly, the court held that *Schuler* failed to state a claim for intrusion.²⁹⁰

The court held that the references to *Schuler’s* transsexual status were not false or defamatory.²⁹¹ In doing so, it dealt inadequately with whether the article placed her in a false light. With regard to defamation, the court analyzed twenty-eight sentences in the *Business Week* article, some of them pointing to the plaintiff’s sex change.²⁹² The court concluded that the article raised the legitimate question of whether the sex change was an advantage for *Schuler*,

284. *Id.*

285. *Id.* at 1384–85.

286. *Id.* at 1389–90.

287. *Id.* at 1390.

288. *See* U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 770 (1989) (that “an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information.”); *id.* at 780 (“The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high.”).

289. *Schuler*, 989 F. Supp. at 1390.

290. *Id.* Today, calling attention to personal facts about a person is the kind of thing we might regard in ordinary parlance as intrusive. But to plead the intrusion privacy tort, a plaintiff must allege and prove facts that go to the elements of the tort. Even when the facts are alleged and a paradigm instance of intrusion is seemingly proven, as in *Plaxico v. Michael*, 735 So. 2d 1036, 1038 (Miss. 1999), an LGBT plaintiff may lose.

291. *Schuler*, 989 F. Supp. at 1390.

292. *See id.* at 1384–89.

because AMEX did not realize that a lawsuit filed against the plaintiff under her male surname (Huminik) was a suit against her. The plaintiff argued that statements such as the “Schuler/Huminik affair,” “the next Huminik/Schuler exploit,” and the “Huminik/Schuler matter” suggested that she either had a multiple personality disorder or was “involved in a game of hide and seek.”²⁹³ In response, the court held that these phrases are not false statements of facts and not defamatory in the context of the article.²⁹⁴ If, however, the *Business Week* story could have been fairly read as implying that Schuler changed her sex to escape recognition as the person the business world knew as Mr. Huminik, she arguably would have had a plausible false light action. It is one thing to point out that a sex change can have career advantages but something else to imply that a sex change was prompted by an unethical and perhaps pathological desire to gain those advantages.

Finally, Schuler’s intentional infliction of emotional distress claim was rejected on the ground that there was nothing outrageous in *Business Week* magazine’s conduct.²⁹⁵ Furthermore, the court found Schuler’s transsexual status was relevant to the article—a new sex and a new name meant that some individuals in the business community did not know that when dealing with Schuler they were dealing with a person who was already known to them as Huminik. But there are several questions of fact the court did not give Schuler a chance to prove to a jury.²⁹⁶ These questions include whether the article implied that she changed her sex for success in the business world, whether publishing the implication was outrageous, and whether Schuler experienced severe emotional distress as a result of the defendant’s outrageous conduct. Imagine that Schuler produced evidence of a psychiatric diagnosis of gender dysphoria dating back to adolescence and evidence of years of therapy and medical treatments, culminating in surgical sex reassignment. A fact finder might well have concluded that was outrageous for a magazine to suggest blithely Schuler would have changed her sex merely to advance her career.

D. Problems of Selective Disclosure

In addressing wrongful publication of private fact claims, courts have not always grappled with the important question of what might be termed LGBT

293. *Id.* at 1386–87. Schuler’s reference in her argument to “multiple personality disorder” displayed a regrettable lack of knowledge about this psychiatric condition—a condition it was unfair to say *Business Week* attributed to her. People with the rare, controversial condition dissociative identity disorder (“multiple personality disorder”) typically develop two or more distinct personalities, often in response to a serious emotional trauma. They do not typically surgically alter their external appearances in order to satisfy the gender identities of one of their personalities. *See generally* David H. Gleaves, Mary C. May & Etzel Cardeña, *An Examination of the Diagnostic Validity of Dissociative Identity Disorder*, 21 *Clinical Psychol. Rev.* 577 (2001).

294. *Schuler*, 989 F. Supp. at 1386–87.

295. *Id.* at 1390.

296. *See id.* at 1391–92.

“selective disclosure rights.” Is there a right to maintain secrecy with respect to sexual orientation in some contexts, despite freely disclosing sexual orientation in other contexts? Should there be a legal right to be “out” for some purposes and “in” for others? What are the psychological, social, and political dimensions of LGBT Americans’ need to control the flow of information about sexual orientation?

These questions are implicit in cases in which courts must decide whether unwanted disclosure to a small group constitutes “publication.” In *Borquez*²⁹⁷ and *Greenwood v. Taft*,²⁹⁸ employment cases, the courts answered the question in the affirmative. The workplace in each case was a law firm. The court in *Borquez* held that the publication private fact claim’s secrecy element could be satisfied by limited disclosure to a discrete segment of the public, such as fellow employees in a workplace.²⁹⁹

In *Greenwood v. Taft*, plaintiff Scott Greenwood argued that the defendant law firm Taft, Stettinius & Hollister fired him because he was gay.³⁰⁰ The trial court granted summary judgment in favor of the defendant.³⁰¹ The appellate court affirmed the rejection of Mr. Greenwood’s wrongful discharge claim because Ohio offered no defense to LGBT people in its antidiscrimination law.³⁰² However, the court reversed the dismissal of Greenwood’s publication of private fact claim.³⁰³ Greenwood argued that when he amended his benefits forms to include his male partner as the recipient of his pension, staff within the law firm disclosed the information to other people to whom the information was irrelevant.³⁰⁴ The court concluded that a reasonable person who has disclosed his sexual orientation for some employment-related purposes might nonetheless have been offended by being more generally “outed.”³⁰⁵ The court emphasized that the plaintiff shared the information with people to whom the information was irrelevant and that the information did not stay within the law firm, implying that the requirement of public disclosure could potentially be established at trial.³⁰⁶ However, the court ultimately held that whether the defendant publicly disclosed the information was a question of fact that needed

297. *Borquez v. Ozer*, 923 P.2d 166 (Colo. App. 1995), *rev’d on other grounds*, 940 P.2d 371 (Colo. 1997).

298. *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1034 (Ohio Ct. App. 1995).

299. *Borquez*, 923 P.2d at 173. The Supreme Court of Colorado reversed the case, stating that the trial court erred by instructing the jury that the plaintiff’s claim could be based on “publicity” of private fact rather than “publication.” 940 P.2d 371 (Colo. 1997).

300. *Greenwood*, 663 N.E.2d at 1034.

301. *Id.* at 1031.

302. *Id.* at 1032.

303. *Id.* at 1036.

304. *Id.* at 1034.

305. *Id.* at 1035.

306. *Id.* at 1035–36.

to be examined by the trial court.³⁰⁷

Few cases better highlight the problem of selective disclosure than *Sipple v. Chronicle Publishing*,³⁰⁸ a case in which a bid for selective disclosure rights was rejected on dramatic facts. Oliver W. Sipple, a gay ex-marine, prevented the assassination of President Gerald Ford by foiling Sara Jane Moore's attempt to shoot Mr. Ford.³⁰⁹ Following the incident, Sipple became a hero and received significant publicity.³¹⁰ Subsequently, several newspapers published articles describing Sipple as a gay activist and as a friend of Harvey Milk,³¹¹ a famous gay political figure. Sipple's heroism and military service history challenged the once pervasive stereotype of homosexual men as weak and timid. The public speculated whether the White House's failure to display gratitude toward Sipple stemmed from the administration's bias toward homosexuals.³¹²

Sipple found press reports of his homosexuality offensive and filed a complaint for publication of private facts.³¹³ He argued that press reports exposed his sexual orientation to close relatives, his employer, and other people who previously did not know about it.³¹⁴ As a consequence his family abandoned him, and Sipple suffered embarrassment and mental anguish.³¹⁵

Mr. Sipple appealed a trial court's summary judgment order in favor of the defendants, who consisted of several publishers, a newspaper, and a columnist.³¹⁶ The appellate court upheld the dismissal of Sipple's complaint, finding that Sipple's sexual orientation was not a private fact, and the publication was newsworthy and thus protected by the First Amendment.³¹⁷ The court stated that Sipple was a known gay figure in San Francisco who had marched in gay parades and who gay magazines mentioned as a close friend of Milk.³¹⁸ Moreover, when asked about his sexual orientation, Sipple himself admitted that he was gay.³¹⁹ Therefore, the court concluded that the articles disclosed a fact that was not private but already publicly known.³²⁰ In addition, the court held that the publication was newsworthy, and did not reveal a fact that met the requisite level of offensiveness.³²¹

307. *Id.* at 1036.

308. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

309. *Id.* at 666.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 667.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 668.

318. *Id.* at 669.

319. *Id.*

320. *Id.*

321. *Id.* at 669–70.

While Sipple's bid for selective disclosure rights met with understandable failure, the failure of other LGBT plaintiffs' bids for selective disclosure raises concern. In *Merriwether v. Shorr*, substantively a public disclosure case brought under New York's commercial appropriation statute,³²² a court found that a picture of a lesbian couple taken at their commitment ceremony and published years later in a magazine was newsworthy because gay couples' commitment ceremonies are a reflection of the progress of society.³²³ Yet the abatement of stigma and discrimination on a societal level should not mean the end of individuals' entitlement to keep their relationships out of the press.

Plaintiffs Valerie Merriwether and Rosetta Fords, a lesbian couple, took part in a religious commitment ceremony in which one plaintiff was dressed in a bridal gown and the other a tuxedo, thereby appearing as a traditional bride and groom.³²⁴ Defendant Kathy Shorr was a professional photographer and also served as their limousine driver on the day of the ceremony.³²⁵ In the limousine she took the plaintiffs' pictures with their permission.³²⁶ She asked for the plaintiffs' written consent to use the photographs for commercial purposes, but the plaintiffs refused.³²⁷ Six years later, defendant magazine *Popular Photography* published an article on Ms. Shorr's work, accompanied by a montage of her pictures, including one of the plaintiffs' pictures with the caption: "LESBIAN COUPLE . . . two women on their way to a commitment ceremony in a church in Greenwich Village."³²⁸ The plaintiffs filed a complaint claiming invasion of privacy and infliction of emotional distress.³²⁹ The plaintiffs sought monetary and injunctive relief,³³⁰ not denying they were gay but arguing that they always kept their sexual orientation private and discreet. They also contended that they never disclosed this information to their coworkers, and that the publication caused them embarrassment and distress.³³¹

The court dismissed the privacy claim against the magazine on the ground that intimate homosexual ceremonies are a reflection of the progress of society and are thus newsworthy.³³² The court rejected the couple's emotional distress claim too. The court stated that the defendants' conduct did not reach the level

322. The plaintiffs availed themselves of the only privacy right New York embraces, the right codified in Sections 50 and 51 of the New York Civil Rights Law. N.Y. Civ. Rights Law § 50, 51 (McKinney 1994) (liability for nonconsensual use of a person's name or likeness for business or trade purposes).

323. *Merriwether v. Shorr*, No. 116582/94, 1995 WL 461265 (N.Y. Sup. Ct. Feb 6, 1995).

324. *Id.* at *1.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* at *2.

332. *Id.*

of outrage required for establishing this tort.³³³ According to the court, the picture did not present the plaintiffs in a sensational manner or make the gay wedding event appear foolish.³³⁴ Furthermore, the wedding was held in a public venue and the festivities took place in several locations.³³⁵ In reaching these conclusions about public and private, the court ignored the potential relevance of the vast size and effective anonymity of New York City and the couple's likely knowledge of how to avoid "running into" workplace colleagues.

The dismissal of the privacy and emotional distress claims ignored the importance to a gay couple of controlling the flow of information regarding sexual orientation from limited groups to the broad public.³³⁶ The dismissal entails a rejection of selective disclosure rights, and even more, reflects a policy of subordinating the personal desire of LGBT individuals for privacy to the public need for keeping pace with LGBT lifestyles.

Many LGBT Americans have sought to live lives in which their sex, sexuality, or sexual orientation remains undisclosed in some social networks—perhaps those including parents or coworkers—but is disclosed in other social spheres. Yet appellate courts often take what might be called a simplistic "once out, always out" point of view.³³⁷ If tort doctrine currently demands this point of view, the doctrine and the tort require rethinking and redesign to accommodate the reasonable privacy preferences of some member of the LGBT population.

IV

FALSE LIGHT IN THE PUBLIC EYE

The false light tort is among the four recognized in Prosser's 1960 article and later incorporated into the Second Restatement of Torts under his influence.³³⁸ The cause of action serves to vindicate interests in both mental

333. *Id.* at *3.

334. *Id.*

335. *Id.*

336. *Id.*

337. *See, e.g.,* *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (holding that Sipple's sexual orientation was not a private fact because he was a known gay figure in San Francisco) *cf. Merriwether v. Shorr*, No. 116582/94, 1995 WL 461265, at *2 (N.Y. Sup. Ct. Feb. 6, 1995) ("plaintiffs do not deny being lesbians, but contend that they have 'always been extremely private and discreet about their long-standing relationship. . . . [T]hey never told any of their co-workers of the nature of their relationship. . . ."); *Prince v. Out Publ'g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002) (rejecting plaintiff's claim that the article disclosed to a large number of people that he was gay, information that he had shared previously with only certain family members and close friends, because the article was newsworthy).

338. Prosser, *supra* note 10, at 398. The *Restatement (Second) of Torts* provides: § 652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

repose and reputation. According to Prosser, the roots of the “false light in the public eye” tort were deep in the ground before the Warren and Brandeis article.³³⁹ Prosser traced the origins of this tort to an 1816 suit brought by the poet Lord Byron “enjoining the circulation of a spurious and inferior poem attributed to his pen.”³⁴⁰ Prosser identified three categories of false light in the public eye cases: (1) inaccurate attribution cases (like Byron’s); (2) misleading use of photographs cases; and (3) imputation of criminality cases.³⁴¹ Prosser wrote that “[t]he false light cases obviously differ from those of intrusion, or disclosure of private facts” in that the interest protected is reputation as in defamation.³⁴² But as previously emphasized, plaintiffs alleging invasion of privacy after 1960 also commonly allege two or more of Prosser’s torts. The contemporary false light case—whether involving inaccurate attribution, misleading photographs, and/or implied immorality or criminality—is also likely to be an intrusion case, and/or a disclosure of private fact case. For example, LGBT plaintiffs or plaintiffs claiming not to be LGBT who bring suits alleging false light commonly also allege intrusion, publication of private facts, and even appropriation claims. If false light is normatively akin to defamation, then defamation is normatively akin to the invasion of privacy tort generally.

A. False Light: Misattribution of Sexual Orientation

In several cases alleging false light, the plaintiffs argued that they were not gay, lesbian, or transgender but were falsely portrayed as such and sought recovery. In *D.C. v. Harvard-Westlake School*, the parents of a high school boy filed an action against his secondary school. The school allegedly allowed or assisted students and the school newspaper to depict falsely the youth as gay and to belittle him as a “faggot.”³⁴³ In another case, *Langford v. Sessions*, a man’s photograph was used in a flier that promoted a gay club and portrayed him as gay.³⁴⁴ In *Douglass v. Hustler Magazine, Inc.*, a heterosexual woman alleged that nude photographs of her posing with another woman published in *Hustler Magazine* falsely portrayed her as a lesbian.³⁴⁵ In *Geissler v. Petrocelli*,

Restatement (Second) of Torts § 652E (1977).

339. Prosser, *supra* note 10, at 398.

340. *Id.*

341. See *id.* at 399 nn.140 & 143; *Martin v. Johnson Publ’g Co.*, 157 N.Y.S.2d 409 (N.Y. Sup. Ct. 1956) (“Man Hungry” woman); *Semler v. Ultem Publ’ns*, 9 N.Y.S.2d 319 (N.Y. City Ct. 1938).

342. Prosser, *supra* note 10, at 400.

343. *D.C. v. Harvard-Westlake Sch.*, 98 Cal. Rptr. 3d 300 (Cal. Ct. App. 2009) (defendant school’s motion to compel arbitration reversed).

344. *Langford v. Sessions*, No. 03-255 (CKK) (D.D.C. July 29, 2005), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv0255-17.

345. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1135 (7th Cir. 1985) (reversing a large judgment in favor of plaintiff, reasoning that “*Hustler* is a magazine for men. Few men are interested in lesbians. The purpose of showing two women in an apparent sexual embrace is to

a woman claimed a book authored by former colleague falsely depicted her as transgender.³⁴⁶ Finally, in *Tina Thompson v. John Doe*, a female “exotic dancer” filed a false light claim against a male entertainer known as “Shawty Shawty” who frequented Pleasers, the Atlanta club at which she worked.³⁴⁷ Shawty Shawty posted on his Twitter account: “Pass this on. There is a nigga dancing at Pleasures. His name is Nairobi and it looks female. Ass and titties and pussy! Be careful!”³⁴⁸

The false light tort does not require proof on the part of plaintiffs that a defendant has published an untruth. It requires that defendant has published words or images that depict the plaintiff in a false or misleading light. Plaintiffs need not be prepared to characterize defendants as liars. However, courts struggle with how to distinguish false light actions from defamation actions.³⁴⁹ Some courts will dismiss false light actions if the plaintiff’s claim is that attributions of LGBT status are flatly untrue. Thus in *Nazeri v. Missouri Valley College*, the court found that a state school system employee condemned by a college Vice President as incompetent and a “fag” would have to seek recovery through a defamation claim.³⁵⁰ In *Albright v. Morton*, a straight man alleged privacy invasion following publication of a book in which a gay man’s photograph appeared alongside a caption bearing his name.³⁵¹ Plaintiffs James Albright, a former bodyguard and the ex-lover of the pop star Madonna, and his ex-employer Amrak Productions sued defendants Andrew Morton, Michael O’Mara Books, St. Martin’s Press, and Newsgroup Newspapers for allegedly falsely portraying Albright as a homosexual in their book.³⁵² The court held that Albright’s false light claim was actually a defamation claim because “he objects to the making of a *false* statement, not the revelation of private information.”³⁵³ *Albright* was an especially far-fetched, even silly false light claim litigated by a straight man.³⁵⁴ However, the Massachusetts court took

display the charms of two women.”); *cf.* *Schomer v. Smidt*, 170 Cal. Rptr. 662 (Cal. Ct. App. 1980) (holding that a false attribution of homosexuality is “slander per se” in a case where flight attendant sued fellow employee for slander, invasion of privacy, battery and intentional infliction of emotional distress after she falsely represented to others that the plaintiff was a lesbian).

346. *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980).

347. Complaint for *Thompson*, *supra* note 53, at 3–4.

348. *Id.* at 4.

349. *Cf.* *Jews for Jesus, Inc., v. Rapp*, 997 So.2d 1098, 1114 (Fla.2008) (declining to recognize a claim for false light invasion of privacy separate from defamation).

350. *Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 312 (Mo. 1993).

351. *Albright v. Morton*, 321 F. Supp. 2d 130 (D. Mass. 2004).

352. *Id.* at 132–33.

353. *Id.* at 140.

354. *See id.* at 136. The court also rejected the false light claim because the tort was not recognized in Massachusetts. *Id.* at 140. Albright asked the court to recognize the false light claim, and the court held that it was not essential to recognize the tort for this case. *Id.* In Massachusetts there was a cause of action for invasion of privacy, but in this case all the information in the book was delivered with the permission of Albright, so there was no invasion of privacy. *Id.* The court rejected all the other claims. *See id.* at 133.

advantage of the case as an opportunity to advance large claims about the modern significance of stating that a person is a homosexual: it can be defamatory to assert falsely that someone is homosexual, but it is no longer inherently highly offensive or defamatory per se to assert that someone is a homosexual.

The defendants purchased from Albright the rights to publish information about his romantic relationship with Madonna, and later published it in an internationally distributed book.³⁵⁵ The book contained a picture of Madonna walking beside her ex-employee, Jose Guitierrez.³⁵⁶ Guitierrez was outspoken about his sexual orientation and represented “his homosexual ideology in what many would refer to as sometimes graphic and offensive detail.”³⁵⁷ According to the complaint, Guitierrez was well known because he appeared in a documentary about Madonna, and performed on stage with her.³⁵⁸ The caption accompanying the picture of Guitierrez read “Jim Albright (with Madonna in 1993) told Morton he felt ‘overwhelming love’ for her.”³⁵⁹ Albright in turn argued that the picture portrayed him as gay.³⁶⁰

The plaintiffs filed a complaint for defamation, among other claims, but the court held that the photograph contained nothing to imply that Albright was gay.³⁶¹ Furthermore, the book described Albright as having had a long heterosexual relationship with Madonna.³⁶² The court also stated that, even if the picture implied that Albright was gay, to identify someone as gay is not a defamatory act per se and such a holding would “legitimize relegating homosexuals to second-class status.”³⁶³ The court discussed several developments in law, including the Massachusetts Supreme Judicial Court’s decision in favor of same-sex marriage, as indicating that the law cannot support a discriminatory view of gays.

B. Misattribution of Lifestyle or Character

Sometimes LGBT individuals resort to the privacy tort, not to complain that someone has revealed their sexual orientation, but that someone has distorted or degraded their characters in way connected to their sexual orientation. Andrea Dworkin’s false light claim against *Hustler Magazine* can be understood in this light.³⁶⁴ In another case, a former employee sued Sun Microsystems alleging that his supervisor depicted him in a false light by

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.* at 133–34.

359. *Id.* at 133.

360. *Id.* at 134.

361. *Id.* at 136.

362. *Id.* at 136.

363. *Id.* at 138.

364. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188 (9th Cir. 1989).

telling others he had “hit on” coworkers, turning him into a perpetrator of sexual harassment.³⁶⁵ The *Schuler v. McGraw-Hill Cos.*³⁶⁶ court, as discussed earlier, rejected the false light claim of a transgender businesswoman who argued that the article implied she “changed her sex in order to conceal an SEC filing rather than to cure her gender dysphoria syndrome.”³⁶⁷ The court held that the article “raise[d] the legitimate issue of whether Plaintiff’s sex change worked to her advantage by concealing part of her past.”³⁶⁸ The court stated that a false light claim required proof of a false statement of fact, which in this case the plaintiff did not establish.³⁶⁹ Schuler also did not prove that the article placed her under false light.³⁷⁰

In *Whitaker v. A&E Television Networks*, defendant-appellant A&E Television Networks broadcasted a picture of the plaintiff in its documentary, “The History of Sex,” that suggested the plaintiff was gay, HIV-positive, and a drug user.³⁷¹ According to the court,

The narrator state[d]: “AIDS had exacted a deadly toll on gay men and [intravenous] drug users as well as hundreds of thousands of heterosexuals in Africa and Haiti. But it wasn’t publicly acknowledged by [President] Ronald Reagan until well after Rock Hudson died of the disease in 1985. . . .” Just before the narrator [stated] “users,” the documentary shows a picture of [plaintiff-respondent Miles] Whitaker on the street at night shaking what appears to be a cup and nodding at people walking by.³⁷²

The documentary neither mentioned Whitaker’s name, nor mentioned he was HIV-positive, a drug user, or homosexual.³⁷³ Nonetheless the plaintiff argued that the documentary inaccurately portrayed him as a gay drug user living with HIV.³⁷⁴ The plaintiff filed a complaint for defamation, false light, and intentional infliction of emotional distress, and he sought injunctive relief.³⁷⁵ The defendant moved to strike, arguing the causes of action arose from First Amendment-protected activity.³⁷⁶ The trial court denied the motion, and the defendant appealed.

Affirming the trial court’s decision, the appellate court held that, while the

365. *Williams v. Sun Microsystems, Inc.*, No. H029828, 2007 WL 2254301 (Cal. Ct. App. Aug 7, 2007) (false light claim time dismissed as barred by statute of limitations).

366. *Schuler v. McGraw-Hill Cos.*, 989 F. Supp. 1377 (D.N.M. 1997).

367. *Id.* at 1384–85.

368. *Id.* at 1385.

369. *Id.* at 1390.

370. *Id.*

371. *Whitaker v. A&E Television Networks*, No. G040880, 2009 WL 1383617, at *1 (Cal. Ct. App. May 18, 2009).

372. *Id.* at *1.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

subject matter of the documentary was a matter of public concern, the plaintiff was not a public figure, and whether he was a drug user or HIV carrier was not a matter of public concern.³⁷⁷ The defendants argued that the documentary did not disclose the plaintiff's name and his appearance was brief.³⁷⁸ The court rejected this argument, stating that the relevant question was whether the documentary implied that the plaintiff belonged to one of the groups mentioned: gays, drug users, or HIV carriers.³⁷⁹

C. False Light and Beyond: Privacy Invasions Excused for the Greater Good

Individuals who have sued under any privacy tort theory alleging that their actions, opinions, or beliefs were portrayed in a false and misleading light have often lost these suits.³⁸⁰ In *Dominick v. Index Journal Co.*,³⁸¹ the defendant newspaper, *The Index Journal*, published a pro-gay letter and attributed it to the plaintiff. The plaintiff denied writing it. The letter preached tolerance toward same-sex marriage, arguing against the “‘close-minded opinions’ of a lot of local citizens . . . towards the gay and lesbian celebrations” in the area, and calling for the “need to expand our horizons on prejudice.”³⁸² The plaintiff was gay and argued that the article exposed his “private affairs,” although it was not clear if he argued that his homosexual identity was exposed or just his view on gay marriage.³⁸³ Among the privacy torts, a false light claim would have been better suited to the facts, but the tort is not favored in South Carolina and may not be available at all.³⁸⁴ Dominick filed a complaint for negligence, libel, invasion of privacy, and intentional infliction of emotional

377. *Id.* at *3.

378. *Id.* at *4.

379. *Id.*

380. In the *Uranga* case, the plaintiff had to abandon his false light claim because the publication that placed him in false light relied on a court record, and the court held that it would be an unreasonable burden on newspapers to verify every court document. *Uranga v. Federated Publ'ns, Inc.*, 67 P.3d 29 (Idaho 2003). In *Prince*, the court rejected a gay model's claim that he was falsely portrayed as attending a type of party popular with a segment of the gay community because the party was a public event. *Prince v. Out Publ'g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002). Furthermore, in *Raymen v. United Senior Ass'n, Inc.*, a picture of same-sex spouses kissing was published without their permission as part of an advertising campaign to which they objected. 409 F. Supp. 2d 15, 18–19 (D.D.C. 2006). The newspaper photographer had photographed the couple while they waited their turn to marry. *Id.* at 18. The men unsuccessfully argued that the publication falsely portrayed them as “unpatriotic American citizens who do not support the United States Military.” *Id.* at 22. Neither their false light nor their appropriation claims were sustained. *Id.* at 18.

381. *Dominick v. Index Journal Co.*, No. 99-CP-24-370, 2001 WL 1763977 (S.C. Ct. Com. Pl. Mar. 15, 2001).

382. *Id.* at *1.

383. *Id.* at *3.

384. See *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 684 S.E.2d 756, 759 (S.C. 2009) (“In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs.” (citing *Swinton Creek Nursery v. Edisto Farm Credit*, 514 S.E.2d 126 (1999))).

distress.³⁸⁵ The trial court granted the media defendant's motion for summary judgment as to all counts except negligence.

On appeal, the court held that Dominick failed to establish a libel claim because the publication did not adversely affect the plaintiff or his reputation in the community.³⁸⁶ The court also denied the publication of private fact claim because the plaintiff did not establish that the defendant intentionally gave publicity to private fact or had knowledge that adverse results were likely to follow.³⁸⁷ As to the intentional infliction of emotional distress claim, the court determined that the plaintiff could not establish that the defendant's "conduct was so extreme or outrageous that [it] exceeded all possible bounds of decency."³⁸⁸ Finally, the court dismissed the negligence cause of action because the plaintiff's libel claim had been denied, and the court did not want the plaintiff to use the negligence claim to "sneak[] into the courthouse through the back door."³⁸⁹ Since the libel claim provides some constitutional protections that do not exist in negligence, the court expressed concern that allowing the plaintiff to plead negligence would undermine the media's First Amendment protection and defeat the purposes of libel law.³⁹⁰

Of special interest, the court seemed unwilling to punish the media for publishing a letter discussing a matter of public interest. The court observed that the "letter discussed two major public events, one of which occurred in South Carolina and was the subject of two news articles in the *Index Journal* the month preceding the publication of the letter."³⁹¹ Moreover the "letter called for community tolerance and promoted constitutional values."³⁹²

In *Dominick*, as in other cases, the national importance of the LGBT population's historic quest for equality and inclusion undercuts the practical utility of the invasion of privacy tort and perhaps the defamation tort as well. Recall the Massachusetts judge in *Albright* arguing that the lessening of stigma and discrimination in his state, which recognized same-sex marriage in 2003 in *Goodridge*, means it can no longer be considered defamatory to gossip that someone is a homosexual.³⁹³ In the words of another judge: "Several legal authorities have suggested that one's identity as a homosexual—even though it

385. *Dominick*, 2001 WL 1763977, at *1.

386. *Id.* at *2–*3.

387. *Id.* at *4.

388. *Id.*

389. *Id.* at *5.

390. *Id.*

391. *Id.* at *4.

392. *Id.*

393. *Albright v. Morton*, 321 F. Supp. 2d 130, 136 (D. Mass. 2004) ("I could not find that such a statement is capable of a defamatory meaning. . . . [I]n this day and age, I cannot conclude that identifying someone as a homosexual discredits him, that the statement fits within the category of defamation per se."). The *Albright* court argued that in the wake of *Lawrence v. Texas* accusations of homosexuality no longer imply criminality and that describing someone as a homosexual is no longer properly viewed as defamatory per se. *Id.* at 137.

is in essence a private matter—is inherently a matter of public concern because it ‘necessarily and ineluctably’ involves that person in the ongoing public debate regarding the rights of homosexuals.’³⁹⁴ In *Prince*, the gay model lost on his privacy claims against *Out* magazine because photographs of him selected for the magazine had been taken in a “public place” and illustrated a newsworthy public health story.³⁹⁵ It did not seem to matter to the court that the model whose photographs *Out* had appropriated had not yet come out to his family and did not live the reckless life of excessive illegal drug use and unprotected sex described in the article.³⁹⁶ Although information about sexual orientation can be highly sensitive, courts have deemed the conduct and experiences of members of the LGBT population broadly “public,” “newsworthy,” and “of legitimate public concern” even when individual members of the group have not.³⁹⁷

V

APPROPRIATION

A plaintiff’s prima face case of appropriation will typically allege a nonconsensual use of the name, moniker, or photographic likeness of the plaintiff in an advertisement or in connection with a business or commercial product such as a book, magazine, newspaper, or film. The first state court to recognize the existence of a freestanding invasion of privacy cause of action did so in the context of an “appropriation” case.³⁹⁸

Prosser identified “appropriation” as among the four extant privacy torts and included it in his formulation of the tort for the Second Restatement.³⁹⁹ Prosser did not think commercially appropriating attributes of personal identity, intrusion upon seclusion, or false light were the kind of offenses Warren and Brandeis had in mind for their new tort action to address, and he seems to have been correct.⁴⁰⁰ But common law courts citing Warren and Brandeis nonetheless came to regard these offenses, along with publication of private

394. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp.2d 1279, 1284 (D. Utah 1998) (citing *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of certiorari)). The court went on to conclude: “Thus, it could be said that a voluntary ‘coming out’ or an involuntary ‘outing’ of a gay, lesbian or bisexual teacher would always be a matter of public concern.” *Id.*

395. *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999, at *9. (Cal. Ct. App. Jan. 3, 2002).

396. *Id.* at *7–*8.

397. I refer to Sipple, Uranga, Prince, Cinel and other individuals extensively discussed herein.

398. *Pavesich v New England Life Ins. Co.*, 50 S.E. 68, 68 (Ga. 1905).

399. *See Restatement (Second) of Torts* § 652C (1977) (“One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.”).

400. *See Prosser, supra* note 10, at 401.

fact, as actionable “invasions of privacy.”⁴⁰¹ Upon reflection, it should not be surprising that courts would regard using a person’s name, picture, or likeness in circulated materials as a wrong in the same general category of tort as prying into that same person’s private life or publishing the details of her private life. Commercial appropriation and publication of private fact are both ways of paying attention and calling attention to someone who might prefer to be let alone.

A. Appropriation Tort Winners

Appropriation claims by those portrayed as homosexual are occasionally successful, as in *Langford v. Sessions*.⁴⁰² Plaintiff Marcus Langford was an amateur bodybuilder who alleged that the defendants, a nightclub and flier-design company, impermissibly used his photograph on a flier to promote a gay party.⁴⁰³ The flier was also posted on a website.⁴⁰⁴ Langford argued that the flier wrongfully portrayed him as gay, and as a result, he allegedly suffered emotional damage. Based on his religious background and beliefs, a gay lifestyle was intolerable.⁴⁰⁵ He argued that since the publication, more gays approached him in the gym, and he had to explain to friends that he was not gay.⁴⁰⁶ He also contended that after the flier was distributed, the website Gay.com started using his photograph as a profile picture.⁴⁰⁷ In addition to punitive damages, Langford filed a complaint for misappropriation, false light, intentional infliction of emotional distress, negligence, and defamation.⁴⁰⁸ The court found Langford entitled to compensatory damages for counts of misappropriation, false light, and negligence and awarded him \$70,000.⁴⁰⁹

The court found that the defendants appropriated Langford’s photograph for their benefit.⁴¹⁰ This holding is consistent with Prosser’s description of the appropriation tort as effective for plaintiffs who show that a defendant has pirated the plaintiff’s identity for some advantage of his own.⁴¹¹ The *Langford* court also held that the use of the photograph placed the plaintiff in false light because it portrayed him as something he was not, and he had a right to portray

401. See, e.g., *Pavesich*, 50 S.E. at 74 (citing Warren and Brandeis).

402. See *Langford v. Sessions*, No. 03-255 (CKK) (D.D.C. July 29, 2005), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv0255-17. But see *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1135 (7th Cir. 1985); *Raymen v. United Senior Ass’n, Inc.*, 409 F. Supp. 2d 15 (D.D.C. 2006).

403. *Langford*, No. 03-255 (CKK), at 1.

404. *Id.* at 1.

405. *Id.* at 4–6.

406. *Id.* at 5.

407. *Id.* at 4.

408. *Id.* at 1.

409. *Id.* at 15.

410. *Id.* at 10.

411. Prosser, *supra* note 10, at 403.

himself in that context in a manner of his choosing.⁴¹² The court thus found the defendant liable for negligence because reasonable care would have included asking for the plaintiff's permission to use his photograph.⁴¹³

The court rejected Langford's intentional infliction of emotional distress claim because he had not shown he asked the defendants to stop using the photograph.⁴¹⁴ In addition, the defendants' conduct was not so extreme and the plaintiff did not prove he suffered emotional damage "so acute a nature that harmful physical consequences might be not unlikely to result."⁴¹⁵ The court also dismissed the claim for punitive damages, finding that the defendants' conduct was not outrageous and that they did not act in malice, did not risk harm to others, did not physically or economically harm the plaintiff, and did not repeat the tortious act.⁴¹⁶ Rejecting the claim for defamation, the court held that the plaintiff did not prove that claiming someone is homosexual is a defamatory act.⁴¹⁷

Albright v. Morton, cited by the *Langford* court to support the notion that "an allegation of homosexuality is defamatory does not have an initial plausibility or appeal,"⁴¹⁸ rejected an appropriation claim brought by Madonna's ex-bodyguard and lover.⁴¹⁹ In *Albright* the court stated that for plaintiffs to prevail in an appropriation case, they need to prove that the appropriation's purpose is to take advantage of their reputation or prestige.⁴²⁰ The court held that, even though the defendant used Albright's picture to sell more books, since the picture was also published in a newspaper article, it did not use the reputation of Albright or make commercial use of Albright's name.⁴²¹

B. Appropriation Losers

As in *Albright*, appropriation claims by those wrongly portrayed as homosexual are sometimes unsuccessful. *Raymen v. United Senior Ass'n, Inc.*, is another, less palatable, example.⁴²² In *Raymen*, a newspaper photographer shot a picture of the plaintiffs, a same-sex couple, kissing while waiting their turn to marry.⁴²³ The photograph was published in the newspaper and on its

412. *Langford*, No. 03-255 (CKK), at 10.

413. *Id.* at 11–12.

414. *Id.* at 10–11.

415. *Id.* at 11 (citing *Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 862 (D.C. 1999)).

416. *Id.* at 14.

417. *Id.* at 13.

418. *Id.* at 13 n.6 (citing *Albright v. Morton*, 321 F. Supp. 2d 130, 139 (D. Mass. 2004)).

419. *Albright*, 321 F. Supp. 2d 130 at 139 (D. Mass. 2004).

420. *Id.* at 139–40.

421. *Id.*

422. 409 F. Supp. 2d 15, 18–19 (D.D.C. 2006). In *Albright* the alleged appropriation was in a detergent publication glitch, whereas in *Raymen* the use of the plaintiffs' photographs was intentional and for political gain unrelated to the beliefs and values of the plaintiffs. *Id.* at 18.

423. *Id.*

website and later used without permission as part of an advertisement for a nonprofit organization, United Senior Association (USA Next).⁴²⁴ USA Next challenged the positions taken by the American Association of Retired Persons (AARP).⁴²⁵ The advertisement contained two pictures: one of the plaintiffs kissing with a green checkmark over it and a second picture of an American soldier, presumably in Iraq, with a red X over it.⁴²⁶ Under the photograph there was a caption: “The Real AARP Agenda,” suggesting that AARP opposes the United States’ wars abroad and supports gay lifestyle.⁴²⁷ The plaintiffs argued that the advertisement portrayed them as against American troops and unpatriotic.⁴²⁸ They allegedly suffered embarrassment and extreme emotional distress in consequence and filed a complaint for libel, false light, appropriation of their likeness, and intentional infliction of emotional distress.⁴²⁹

The court rejected the men’s appropriation claim, stating that the advertisement was non-commercial.⁴³⁰ The photograph had been used by a nonprofit organization and was not for commercial use.⁴³¹ The court then characterized the publication as newsworthy and thus protected by the First Amendment.⁴³² The court held that the campaign used the photograph to address matters of legitimate public concern—same-sex marriage and support for the military.⁴³³ The court also dismissed libel, false light, and intentional infliction of emotional distress claims.⁴³⁴

In *Prince*, the court held that the misappropriation claim was not actionable because the photograph accompanied an article on a gay lifestyle that was an “element of popular culture,” and thus newsworthy.⁴³⁵ The contention that a matter is newsworthy merely because it relates to the amorphous beast “popular culture” threatens to gut the right to privacy entirely.

VI

424. *Id.*

425. *Id.* at 19.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.* at 19–20.

430. *Id.* at 20.

431. *Id.*

432. *Id.* at 23.

433. *Id.* at 25.

434. The court dismissed all claims, holding that the plaintiffs failed to establish libel because the advertisement was not defamatory and a reasonable person could not interpret the advertisement as stating that the plaintiffs were unpatriotic. *Id.* at 21–22. The court similarly dismissed the couple’s false light claim on the ground that there was no reasonable link between the advertisement and the pictured men’s belief system. *Id.* at 25. The kissers’ intentional infliction of emotional distress claim was denied because the defendant’s conduct was not so outrageous in character as to go beyond all possible bounds of decency. *Id.* at 29–30.

435. *Prince v. Out Publ’g*, No. B140475, 2002 WL 7999, at *10. (Cal. Ct. App. Jan. 3, 2002).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Prosser was skeptical of the privacy tort. He feared the tort—the four torts—would be overly generous to plaintiffs with trivial or self-inflicted wounds.⁴³⁶ He also feared the tort would be duplicative of other actions with the same gist: “Taking intrusion [e.g.], the gist of the wrong is clearly the intentional infliction of mental distress, which is now in itself a recognized basis of tort liability.”⁴³⁷ He could not have known that fifty years later lawyers would survey the privacy tort case law and find duplication (1) among the four privacy torts; and (2) between the privacy torts and defamation, and the privacy torts and intentional infliction of emotional distress, and—not examined here—between the privacy torts and the right to publicity⁴³⁸ and confidentiality.⁴³⁹ The privacy torts have been additive and duplicative, but not in ways that appear to have made a difference in the justice of outcomes.

There may be duplication and even cannibalization, but LGBT cases suggest that the invasion of privacy tort and the infliction of emotional distress torts function more as friends than competitors. The intentional infliction of emotional distress tort commonly accompanies the invasion of privacy torts in lawsuits alleging wrongs of intrusion, publicity, and appropriation, with the latter two more or less standing or falling together. In *Simpson*, for example, the court held that the sending of threatening and intimidating letters to a lesbian couple invaded privacy and caused extreme emotional distress, driving them to sell their newly acquired restaurant business and leave town.⁴⁴⁰ The repetition of the letters and the death threats supported the emotional distress claim.⁴⁴¹ Meanwhile, the act of publicizing the plaintiff’s sexual orientation in disparaging letters mailed to the community supported a privacy invasion claim.⁴⁴² The court acknowledged that the defendants had the right to believe that homosexuality “is at odds with the teachings of the bible,” but it found that the defendants’ behavior “constituted an extraordinary transgression of the bounds of socially tolerable conduct” and enjoyed no immunity.⁴⁴³

However, in many other cases, the plaintiffs’ emotional distress did not make the grade.⁴⁴⁴ Courts in these cases have ruled that wrongdoings did not

436. Prosser, *supra* note 10, at 422.

437. *Id.*

438. *Cf.* *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Cal. Ct. App. 2010) (“California has long recognized a common law right of privacy for protection of a person’s name and likeness against appropriation by others for their advantage.”).

439. *See generally* Neil M. Richards & Daniel J. Solove, *Privacy’s Other Path: Recovering the Law of Confidentiality*, 96 *Geo. L.J.* 123 (2007).

440. *Simpson v. Burrows*, 90 F. Supp. 2d 1108, 1131 (D. Or. 2000).

441. *Id.* at 1124.

442. *Id.* at 1125.

443. *Id.* at 1123–24.

444. Courts ruling this way include *Raymen v. United Senior Ass’n, Inc.*, 409 F. Supp. 2d 15 (D.D.C. 2006); *Langford v. Sessions*, No. 03-255 (CKK) (D.D.C. July 29, 2005), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2003cv0255-17; *Albright v. Morton*, 321 F.

amount to extreme and outrageous conduct, which is either intentional or reckless and which causes the plaintiff severe emotional distress.

Templeton is a good illustration of privacy and emotional distress claims meeting the same doomed fate.⁴⁴⁵ Plaintiff Doe and a friend permitted the defendant Templeton, a professional skateboarder, to take their photograph, after he had misrepresented himself as world-renowned professional skateboarder Tony Hawk.⁴⁴⁶ Defendant Toy Machine used the photograph to advertise a videotape describing the company's skateboard team.⁴⁴⁷ The advertisement, with the plaintiff's picture, instructed those who wanted the videotape to "[w]rite to: I am gay in a happy way not a sexual one" at a specific address.⁴⁴⁸ Doe, who was gay, argued that the advertisement drew attention to and disclosed her sexual identity.⁴⁴⁹ She filed a complaint for violation of the Illinois Right of Publicity Act, publication of private facts, intentional infliction of emotional distress, and negligence.⁴⁵⁰ The plaintiff, who worked as a teacher, had to discuss the advertisement with her employer, but did not expose her sexual orientation during the conversation.⁴⁵¹

The court granted summary judgment in favor of the defendants on the counts of publication of private facts and intentional infliction of emotional distress. As to the publication of private facts count, the court held that the plaintiff did not establish the necessary elements of the tort because the advertisement did not disclose that she was gay but at most "disclosed what plaintiff looked like on that particular day in June 2002," and the defendants did not know that plaintiff was gay and therefore could not intentionally reveal any private fact.⁴⁵² In so holding, the court stated for the record that a plaintiff's sexual orientation is not a legitimate public concern, and its disclosure could be highly offensive to a reasonable person in an appropriate case.⁴⁵³

For similar reasons, the court also denied the intentional infliction of emotional distress claim. For one, the defendants' behavior was not extreme or outrageous.⁴⁵⁴ Second, they did not intend to cause emotional distress to the plaintiff, as they did not know about the plaintiff's sexual identity.⁴⁵⁵ Third, the

Supp. 2d 130 (D. Mass. 2004); *Doe v. Templeton*, No. 03 C 5076, 2004 WL 1882436 (N.D. Ill. Aug. 6, 2004); *Uranga v. Federated Publications, Inc.*, 67 P.3d 29, 31 (Idaho 2003); *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985); *Merriwether v. Shorr*, No. 116582/94, 1995 WL 461265 (N.Y. Sup. Ct. Feb 6, 1995); and *Dominick v. Index Journal Co.*, No. 99-CP-24-370, 2001 WL 1763977 (S.C. Ct. Com. Pl. Mar. 15, 2001).

445. *Templeton*, 2004 WL 1882436.

446. *Id.* at *1.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* at *3.

453. *Id.*

454. *Id.* at *5.

455. *Id.*

plaintiff failed to introduce compelling evidence to demonstrate severe emotional distress. Her claims of stress, weight loss, and eczema were insufficient.⁴⁵⁶ The claim for punitive damages was denied because the plaintiff did not establish that the defendants' conduct was "similar to that found in a crime."⁴⁵⁷ Jane Doe's privacy and emotional distress actions thus stood and fell together.

CONCLUSION

Although there have been victories worth mention, the invasion of privacy tort has not proven especially useful to lesbian, gay, bisexual, and transgender plaintiffs. Despite the apparent limited success by LGBT plaintiffs in the cases examined here, one must acknowledge the theoretical possibility that the invasion of privacy tort has been a powerful deterrent to privacy invasions targeting the LGBT population. It is also possible that many invasion of privacy suits have been filed and either successfully settled out of court or litigated and won without appeal. Nonetheless, published appellate court opinions paint a troubling picture, suggesting that privacy tort litigation may not be worth the bother.

American society seems to be moving toward a more socially tolerant future. One day, sexual orientation and sex change will cease to warrant special notice. People will stop threatening, mocking, and discriminating. Although we are not there yet, some courts have prematurely declared that LGBT persons have achieved sufficient equality—that what is whispered in the closets can now be shouted from the rooftops.⁴⁵⁸ That to be known as queers or fags or simply as LGBT is no longer to be vulnerable or despised. Courts deciding whether a privacy claim should withstand summary judgment, a motion to dismiss, or an appeal should be cautious in adopting what may be overly expansive, optimistic assumptions about what is appropriately privileged, public, and newsworthy. I make this point not to cling to the false security of the closet on behalf of LGBT Americans or to encourage hypersensitivity about their orientation, identity and relationships, but firmly to decline the invitation to assume an inherent lack of merit or wisdom in privacy-seeking in everyday life after *Lawrence* and *Goodridge*.

The enduring legacy of Prosser's article is beyond dispute. However, several questions must be asked. First, did Prosser acknowledge all of the categories and subcategories of "privacy" torts?⁴⁵⁹ The LGBT cases suggest

456. *Id.*

457. *Id.*

458. See *Luke* 12:3 (King James) ("Therefore whatsoever ye have spoken in darkness shall be heard in the light; and that which ye have spoken in the ear in closets shall be proclaimed upon the housetops."); cf. *Matthew* 10:27 (King James) ("What I tell you in darkness, that speak ye in light: and what ye hear in the ear, that preach ye upon the housetops.").

459. Some critics have suggested that Prosser failed to include a fifth privacy tort, "breach of confidentiality." See, e.g., Richards & Solove, *supra* note 439, at 125.

that Prosser missed or oversimplified cases or categories that ought to have been included in his purportedly comprehensive analysis of privacy case law. Second, did Prosser exaggerate the distinctiveness with which his four torts were imminent in the case law? Edward Bloustein famously argued that the four privacy torts have an important commonality: the concept of dignity.⁴⁶⁰ In fairness, Prosser neither affirms nor denies that there is a common value that justifies recognition of all four invasions of privacy torts. Yet stressing, as he did, the severability of the tort into four discrete categories can obscure the unifying fact that defendants have affronted plaintiffs in a way that leaves plaintiffs feeling—to borrow an image from the Georgia opinion *Pavesich v. New England Life Insurance*—like slaves to a merciless master.⁴⁶¹

The cases examined reveal that a gap has developed between the formalities of pleading that can be credited to Prosser's enormous influence, and the actual experiences of LGBT plaintiffs. LGBT plaintiffs often allege in their complaints that a single injurious episode has given rise to multiple privacy causes of action. Indeed, LGBT plaintiffs often allege, as a formal matter, that defendants in a single action violated two, three, or all four of Prosser's privacy sub-torts, plus the defamation and emotional distress torts.⁴⁶² This allegation of multiple torts is an undisputable fact about pleading, a function of responsible lawyering within the taxonomic framework of the positive law Prosser shaped. But as Prosser's critics note, the four torts have in common a singular normative foundation of respect for human dignity and inviolate personhood.⁴⁶³ Thus, while LGBT plaintiffs typically allege that a single wrongful encounter with disrespectful defendants has affronted their basic desire to be left alone, their attorneys formally divide these encounters into multiple causes of action. People want to be let alone; leave it to lawyers and analytic philosophers to tell them they want to be let alone in four or more distinguishable senses.

In principle, LGBT individuals, like everyone else, can recover for highly offensive wrongful acts of intrusion, publication, or appropriation. But on the

460. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 971 (1964).

461. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905) (“[H]e is in reality a slave without hope of freedom, held to service by a merciless master . . .”).

462. See, e.g., *Schuler v. McGraw-Hill Cos.*, 989 F. Supp. 1377 (D.N.M. 1997) (transgender woman alleged that publication of a magazine article critical of her constituted defamation, intentional infliction of emotional distress, false light, publication of private facts and intrusion); *Prince v. Out Publ'g*, No. B140475, 2002 WL 7999 (Cal. Ct. App. Jan. 3, 2002) (gay man alleged that publication of his photographs without consent constituted both libel and invasion of all four privacy torts); *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (gay ex-marine whose sexual orientation was publicized in the press after he thwarted assassination of President Ford alleged intrusion, publication of private facts, false light, and intentional infliction of emotional distress); *Madsen v. Erwin*, 481 N.E.2d 1160 (Mass. 1985) (lesbian fired from job at Christian Science Monitor alleged defamation, intrusion, publication of private facts, and intentional infliction of emotional distress).

463. See generally Bloustein, *supra* note 460.

evidence of the tort cases cited in this Article, I reluctantly conclude that recovery for invasion of privacy is unlikely where the “reasonable person” and the “reasonable LGBT” person part ways. What is offensive to LGBT persons struggling for liberty, equality, dignity, and intimacy is not always offensive to the judiciary’s hypothetical everyman. Homosexuality, gender unorthodoxy, and sex change were once considered morally illicit, dangerous, and potentially criminal. Secrecy and selective self-disclosure are needs that arose in a time of intolerance and discrimination. As long as intolerance and discrimination against LGBT individuals remain, the need for seclusion, secrecy, and selective self-disclosure will remain as well.⁴⁶⁴

464. Sadly, the intimate lives of LGBT Americans are still subject to unwarranted invasion. On September 22, 2010, Rutgers University freshman Tyler Clementi committed suicide after his roommate and another student used hidden webcams to stream over the internet live images of Clementi having sex with a male partner in a supposedly private dorm room.