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Outing and Freedom of the Press: Sexual Orientation's Challenge to the Supreme Court's Categorical Jurisprudence

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"OUTING" AND FREEDOM OF THE PRESS: SEXUAL ORIENTATION'S CHALLENGE TO THE SUPREME COURT'S CATEGORICAL JURISPRUDENCE

INTRODUCTION

No area of the law exemplifies the tension between individual rights and concerns for the social order better than the debate between freedom of the press and the rights of individuals subjected to the press. This debate has recently surfaced for reevaluation in light of the growing potential for lawsuits concerning the publication of individuals' sexual orientation. As more gay newspapers engage in "outing"[1] public figures by exposing their sexual orientation, the possibility of lawsuits for defamation and invasion of privacy has increased. In this legal context, sexual orientation challenges traditional thinking about the balance between the rights of the individual and the rights of the press.

In a series of cases decided during the 1960s, the Supreme Court balanced the press's right to disseminate information freely with two distinct rights of the individual—the right to maintain one's reputation amidst false accusations (defamation suits), and the right to prevent invasion of privacy. Beginning with *New York Times, Co. v. Sullivan*,[2] and continuing through *Milkovich v. Lorain Journal Co.*,[3] the Court developed a methodology for balancing these interests. This balance was based primarily on an epistemology of dichotomies and categories with vague parameters: truth/falsity,[4] public issues/private issues,[5] public figure/private figure.[6] Courts and attorneys must consider this legal background when they attempt to litigate and adjudicate the "outing" cases that will inevitably arise.[7]

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1 *See infra* notes 7-14 and accompanying text.

2 376 U.S. 254 (1964).

3 110 S. Ct. 2695 (1990).

4 *See* New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (the necessary proof for libel is "actual malice—that is, with [the] knowledge that it was false").

5 *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (the concern is that "true speech on matters of public concern" not be deterred); *see also* Anne Benaroya, Note, Philadelphia Newspapers v. Hepps *Revisited*, 58 GEO. WASH. L. REV. 1268, 1270 (1990).

6 *See* Gertz v. Robert Welch, 418 U.S. 323, 344 (1974) ("Public figures usually enjoy greater access to the channels of effective communication .... Private individuals are ... more vulnerable to injury"); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)(defining a "public figure").

7 Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) is the first reported case that challenged the practice of "outing"—the publication of an indi-

This Note discusses the legal and jurisprudential difficulties that the legal community will confront in cases of "outing." Part I establishes the Court's methodological approach that "outing" ultimately challenges. This Part focuses on the possible legal causes of action available to an "outed" plaintiff, such as defamation and invasion of privacy, and places "outing" in its legal and historical context. Part II analyzes possible difficulties with the legal requirements of defamation and invasion of privacy claims, and explains how "outing" presents a unique case for attorneys and for courts. Finally, Part III offers some suggestions on how the courts should reconfigure the legal standards and the underlying legal reasoning to allow "outed" plaintiffs successful causes of action under defamation and invasion of privacy.

I
OUTING AND ITS PLACE IN THE LAW

A. Outing—What is It?

"Outing" is the intentional exposure by gay people of the sexual orientation of public figures.[8] Gay activists assert a number of reasons for this exposure. Frustrated with the public indifference to the AIDS epidemic, activists have "claim[ed] a moral right" to expose public figures' sexual orientations.[9] These activists also claim that "outing" is a way of helping the gay rights movement by forcing people to accept the position of role models. Additionally, "outing" purportedly helps to eliminate opposition to gay political causes by exposing the secret, hypocritical lives of proponents of anti-gay legislation.[10] "Outing" is accomplished through news stories in gay publications[11] which allege that the public figure, while not admitting it, is in fact a homosexual.

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vidual's sexual orientation. Cases have discussed an individual's sexuality in conjunction with sexual crimes (*e.g.*, Lindsey v. Dayton-Hudson, 592 F.2d 1118 (10th Cir. 1979)), but in these cases the police record, not a newspaper, first made the information public. This Note explores the possible future changes in the law to accommodate the recent trend by gay newspapers of publishing names of alleged homosexuals.

8 "Outing" comes from the notion of bringing someone "out of the closet" by exposing that person's sexuality.

9 William A. Henry, III, *Forcing Gays Out of the Closet*, TIME, Jan. 29, 1990, at 67.

10 "Outing" differs from mere gossip articles in tabloids such as *The National Enquirer* or *The New York Post* in that the motivation of the publisher is different. Gay papers perform "outing" with the intent of supporting the gay community politically and psychologically. *See Outspoken*, OUTWEEK, March 18, 1990, at 4 (editorial explaining reasons for "outing" Malcolm Forbes and others in the future). Although there is no legal distinction between maliciously exposing someone's sexual orientation and doing it for political reasons, some ethical or moral desire to differentiate the two may exist. Such a discussion is beyond the strictly legal analysis of this Note.

11 New York City's *Outweek* regularly listed approximately 20 famous people they believe to be gay in a weekly feature titled "Peek-a-Boo." *Outline*, a Chicago paper, is

When *Outweek* magazine exposed the sexual life of Malcolm Forbes,[12] it sparked furor and controversy within the press. Since the Forbes article, every major newspaper in the country has run an article debating the social and moral rationales of "outing."[13] Aside from the social and moral issues surrounding "outing," the practice also raises important legal issues concerning the extent of the press's freedom as opposed to the rights of the individual.[14] "Outing" raises the possibility of defamation and invasion of privacy lawsuits because it is an activity of the press performed upon an individual.

B. An "Outed" Plaintiff's Causes of Action

An "outed" plaintiff has two avenues of legal recourse against the publication that exposed his or her sexual orientation: defamation[15] and invasion of privacy. The state tort claim of defamation requires that the plaintiff show the statement was published negligently or intentionally to third parties and that the publication resulted in damage to the plaintiff's reputation.[16] Additionally, the Supreme Court has noted that if the plaintiff is a public figure,[17] the Constitution further requires the plaintiff to show either that the statement is knowingly false or that the press acted with reckless disregard for its truth.[18]

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less regimented in its schedule, but often publishes articles spotlighting a public figure and his or her sexuality.

12 Michelangelo Signorile, *The Other Side of Malcolm*, OUTWEEK, Mar. 18, 1990, at 40.

13 *See, e.g.*, *The Ins and Outs of Outing the Ins*, S.F. CHRON., Aug. 12, 1991, at E12; WASH. POST, July 13, 1990, at C1; USA TODAY, May 7, 1990, at 1; CHI. TRIB., May 6, 1990, at 3; BOSTON GLOBE, May 3, 1990, at 1; N.Y. TIMES, Apr. 12, 1990, at A23; L.A. TIMES, Mar. 22, 1990, at E1.

14 "Outing" raises concerns about how far the press should delve into the private lives of people to generate news stories. *See Gays, Privacy and the Free Press*, WASH. POST, Apr. 8, 1990, at B7; *The Ins and Outs of Outing the Ins*, S.F. CHRON., Aug. 12, 1991, at E12.

15 Defamation includes the torts of libel and slander. Libel is written defamation and slander is oral. Due to my focus on the press, throughout this Note I will use defamation synonymously with libel.

16 A presumption of damages, at least as it applies to media defendants, no longer exists. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974). Exactly what constitutes a defamatory statement, or lowers reputation, is a bit vague. Reputation has been harmed when "third persons [are deterred] from associating or dealing" with the person. RESTATEMENT (SECOND) OF TORTS § 559 (1977). In Clark v. American Broadcasting Co., 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983), a television documentary on prostitution, which showed the plaintiff walking toward the camera, was held defamatory because of the potential for a bad impression. In Haas v. Evening Democrat Co., 107 N.W.2d 444 (Iowa 1961) the court held that calling the plaintiff conservative was not defamation because the statement did not disgrace or lower the plaintiff's esteem in society's eyes. In Vigil v. Rice, 397 P.2d 719 (N.M. 1964), the court held that a doctor's report to school authorities that a student was pregnant was defamatory.

17 For a discussion of "public fignres," see *infra* notes 91-95 and accompanying text.

18 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (the plaintiff must show

The "outed" plaintiff's second route of legal redress is an invasion of privacy claim. Like defamation, invasion of privacy is a state tort claim on which the Supreme Court has placed constitutional limitations.[19] A prima facie case[20] requires that the plaintiff demonstrate that the defendant's publication was an offensive, public disclosure of private facts.[21] Additionally, and significantly in relation to future "outing" cases, the Court has interpreted the United States Constitution as requiring that the plaintiff also show the publication's lack of newsworthiness.[22] The Supreme Court has long noted the democratic concern for a free press[23] and has interpreted the First Amendment as providing a constitutional privilege for the media.[24] That is, the Court accords more protection to the press than to other modes of discourse. This privilege, however, extends only to newsworthy publications.[25] Whether the media privilege exists when the press publishes facts not presently in the public domain remains unclear,[26] since the Court has only discussed this newsworthiness requirement in terms of information that is already public.[27]

"Outing" cases clearly will rest on claims of defamation or inva-

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the statement's "falsity or [a] reckless disregard for the truth" on the part of the publication).

19 *See infra* text accompanying notes 217-20 (discussion of Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).

20 W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 856-63 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS] ("the disclosure of the private facts must be a public disclosure and not a private one; . . . the facts disclosed to the public must be private facts . . . and the matter made public must be one which would be highly offensive and objectionable to a reasonable person.").

21 The definition of public disclosure is at best vague. In Vogue v. W.T. Grant Co., 327 A.2d 133, 137 (Pa. 1974), the court held that publication to an audience of four did not constitute a public disclosure. There is little doubt, however, that newspaper articles are generally accepted as public disclosures. *See* Didis v. F-R Publishing Corp., 113 F.2d 806, 808 (2d Cir. 1940) (article in *New Yorker* was a public disclosure because it is a "weekly magazine of wide circulation throughout the United States"); Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762 (Cal. Ct. App. 1983) (article in a local paper about a college student being a transsexual was deemed a public disclosure).

22 Because of the need to balance competing interests, the Supreme Court has used the term "public interest" without precisely defining newsworthiness. *See infra* notes 83-85 and accompanying text. One court, however, has set forth a detailed test for determining newsworthiness which includes an assessment of: (1) the social value of the facts; (2) the depth of the article's intrusion; and (3) the extent of the party's voluntary accession to public notoriety. Briscoe v. Reader's Digest Ass'n, 93 Cal. Rptr. 866, 875 (Cal. 1971) (quoting Kapellas v. Kofman, 81 Cal. Rptr. 360, 370 (Cal. Ct. App. 1969)).

23 *See* New York Times, Co. v. Sullivan, 376 U.S. 254, 272 (1964) ("whatever is added to the field of libel is taken from the field of free debate") (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942)).

24 *See infra* notes 79-89 and accompanying text.

25 *See id.*

26 For discussion about the open-endedness of the Court's view of public disclosure of news not already public, see *infra* notes 216-40 and accompanying text.

27 *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

sion of privacy, but "outing" presents unique problems for the traditional legal framework. The current legal structure assumes that courts are capable of striking a balance between freedom of the press and an individual's right to reputation and privacy. Sexual orientation, however, does not fit into this balance, and the problem lies in the essence of sexual orientation. The legal difficulty with sexuality[28] stems from the fact that sexuality is not synonymous with sexual activity.[29] Sexuality, whether a genetic or cultural construct, inheres in the person; it is an ontological concept.[30] The distinction is simply one between what a person does and what that person is.[31] In terms of privacy and the individual, sexual activities are often made public voluntarily, and therefore can be regulated or socially controlled.[32] Sexual orientation, however, need not have any public component; it is not defined by one's activities.[33] Consequently, "outing" raises the question of how much of a person's "being" the public can have access to, as well as the difficulty in determining exactly what one's sexual orientation is. For courts and practitioners, the question will concern the extent to which the prima facie requirements of defamation and invasion of privacy suits are disrupted by the conceptual difficulties of speaking about sexual orientation. In order to understand the legal position of "outing" in defamation and invasion of privacy suits, however, it is first neces-

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28 *See infra* note 32. For purposes of this Note, "sexuality" and "sexual orientation" are synonymous. Although sexuality may evoke slightly different popular connotations, the legal writings on the topic have used the terms interchangeably, and this Note stays within that tradition.

29 For a general discussion of the legal difficulties with the concept of homosexuality in particular, see Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

30 For a discussion as to the genetic or familial production of sexuality, see the findings of the Kinsey Institute study in ALLEN BELL ET AL., SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN (1981); *see also* David A.J. Richards, *Sexual Autonomy and the Constitutional Right to Privacy*, 30 HASTINGS L.J. 957 (1979); *but see* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 49-52 (1987) (arguing that sexuality is a socio-political, not a biological, construct).

31 Courts confuse activities with orientation, although the two are not necessarily the same. *See infra* note 32.

32 State solicitation cases exemplify how sexual activity, not sexuality, comes into confrontation with the law, and how the public nature of that sexual activity subjects it to some form of social control. *See, e.g.*, Pryor v. Municipal Court, 599 P.2d 636 (Cal. 1979) (man solicited undercover police officer to perform oral copulation in a parking lot); Commonwealth v. Sefranka, 414 N.E.2d 602 (Mass. 1980) (man charged with solicitation of homosexual acts at a rest area); People v. Uplinger 447 N.E.2d 62 (N.Y. 1983), *cert. denied*, 467 U.S. 246 (1984) (man charged with soliciting another man to engage in homosexual intercourse in a public place).

33 *See* DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 1-4 (1988); ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); KENNETH LEWES, THE PSYCHOANALYTIC THEORY OF MALE HOMOSEXUALITY 232-41 (1988).

sary to explore the historical development of these two causes of action.

C. History of Defamation and Invasion of Privacy

1. *Defamation Before* New York Times, Co. v. Sullivan

Defamation is a common-law tort claim that provides an individual redress for the invasion of one's interest in reputation or good name.[34] Prior to the Norman Conquest, early English canon law defined defamation as an insult against a person's character, and an apology was the only form of remedy.[35] By the seventeenth century, common-law courts were providing damages as redress for false attacks on reputation.[36] The present day claim of defamation retains this common-law tradition and requires both falsity of statement and damage to reputation.

In a common-law suit of defamation, the law presumed damage to the plaintiff's reputation.[37] The common law, however, has failed to precisely define the notion of reputation.[38] Dean Prosser stresses that reputation is a "relational" concept[39] since common-law suits hinged solely upon whether or not the plaintiff's reputation was lowered in the estimation of the community.[40] Interaction with the public defines reputation,[41] and defamation focuses on how an ac-

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34 *See* PROSSER AND KEETON ON TORTS, *supra* note 20, at 771.

35 Colin R. Lovell, *The Reception of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962) (Lovell points out that if the defendant resisted this remedy, the plaintiff was to "be compensated with no lighter penalty than the cutting off of [the defendant's] tongue") (footnote omitted).

36 *See* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 568-73 (1903); Van Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33, 39-41 (1904).

37 Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) (common-law defamation demonstrates the "pervasive and strong interest in preventing and redressing attacks upon reputation"). *See* Thompson v. Upton, 146 A.2d 880 (Md. 1958) (an allegation that the plaintiff was part of a "racket" was sufficient to lower his reputation and thereby constitute defamation); Wandt v. Hearst's Chicago American, 109 N.W. 70 (Wis. 1906) (the court found the allegation that the plaintiff had attempted suicide to damage reputation).

38 Although common-law notions of reputation resided in the relational dealings between people, it is unclear whether reputation consisted merely of public image or whether something more tangible and inherently personal constituted reputation. It has been argued that, in fact, courts have "not attempted to define reputation" but merely assumed that everyone knew what reputation was. Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 877 (1956).

39 PROSSER AND KEETON ON TORTS, *supra* note 20, at 771.

40 RESTATEMENT (SECOND) OF TORTS § 559 comment e; *see* Kimmerle v. New York Evening Journal, 186 N.E. 217 (N.Y. 1933) (defamation "induce[s] an evil opinion of one in the minds of right-thinking persons"). This notion of the damage to reputation stems from Parmiter v. Coupland, 151 Eng. Rep. 340 (1840), *quoted in* PROSSER AND KEETON ON TORTS, *supra* note 20, at 773.

41 *See* RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION, 58-74 (1990) (Reputa-

tion causes others to view the plaintiff.[42] Unlike many tort laws that measure damages in absolute terms, independent of the social effects of the tortious actions, courts determine damages in defamation suits only by assessing how the defendant's actions affected the plaintiff's relationship to the whole of his or her society.[43] Thus, damages in defamation suits rest on "the law[s] recogni[tion] in every man [of] a right to have the estimation in which he stands in the opinion[s] of others"[44] determine the extent of injury.

In addition to injury to reputation, the claim of defamation is also based on notions of falsity.[45] Under the common law, truth constituted a defense to the plaintiff's charge of defamation,[46] and the defendant was required to prove the statement's truth.[47] Placing the burden of proof on the defendant deterred individuals from merely repeating what they had heard and thus helped to prevent the "mere repetition of slander."[48] Diane Zimmerman argnes that although truth had been a defense until the early seventeenth century, at the time the First Amendment was drafted "truth was not a defense in criminal defamation actions."[49] Instead, at the end of the seventeenth century and throughout the eighteenth century, malice

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tion is a "pro-attitude by other people toward the person 'whose' reputation is in issue.") (citation omitted); RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 184-85 (1990) (reputation is not "an asset of the person," but is a transactional concept).

42 Robert Post has argued that this notion of reputation was, and still is, a divisible notion of property, honor, and diguity. Dignity and honor are, by definition, conferred upon a person through society's perception of that person, which does not necessarily correspond to who that person is. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 696-708 (1986). Consequently, all of Post's notions presume an underlying theory of ownership, not only of the tangible property interest, but also of an image of that person.

43 One earns a reputation and, therefore, reputation is part of the marketplace—it creates capital because it creates the "potential for 'patronage and support.'" Post, *supra* note 42, at 693-94. Since reputation is akin to goodwill, one's "earnings" exist only because of how society has viewed the person. This economic view underscores the socially relational aspect of reputation.

44 Scott v. Sampson, 8 Q.B.D. 491, 503 (1882).

45 *See* PROSSER AND KEETON ON TORTS, *supra* note 20, at 804.

46 RESTATEMENT (FIRST) OF TORTS §§ 558, 613 (1938).

47 Owens v. Scott Publishing Co., 284 P.2d 296, 303 (Wash. 1955) ("[T]he defendants [must] sustain the defense of truth [and] prove by a fair preponderance of the evidence the substantial truth of each and every defamatory and libelous statement . . . ."); RESTATEMENT (FIRST) OF TORTS § 582 comment h (1938); *id.* § 613(2)(a). Under American constitutional law, the press, as defendant, need no longer prove the truth of the publication.

48 Nicholson v. Rust, 52 S.W. 933, 934 (Ky. 1899) ("tale bearers are as bad as tale makers) (citation omitted); *see also* Skinner v. Powers, 1 Wend. 451, 457 (N.Y. 1828) ("publication in a newspaper of rumors is not justified by the fact that such rumors existed").

49 Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 308 (1983).

was the basis for recovery in defamation.[50] That is, courts did not impose liability for false, benign speech but could impose liability for truthful speech, if promulgated with a malicious intent. It is, therefore, unlikely that the Framers intended to make all truthful speech immune from liability.

By the nineteenth century, United States courts unequivocally viewed truth as a complete defense to defamation suits[51] and sought to prevent the placement of limitations on truthful speech.[52] In part, this view of defamation law evolved from the post-Revolutionary, democratic desire for the free dissemination of information and the ability to criticize governmental figures.[53] The desire to foster economic development and the free exchange of ideas further promoted a "no limitations" policy on truthful speech.[54] The legal focus of defamation, therefore, shifted from a concern over reputation toward the social value in fostering truthful speech.[55]

2. Sullivan *and Its Legacy*

In *New York Times Co. v. Sullivan*,[56] the Supreme Court subjected the law of defamation, traditionally a state law question, to First Amendment analysis.[57] In 1960, L.B. Sullivan was the police commissioner in Montgomery, Alabama.[58] When an advertisement placed in the *New York Times* by Martin Luther King's civil rights movement charged the Montgomery police with brutality, Sullivan brought a defamation action against the New York Times Com-

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50 *See* Crawford v. Middleton, 83 Eng. Rep. 308 (1674) (the defendant was not liable because he had spoken the words "as a story, and not with any malice"), *quoted in* LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 25-29 (1978).

51 Zimmerman, *supra* note 49, at 311. *See, e.g.*, Neilson v. Jensen, 76 N.W. 866 (Neb. 1898); Atwater v. Morning News Co., 34 A. 865 (Conn. 1896); Dement v. Houston Printing, Co., 37 S.W. 985 (Tex. Civ. App. 1896); Langton v. Hagerty, 35 Wis. 150 (1874) (all of these cases held that truth is a defense to defamation).

52 *See* Fort Worth Press Co. v. Davis, 96 S.W.2d 416, 419 (Tex. Civ. App. 1936) (libel should not stand when "statements set forth . . . are substantially true").

53 For a discussion of this heritage, see KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 87-106 (1989); *see also infra* note 63 and accompanying text.

54 *See infra* note 68 (discussion of Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988)).

55 This led publishers of defamatory material to print it at the risk of not being able to prove its veracity if they were ultimately sued. The damage to reputation alone was not sufficient to prove defamation. For further discussion of the legal changes in defamation, see Joan E. Schaffner, Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 435-42 (1990).

56 376 U.S. 254 (1964).

57 *Sullivan* set forth the basic requirements for recovery: knowledge of falsity or disregard for truth when the subject is a public figure. *Sullivan*, 376 U.S. at 279-80. In the case of private plaintiffs, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), set a minimum standard for recovery but left it to the states to impose further standards.

58 *Sullivan*, 376 U.S. at 256.

pany.[59] The defendants failed to prove the truth of their claims, and the jury found for the plaintiff.[60] The Supreme Court reversed, holding that in the case of public officials, the public official bringing the action must prove that the "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[61] Similarly, at least when the matter is of public concern, the First Amendment requires a plaintiff to prove the falsity of the statement.[62] Since criticism of the government is central to the democratic exchange of ideas, the fear of uttering potential falsehoods could chill free expression by the press.[63] The Court held that the press need not "guarantee the truth of all [its] factual assertions."[64] Thus, the *Sullivan* Court set the standard that in the case of public officials or matters of public concern, an individual's right to recover for defamation must be balanced against the constitutional issue of freedom of the press.[65]

While *New York Times, Co. v. Sullivan* established clear standards for courts to follow in defamation suits, the opinion also articulated the Court's methodology for adjudicating the rights of the individual against the rights of the press.[66] First, the decision clearly established falsehood as a threshold requirement for recovery.[67]

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59 *Id.*

60 *Id.*

61 *Sullivan*, 376 U.S. at 279-80. This holding represents a move away from the common-law notion that the defendant must prove the truth of the statement. *See* RESTATEMENT (SECOND) OF TORTS § 581A comment b (1977) (the statement in issue is presumed false, and the defendant had to raise truth as an affirmative defense); PROSSER AND KEETON ON TORTS, *supra* note 20. *But see* Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964). The burden, as *Sullivan* states, has shifted to the plaintiff, thus demonstrating the priority of the First Amendment.

62 *See Sullivan*, 376 U.S. at 279-80; Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (limiting First Amendment protection to defamatory speech involving public matters).

63 "The rule [of requiring the defendant to prove truth] dampens the vigor and limits the variety of public debate." *Sullivan*, 376 U.S. at 279.

64 *Id.* The Court further expressed the policy underlying its holding by stating that "would-be critics of official conduct may be deterred from voicing their criticism." *Id.* For an argument that *Sullivan* "permits no libel actions against the critics of official conduct," see Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to the Central Meaning of the First Amendment*, 83 COLUM. L. REV. 603, 621 (1983).

65 As Laurence Tribe points out, implicit in this ruling is the notion that potentially "the first amendment establishes a right to speak defamatory truth." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 864 (2d ed. 1988).

66 *Sullivan* was the first case in which the Court spoke of the first amendment limitations on common-law defamation actions. *See* Sheldon W. Halpern, *Of Libel, Language and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273, 277-80 (1990).

67 *Sullivan* set forth the "actual malice" standard that the plaintiff must prove the falsity of a statement and that it was spoken with "reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 279-80. The epistemological approach behind this standard is obviously based on the dichotomy of falsity and truth. Thus, even if plaintiffs

Underlying this standard is the need to promote the free exchange of ideas as well as to recognize that such an exchange is only worthwhile when dealing with truth.[68] However, the Court's definition of the malice requirement,[69] which prevents some plaintiffs from recovering despite publications of falsehoods, undermines its commitment to true speech. As the Court said, to require factual support for every comment would be comparable to "self-censorship."[70] Even though the malice standard may complicate some plaintiffs' cases, the Court's underlying methodological approach involves balancing the rights of the press with rights of individuals, by dichotomizing its analysis between truth and falsity.[71]

The *Sullivan* Court's second requirement for a successful defamation suit involved the separation of public and private figures. Like the truth/falsity division, this standard shows the Court's penchant for a dichotomized epistemology.[72] *Sullivan* stands for the right to criticize public officials and was ultimately expanded to protect debate over public issues.[73] According to the Court, the democratic process exemplifies the "national commitment to the principle that debate on public issues should be unin-

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are not proving falsity, they are proving a disregard for truth—either way, the premise is that the statement is always either true or false.

68 In Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988), the Court stated that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas." In *Sullivan*, the Court stressed that the policy behind its decision was to promote criticism of public actions of public officials because in a democracy "the advantages derived are so great, that they more than counterbalance the inconvenience of private persons." *Sullivan*, 376 U.S. at 281. If, however, the speech is knowingly false then no such good can be derived from it. It does not promote the free exchange of ideas or inform the public. Consequently, the policy to promote speech is actually a desire to promote true speech.

69 *See Sullivan*, 376 U.S. at 279-80 (" 'actual malice' requires knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not"); *see also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("Publishing with such doubts [as to the truth of the publication] shows reckless disregard for truth or falsity and demonstrates actual malice.").

70 "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions . . . leads to a comparable 'self-censorship.' " *Sullivan*, 376 U.S. at 279.

71 The Court has identified areas outside the defamation context in which the right to a free press does not guarantee that one may publish any truthful statement. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563 (1976) (papers enjoined from printing certain items about a case because they could "impair the defendant's right to a fair trial"); Near v. Minnesota, 283 U.S. 697, 703 (1931) (recognizing that a newspaper which publishes "malicious, scandalous, and defamatory articles," that are also blatantly anti-Semitic, while perhaps not suppressible under the Constitution, may be punished consistently with the Constitution).

72 *See* Halperu, *supra* note 66, at 282-89 (analyzing the Court's use of the dichotomies of public/private figures and public/private issues from *Curtis Publishing* through *Dun & Bradstreet*).

73 *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971). As the Court has stated, the ability to criticize public figures is "more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

hibited, robust, and wide-open."[74] Of course, one can only extend this principle of democracy to information about private individuals, if the nature of information is of a public concern.[75]

The Supreme Court further defined *Sullivan's* difficult standard regarding First Amendment protection in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[76] two cases decided together. *Curtis* dealt with a football coach charged with fixing games.[77] *Walker* concerned a retired general's voluntary choice to help desegregate the University of Mississippi.[78] In both cases, the Court held that the men were "public figures."[79] The Court distinguished between private and public individuals by asserting that if people are involved in "important public questions or, by reason of their fame, shape events in areas of concern to society at large,"[80] then the press can invoke First Amendment protection when it writes about these public figures.[81] With these decisions, the extension of the press's freedom moved from a discussion of public officials to a debate over public issues that surround public figures.[82]

Using its dichotomized methodology first promulgated in *Sullivan*, the Court then explored when an issue becomes a matter of "public concern." In *Rosenbloom v. Metromedia, Inc.*[83] the police arrested the plaintiff for selling allegedly obscene literature.[84] Metromedia broadcast the news story and referred to the plaintiff as

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74 *Sullivan*, 376 U.S. at 270.

75 Whether the concepts of public issues and public persons are different is debated. The standard from *Sullivan* was based on the status of the person or on the correlative fact that the person was involved in public matters. Later, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971), Justice Brennan noted that "[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."

76 388 U.S. 130 (1967). Both cases were decided with a single opinion.

77 *Id.* at 135.

78 *Id.* at 140. For a thorough analysis of these cases, see Henry Kalven, *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267.

79 *Curtis*, 388 U.S. at 139 (the public figure status was conferred because both men were "involved in activities of great interest to the public").

80 *Id.* at 163-64.

81 "The dissemination of the individual's opinions on matters of public interest is for us . . . an 'unalienable right' that 'governments are instituted among men to secure.'" *Id.* at 149 (citation omitted). The rationales given reflected those which the Court mentioned in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See infra* notes 90-95.

82 There is some doubt as to the fine distinctions between these two categories. Later, the Court discussed the difficult parameters of these terms. *See* Dun & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 765-72 (1985) (the Court questioned whether the idea of "public concern" obscures or makes unnecessary the notion of the public official) (White, J., concurring); *see also* Halpern, *supra* note 66.

83 403 U.S. 29 (1971).

84 *Id.* at 32.

involved in the "smut literature racket."[85] The Court determined that the issue was of "general or public interest,"[86] and that the First Amendment outweighed any concern for reputation,[87] but never explicitly defined an issue of "public interest." As a result, individual courts now have the power to decide on an ad hoc basis what constitutes an item of public interest.[88] Depending upon how courts define "public interest," any information regarding a person is potentially open to the press. How much of the self the individual retains under this methodological approach, and whether sexuality should be considered a matter of " 'general or public interest' remains" uncertain.[89]

The Supreme Court's ruling that the press is protected from suits for publication of personal information requires not only a determination of whether the targeted figure is public or private, but also a calculation of the scope of an individual's "publicness" and whether the published material falls within that scope. The Supreme Court addressed this question in *Gertz v. Robert Welch, Inc.*,[90] in which the plaintiff sued the press for publishing allegations of his Communist involvement. The Court analyzed both the plaintiff's status as a public or private figure and whether the subject matter concerned public or private issues.[91] Reversing the *Rosenbloom* Court's extension of constitutional requirements to private figures, the Court held that when a case involves a public figure, the plaintiff must prove malice in addition to falsity because the involvement of public events gives rise to a strong First Amendment concern.[92] The Court stated that public figures are those who have "assumed roles of special prominence[,] . . . occupy positions of . . . power and influence . . . [or] have thrust themselves to the forefront of particular public controversies."[93] One rationale for adopting such a defi-

85 *Id.* at 34.

86 *Id.* at 44 ("libel law . . . derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest").

87 The Court reasoned that "protecting individual reputation often yields to other important social goals. In this case, the vital needs of freedom of the press and freedom of speech persuade us that allowing private citizens to obtain damage judgments . . . would not provide adequate 'breathing space' for these great freedoms." *Id.* at 49-50.

88 The Court best expressed this concern in Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974), when discussing the *Rosenbloom* ruling, but the Court again failed to establish a definition. The Court stated that "[the *Rosenbloom* court's reasoning] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest.' ".

89 *See id.*

90 418 U.S. 323 (1974).

91 The Court noted that the "*New York Times* standard defines the level of constitutional protection . . . of a public person," *Gertz*, 418 U.S. at 342, and establishes the "public or general interest test" concerning the issues in question. *Id.* at 346.

92 *Id.* at 342.

93 *Id.* at 345.

nition is that these people have access to the media and can contest any accusation.[94] Another rationale is based on society's right to know about public figures;[95] this concern again implicates the First Amendment's purpose of promoting political debate. The problem with the Court's sharp distinctions, however, is that the definition and the parameters of the categories are vague.

Sullivan and its progeny leave us with a distinction, albeit vague, between the public and private realms of both the individual and the information disseminated.[96] When the case involves a public person and a public issue, *Sullivan* and *Gertz* dictate that the plaintiff must demonstrate the falsity of the statement and a reckless disregard for its truth. When the case concerns a private person and a public issue, *Gertz*, as interpreted by the court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[97] requires that the plaintiff need only show a negligent disregard for the statement's truth. The Court has yet to determine the appropriate standard for a case concerning a public figure and a private fact. The Court has only cryptically asserted that the *Sullivan* standard "does not mean that any speech about a public figure is immune from sanction."[98] In each of these standards, however, the Court's use of dichotomized categories has marked its method of interpretation.

3. *Invasion of Privacy*

Though essentially a state tort claim, intrusion into an individual's private life, like defamation, is circumscribed by constitutional principles. Generally, a prima facie case for an invasion of privacy claim requires a public disclosure of private information that results in a highly offensive intrusion.[99] However, the elements of a privacy tort are difficult to describe because they vary between jurisdic-

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94 "Public officials and public figures usually enjoy siguificantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements." *Id.* at 344.

95 "Those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society . . . they invite attention and comment." *Id.* at 345.

96 In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985), the Court was candid about the ambiguity of these terms when it defined a matter of "public concern" as depending upon "the content, form, and context" of the expression. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court suggested that the public figure determination was always linked to the public nature of the issue in question. This raises questions about the status of private information regarding a public person, and whether that private information must be considered part of the "publicness" of the person.

97 472 U.S. 749, 755 (1985).

98 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

99 *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977). The Restatement defines private information as that which a reasonable person would find highly personal and which would offend ordinary sensibilities if disclosed.

tions.[100] In *Cox Broadcasting Corp. v. Cohn*,[101] the Court reaffirmed the precept that in order for a plaintiff to recover, the Constitution requires the absence of a legitimate public interest in the disclosed facts.[102] While this case may suggest that the Court subordinates the privacy interest to the freedom of the press,[103] "outing" challenges the methodology that gives rise to this result and redefines a sphere of privacy that the press cannot appropriate.

4. *History of Privacy*

Privacy, unlike defamation, originated to protect a person's right to be let alone[104] and has repeatedly conflicted with the constitutional value of freedom of the press. Yet privacy's history, like its present status, is perhaps more questionable than that of defamation. The Bill of Rights does not expressly mention a general privacy interest.[105] In addition, the common law was not felicitous of

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100 As to what constitutes a "highly offensive" intrusion, some courts use the standard of a reasonable person with "ordinary sensibilities." Johnson v. Harcourt, Brace, Jovanovich, Inc., 118 Cal. Rptr. 370, 379 (Cal. Ct. App. 1974) (The question is whether "a reasonable person [would find] the article highly offensive"); Melvin v. Reid, 297 P. 91 (Cal. 1931) (concerning a prostitute's past and suggesting a "mores" test to determine the "offensiveness" of the intrusion). For a general list of how various jurisdictions differ as to the required components of the privacy tort, see PROSSER AND KEETON ON TORTS, *supra* note 20, at 856-62. For commentary that describes the tort as hopelessly vague, see Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966).

101 420 U.S. 469 (1975).

102 The First Amendment will allow for the dissemination of private information if it concerns "events of legitimate concern to the public and consequently fall[s] within the responsibility of the press to report." *Id.* at 492. This has been labeled the "newsworthiness" exception to an individual's privacy.

103 *See also* Florida Star v. B.J.F., 491 U.S. 524 (1989) (Court may have effectively prevented a plaintiff from recovering against the press for truthful speech); *infra* notes 229-35 and accompanying text. For a general commentary on this trend, see DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT 238 (1972); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1197-99 (1990).

104 PROSSER AND KEETON ON TORTS, *supra* note 20, at 864. Although defamation and privacy claims protect different concerns, a defamation claim becomes similar to a privacy claim when it involves the issue of "private or public interest." Even Brandeis and Warren used the language of defamation when they wrote that "privacy does not prohibit any publication of matter which is of public or general interest." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy* 4 HARV. L. REV. 193, 214 (1890). In general, plaintiffs have relied on an invasion of privacy claim when the information disseminated was true but private. "Outing" allows for such reliance as well.

105 Obviously the origins of a privacy interest is hotly debated. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 97-99 (1990) (the Bill of Rights does not mention a general right to privacy). *But see* TRIBE, *supra* note 65, at 1390 ("the fourth amendment more than any other explicit constitutional provision reflects the existence of [some right to privacy]"). The debate exists because there is no express mention of privacy in the Constitution. Even Tribe in arguing for the right, finds it "reflect[ed]" in the Fourth Amendment, though not stated explicitly. *Id.*

extending protection to individuals harmed by truthful but private disclosures of information.[106] Whatever its tacit presence, until 1890 no one had set forth a fully detailed privacy interest.

In an attempt to delineate the respective spheres of individual privacy interests and the constitutional values concerning freedom of the press, Louis Brandeis and Samuel Warren published *The Right to Privacy*.[107] Arguing for protection from the press, the authors put forth the right "to be let alone,"[108] and asserted that individuals should be able to prevent the press's invasion of their privacy.[109] Brandeis and Warren argued that an "unwarranted violation of the 'honor' "[110] of individuals occurs when those individuals fail to control personal information about themselves. While recognizing that the First Amendment principle of disseminating information deserved much deference, Brandeis and Warren maintained that a line could be drawn when the information concerned the "private life, habits, acts, and relations of an individual."[111] Although these protected categories are ambignous, Brandeis and Warren saw a need for individuals to protect that which they "owned" of the self. The line they drew was their attempt to demarcate ownership between the public and private realms.

In *Time, Inc. v. Hill*[112] the Supreme Court addressed this tension between the public and private realms. The Court recognized possible privacy tort liability for the publication of falsehoods, and thereby articulated the tension between the press's freedom and the individual's right to privacy.[113] This case, which produced great publicity, involved a family that had been held captive in their

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106 *See* Atkinson v. John E. Doherty & Co., 80 N.W. 285 (Mich. 1899); Robetson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902); ALAN F. WESTIN, PRIVACY AND FREEDOM 348 (1968) (mentioning the "gossip press, commercial advertising, and exposure of the doings of the socially prominent" both as tolerated practices and as the impetus behind the Warren and Brandeis article).

107 Warren & Brandeis, *supra* note 104.

108 *Id.* at 195.

109 "For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; [sic] and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer." *Id.* The authors, while obviously responding to the "yellow journalism" of the day, did not, however, specifically define the kinds of information that the law should protect. *See* Zimmerman, *supra* note 49, at 295.

110 Warren & Brandeis, *supra* note 104, at 198. This stems from Brandeis and Warren's view that privacy was merely "part of the more general right to the immunity of the person." *Id.* at 207.

111 *Id.* at 216. This has led some commentators to suggest that the standard depends upon the individual tastes and preferences of the plaintiff. *See* James H. Barron, *Warren and Brandeis, The Right to Privacy, Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 904 (1979); Zimmerman, *supra* note 49, at 295.

112 385 U.S. 374 (1967).

113 *Time*, 385 U.S. at 383 n.7.

home.[114] Shortly after the incident, the Hill family brought an invasion of privacy suit against Joseph Hayes, who wrote a play based on the crime, and against *Life Magazine*, which ran an article with pictures detailing the true incident.[115] The Court noted that "[r]evelations may be so intimate and . . . unwarranted in view of the victim's position as to outrage the community's notions of decency."[116] The Court found that the New York state privacy statute did not invade the constitutional protections of the press, and on remand the court of appeals sustained the jury verdict for the Hill family. Justice Brennan reasoned that the newsworthiness of a publication must be balanced against the sense of violation to the private individual.[117] The Court's methodological approach was based on the public/private dichotomy and therefore was closely akin to the method used in defamation suits.[118] This dichotomized view of private and public engenders the inevitable tension between the individual's right to privacy and the public's right to news.[119] The tension stems from the Court's need to place every situation into an "either/or" structure.[120] As this Note will later develop, such an approach may not be feasible when the topic involves sexual orientation.

5. *Privacy's Present Status*

Courts must always adjudicate the right to be "let alone" in light of the constitutional freedom of the press.[121] Accordingly, the present status of privacy reflects the difficulty of distinguishing be-

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114 *Id.* at 377.

115 The title of the article was "True Crime Inspires Tense Play." *Id.* at 377. The play only paralleled the actual crime. The question of falsity and truth, however, did not occupy a significant role in the Court's reasoning.

116 *Id.* at 383 n.7 (quoting Sidis v. F-R Publishing Corp., 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).

117 *Id.*

118 The Court stated that there was a "vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official." *Id* at 408. The Court differentiated privacy from defamation claims by stating that privacy damage is the "mental distress from having been exposed to public view." *Id.* at 384-85 n.9. However, the Court used the *Sullivan* standard that the defendant reported the information with a "knowledge of falsity or . . . reckless disregard of the truth." *Id.* at 387-88. Although privacy claims and defamation claims are not the same, the epistemological approach of the Court in these areas is the same; the Court views the legal issues as matters of binary logic (private/public).

119 *See* Comment, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, 67 COLUM. L. REV. 926 (1967).

120 This is best exemplified by the Court's discussion of whether the Hill family, because of the initial reports of the crime, had already become public figures and therefore were subject to less First Amendment protection. The status of the family was questionable, but the Court still felt a need to categorize them for the sake of the mechanical privacy "test."

121 *See supra* notes 104-11 and accompanying text.

tween private and public spheres. The Supreme Court first developed the scope of the constitutional right to privacy in the cases of *Griswold v. Connecticut*[122] and *Eisenstadt v. Baird*.[123] In *Griswold*, the Court declared a Connecticut statute, forbidding the use of contraceptives, unconstitutional and affirmed the right of married couples to a zone of privacy "protected from government intrusion."[124] *Griswold* only extended this privacy right to married couples, while in *Eisenstadt* the Court stressed that the right to privacy "is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[125] Although the Court in *Eisenstadt* continued to limit the scope of the privacy right, this case demonstrates the Court's strong inclination to carve out certain spheres of privacy. "Privacy" in these situations relates to an individual's control over personal identity or autonomy.[126]

With regard to certain legal issues, however, this inclination may be changing.[127] *Webster v. Reproductive Health Services*[128] addressed the constitutionality of a Missouri statute that prohibited abortions in public facilities and required a doctor to perform a viability test before allowing the abortion.[129] *Webster* showed that the present Court has a desire to enlarge state control of abortion. However, whether the Court will go so far as to allow states to completely ban abortion is impossible to predict. As state control increases, one's right to autonomy may be reduced. Thus, it will be difficult to determine what this newly defined sphere of privacy may include. The Court will not necessarily contract the whole range of privacy rights simply because these rights may have been limited in the context of abortion. The *Webster* decision only limits the range of personal autonomy announced in *Roe v. Wade*.[130] Nevertheless,

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122 381 U.S. 479 (1965).

123 405 U.S. 438 (1972). At issue in *Griswold* was a Connecticut law that forbade the use of, or the aiding in the use of, contraceptives. *Eisenstadt* dealt with the legislature's right to limit distribution of contraceptives to married people. Admittedly, neither of these cases involved the press, but each demonstrates the Court's recent methodological approach toward the balance between privacy and public concerns.

124 *Griswold*, 381 U.S. at 483.

125 *Eisenstadt*, 405 U.S. at 453.

126 *See* MACKINNON, *supra* note 30, at 93-102 (the fight for control over one's person is the female fight against male hegemony, and a woman's quest for privacy rights is emblematic of the quest for selfhood); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977).

127 Bowers v. Hardwick, 478 U.S. 186 (1986), has had an enormous effect on redefining notions of privacy. This Note discusses *Bowers* separately in relation to sexual orientation and privacy. *See infra* notes 176-81 and accompanying text.

128 492 U.S. 490 (1989).

129 *Id.* at 513.

130 410 U.S. 113 (1973). In *Webster*, the Court held that the viability test requirement was constitutional. *Webster*, 492 U.S. at 519-20 (viability determination is constitu-

the reasoning of the *Webster* decision as well as the recent shift in the Court's composition[131] may suggest that a redefinition of the right to privacy or autonomy is forthcoming.

How the Court will balance an individual's privacy right against the freedom of the press remains unclear. Although *Eisenstadt* and *Griswold* limited governmental intrusion into individuals' lives, they established the methodological approach that the Court presently takes toward other issues of privacy.[132] The Court has determined that governmental intrusion into some spheres of privacy that individuals control is difficult to justify.[133] In a fundamental way, the Court views any legal interest as either private or public. Although a newspaper's printing of personal information about an individual does not constitute governmental intrusion, the Court has stated that all privacy issues evoke the "same constitutional purpose—to maintain inviolate large areas of personal privacy."[134] The Court has found that privacy is a basic constitutional right which remains unaffected whether the defendants in the case are the press or governmental officials.[135] The Court's approach to privacy issues is to question, as it did in *Griswold*, where privacy ends and the public interest, be it governmental or the rights of the press, begins. For the Court, these are sharply dichotomized legal areas.

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tional, since it permissibly "furthers the State's interest in protecting potential human life"). A plurality further suggested that the trimester approach of *Roe* should be overturned because this test gave a greater role to the state in regulating abortions. *Id.* at 533-35.

131 In terms of judicial balance the Rehnquist Court bears little resemblance to the Burger Court of the *Roe v. Wade* years. For a general discussion of how the composition affects decisions, see ARCHIBALD COX, THE COURT AND THE CONSTITUTION (1987).

132 Although it never explicitly articulated its methodology, the *Griswold* Court specifically differentiated the zones of privacy "where privacy is protected from governmental intrusion." *Griswold*, 381 U.S. at 483. Thus, the Court must somehow determine the definition of the private sphere as distinct from the public. In *Webster*, the Court was not called upon to rethink its methodology, and it continued to employ notions of the public and private spheres. The case merely calls into question where the division between those spheres actually exists.

133 *Eisenstadt* supports the right of privacy over "the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. Similarly, *Griswold*'s holding may be seen as either narrowly defining privacy to include only the decision to procreate, or enlarging the "zone of privacy" and potentially opening several avenues of privacy interests.

134 Time, Inc. v. Hill, 385 U.S. 374, 414 (1967).

135 *Id.* at 414-15. The Court states that privacy is a right "emanating 'from the totality of the constitutional scheme' " and that this right applies to "inva[sion] by words—by the press." *Id.* at 415. One could also read the limitations on the press—that freedom of the press does not allow for unlimited access to peoples' lives—as an implicit constitutional guarantee by the Court that the privacy right protects against not only governmental invasion but also the press.

II
"OUTING" REQUIRES A RETHINKING OF THE LEGAL REQUIREMENTS OF DEFAMATION AND INVASION OF PRIVACY

A. "Outing" and Its Effects on the Law of Defamation

The topic of sexual orientation has created a unique presence in the law[136] which in many ways disrupts conventional notions of privacy and defamation. "Outing" will challenge the Supreme Court's standard methodological approach to defamation suits and concomitantly could force the Court to reassess its balancing of private and public concerns. Sexual orientation complicates the Court's need to separate truth from falsity in defamation suits.[137] Because this dichotomy is a factor in balancing the rights of the press against those of the individual, "outing" will further unsettle the Court's mechanical method[138] of balancing these interests. Sexual orientation also disrupts the public figure/private figure and public issue/private issue dichotomies. Defamation law, in the constitutional context, underscores the tension between the individual's protection of reputation and the public's right to know certain information.[139] "Outing" of public figures raises the constitutional issue of the public/private dichotomy and renews the debate over where public concerns end and private autonomy begins.

1. *"Outing's" Challenge to the Truth/Falsity Distinction*

One of the requirements the *Sullivan* Court set forth for a successful defamation suit was that the statement be knowingly false;[140] sexual orientation challenges this requirement. The Court begins its analysis of defamation by first determining the veracity of the speech based on which of two simple categories it falls into: truth or

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136 *See, e.g.*, CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 126-155 (1989); RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW (1988); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988); Lawrence A. Wilson & Raphael Shannon, *Homosexual Organizations and the Right of Association*, 30 HASTINGS L.J. 1029 (1979).

137 For discussion on the Court's use of this mechanical dichotomy, see *supra* notes 66-72 and accompanying text.

138 *See supra* text accompanying notes 66-120.

139 For more discussion of the Court's constitutional balancing of the public and private concerns, see *supra* notes 72-98 and accompanying text.

140 The Court also made recovery available to a plaintiff who was capable of showing the defendant's "reckless disregard of whether it was false or not" if actual knowledge of falsity was not provable. *Sullivan*, 376 U.S. at 279-80. The Court in Garrison v. Louisiana, 379 U.S. 64, 74 (1964), further demonstrated the dichotomy at work even under the recklessness standard when it defined reckless disregard as a "high degree of awareness of . . . probable falsity." Thus, underlying either of these requirements is a finding that the speech is demonstrably either true or false.

falsity. However, such a simple categorical approach is ill-suited to issues involving sexual orientation.[141] The first difficulty courts will face is how to determine whether an individual is "gay." This problem has perplexed sociologists and psychologists for years,[142] and it is doubtful that the courts can construct a definition that will comport with its rigid categories. A simple definition based on sexual activities is problematic because there is no definitive number of sexual acts that logically classifies someone as gay.[143] One homosexual act need not necessarily mean someone is gay. If a man sleeps with women five nights of the week and with men the other two, it is debatable whether or not he is gay. Alternatively, the definition of "gay" could depend upon the particular sexual acts in which one engages, but this definition is as problematic as the first. In addition, fitting the person who only dreams of committing a homosexual act into any category is always problematic. Although the definition of "gay" is uncertain, many courts have failed to take account of these difficulties.[144] In *Dew v. Halaby*,[145] for example, the court labelled a husband and father a "homosexual" because he had engaged in same-sex acts as an adolescent.[146] In *Bennett v. Clemens*,[147] the court described a woman as living "the gay life" merely because she associated with bisexuals, even though she never admitted to having had any lesbian interaction.[148] In *Kerma Restaurant*

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141 Since the Court expressed the constitutional limitations on press freedom in *Sullivan*, no cases have been brought against newspapers for discussing a person's sexuality that could test the Court's methodology. Cases concerning sexual crimes where the information was already made public by police records have raised suits against the press, but these have claimed invasion of privacy, not defamation. *See supra* note 32. Defamation suits would subject the plaintiff to the added exposure about an issue that carries social stigma. Consequently, cases such as these would logically tend to be settled out of court.

142 *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 473-74 (1953) and KINSEY et al., *supra* note 33, at 638-41 (extensive studies demonstrating that sexuality must be thought of as a continuum, and at the middle, where most people lie, are those who are erotically aroused by both heterosexual and homosexual experiences); D.J. WEST, HOMOSEXUALITY RE-EXAMINED 1 (1977) ("The attempt to categorize all humanity into two mutually exclusive and contrasting groups of homosexuals and heterosexuals . . . produces misleading over-simplifications.").

143 The difficulty in defining "gay" has been pursued extensively in a legal framework by Rhonda Rivera, although she does not discuss "outing" or methodological problems facing the courts. *See* Rivera, *supra* note 29, at 800-01.

144 For a fuller discussion of how courts have defined a person's sexuality and have ignored distinctions, see Rivera, *supra* note 29, at 801-02 (noting the ambiguities in defining "gay" and citing cases, though not discussed, which this Note also finds provocative. *See infra* notes 145-51 and accompanying text.).

145 317 F.2d 582 (D.C. Cir. 1963). The Court upheld the discharge of a CIA employee because the job involved secret security clearances and homosexual orientation according to the Court, constituted a security threat. *Id.* at 587.

146 *Id.* at 583.

147 196 S.E.2d 842 (Ga. 1973).

148 *Id.* at 843.

Corp. v. State Liquor Authority,[149] the court labelled one man a homosexual simply because he had the "stereotypical" features of a gay person. These cases demonstrate the misleading oversimplification inherent in categorizing people's sexuality. Determining whether that categorization is true may be even more problematic.[150]

Determining whether labels of sexuality are true or false invariably leads to the further problem of verifying such claims. Sexual orientation complicates this issue as well. As addressed in *Philadelphia Newspapers v. Hepps*,[151] verification is, in part, a burden of proof problem. In *Hepps*, the *Philadelphia Inquirer* published a series of articles alleging that Maurice Hepps, the principal stockholder of a corporation owning convenience stores, was using his link to organized crime to illegally influence the state government.[152] Contrary to the common law, the Court held that the plaintiff had the burden of proving that the statements were false.[153] Given this requirement, "outed" plaintiffs might very well have to testify that they are not homosexuals.[154] Plaintiffs could introduce testimony that they had engaged in heterosexual activities, but with a concept as nebulous as sexuality, determining whether plaintiffs are truly "gay" could be impossible or at best dubious. Proof of nonhomosexual activity alone might not satisfy the falsity requirement and might fail to support a plaintiff's defamation claim.[155] How the trier of fact decides

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149 278 N.Y.S.2d 951 (N.Y. App. Div. 1967), *rev'd*, 233 N.E.2d 833, (N.Y. 1967). A restaurant's liquor license was suspended because of possible disorderly conduct when a police officer found "patrons exhibiting characteristics and mannerisms which evidenced homosexual propensities." *Id.* at 952. The court upheld the revocation due to the evidence that the "male patrons address[ed] each other in endearing terms." *Id.* The decision was reversed because no disorderly conduct was proven; the discussion of homosexuality based on stereotypical features was not disputed. *Kerma*, 233 N.E.2d at 835.

150 For a general discussion of how the definition of "homosexual" has been the basis of legal problems, see Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131-39 (1979) (claiming that the legal difficulties of homosexuals, or any sexual minority, directly result from the dichotomized thinking that leads to the binary definitions of male and female and forces people to choose a category); Rivera, *supra* note 29, at 800-04.

151 475 U.S. 767 (1986). *See also supra* text accompanying notes 60-65 (discussion of burden of proof).

152 *Hepps*, 475 U.S. at 769.

153 *Id.* at 768-69 ("where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.) "[T]he common law's rule on falsity . . . must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity . . . .". *Id.* at 776.

154 The *Hepps* Court did not specify a quantum of proof. Instead, states are left to decide that standard. Some courts say that a preponderance of the evidence is required. *See* Gazette, Inc. v. Harris, 325 S.E.2d 713, 725 (Va. 1985). Other courts demand clear and convincing evidence. *See* Whitmore v. Kansas City Star Co., 499 S.W.2d 45, 49 (Mo. Ct. App. 1973).

155 *See supra* notes 142-50 and accompanying text for a discussion of the difficulty in assessing one's sexuality merely on the basis of sexual activities. The Kinseyan notion of

this issue ultimately depends on the court's definition of "gay." Furthermore, the basis for these evidentiary standards rests on a notion of "gay" that may be too elusive to reduce to a specific list of features.[156]

"Outing" intensifies the definitional questions of defamation because the press discusses sexual orientation and not sexual activities.[157] If the press were to report that "*X* was seen performing a homosexual act" instead of announcing that "*X* is a homosexual," proving the truth of the statement would not be difficult. The former statement, therefore, would not create any methodological difficulties for defamation. "Outing," however, concerns only the latter type of statement, because the implications of the two differ. The gay political agenda of "outing" is to promote positive public role models and to expose the prominence of gay people.[158] Because homosexual acts do not necessarily mean that a person is gay,[159] "outing" does not merely address stories of sexual activities.[160] Consequently, although some news stories will not defy the categorical approach of the Court, "outing" in its most prevalent form questions the Court's approach because it concerns an orientation, not an activity.

2. *Defamation or Mere Opinion?*

Newspapers often contain opinion pieces. Thus, one must ask whether "outing" should require the Court to rethink its truth/falsity methodology or whether an "outing" is merely opinion and therefore does not elicit the same legal approach. In *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, [161] the Court circumvented the debate between the First Amendment and individual rights. Although *Austin* involved a labor newsletter, the Court

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a sexual continuum suggests that evidence of sexual activities may have little relevance. *See supra* note 142.

156 Where the defendant clearly establishes the plaintiff's homosexuality, and the plaintiff is unable to prove falsity, the "outed" plaintiff has no defamation claim. Consequently, his or her suit must then be brought exclusively under invasion of privacy. *See supra* text accompanying notes 19-27.

157 For the difference between these, see *supra* notes 15-27 and accompanying text. For an example of how "outing" discusses sexual orientation, not sexual activity, see *supra* notes 31-33 and accompanying text.

158 *See* Charlotte Low Allen, *The World is 'Outing': The New Gay Militants*, WASH. TIMES, Sept. 13, 1990, at E1; Bernard Levin, *Come Out of that Closet, or We Go In and Fetch You*, THE TIMES, June 4, 1990.

159 *See supra* text accompanying note 143.

160 Because *Outweek*, *Outline*, and other gay newspapers are merely listing names of suspected homosexuals, and not detailing the person's sexual activities, there is no reason to focus on news stories detailing only activities when discussing "outing." *See supra* note 11.

161 418 U.S. 264 (1974).

reasoned that state libel laws were relevant and that the standards of *Sullivan* applied, by analogy, to the union newsletter.[162] The Court held that opinions deserve more protection than other forms of expression.[163] The Court based its decision on the finding that opinions cannot, by definition, be false.[164] Thus, one could argue that any accusation as to a person's sexual orientation is a mere opinion and therefore not actionable.

In *Milkovitch v. Lorain Journal Co.*,[165] however, the Court stated that opinions do not require a separate constitutional privilege. Because opinions may imply factual assertions, they are subject to the standards that the *Sullivan* line of cases set forth.[166] Opinions, if based on incomplete or incorrect facts, may imply a false assertion of fact. Using "I think" to introduce such an assertion does not relieve the statement of its factual implications. As the dissent, however, reminds us: "Although statements of opinion may imply an assertion of a false and defamatory fact, they do not invariably do so."[167] Consequently, the wording of the news piece will largely determine its ability to pass as an opinion. Since "outing" implies factual determinations, the necessary legal analysis must start within the context of the Court's methodology of defamation.

3. *"Outing" Disrupts Defamation's Public/Private Dichotomy*

Reputation and defamation law are based on a notion of the public figure, but sexual orientation disrupts the underlying epistemology of a private/public dichotomy. *Gertz* established the vague definition that one becomes a public figure either because of general notoriety or through participation in a particular controversy.[168]

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162 *Id.* at 272. The union newsletter referred to employees who refused to join the union as "scabs." *Id.* at 267.

163 *Id.* at 284. This decision also led the American Law Institute to change its view of opinions in defamatory actions. *See* TRIBE, *supra* note 65, at 865 n.22; W. Page Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1245-59 (1976).

164 *Austin*, 418 U.S. at 284 ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth") (quoting Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 63 (1966)).

165 110 S. Ct. 2695 (1990).

166 *Id.* at 2705. ("... expressions of 'opinion' may often imply an assertion of objective fact."). The Court was responding to the view that *Gertz* stood for a wholesale defamation exception. The Court in *Gertz* had stated that although "there is no such thing as a false idea . . . there is no constitutional value in false statements of fact." Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). Opinion is contrasted with fact, and opinions are protected, while statements concerning facts are actionable. This is the rule adopted by section 566 of the RESTATEMENT (SECOND) OF TORTS (1977), which states that opinions are not actionable unless they imply the allegation of undisclosed defamatory facts. *See generally*, Frederick F. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978).

167 *Milkovitch*, 110 S. Ct. at 2709.

168 The definition of "public figure" was parsed into concepts of a limited purpose

The *Gertz* Court noted that a public figure is someone capable of having a "special prominence in the resolution of public questions."[169] In addition, the Court strongly suggested that a statement is protected only if it concerns that which makes the plaintiff a public figure;[170] the Court stated that the general notoriety public figure would not be presumed a "public personality for all aspects of his life."[171] Sexual orientation is an element of a public person that has no inherently public quality.[172] Thus, to establish a defense in an "outing" suit, a defendant would have to show that the statement went to the plaintiff's public character.[173] However, if one uses the Court's test concerning public figures and public issues, sexual orientation as a mental or psychological state does not fit into either the public figure or public issue category and would not contribute to the public character of an individual.

Proponents of "outing" would argue that the very nature of "outing" concerns a person's public character. The "outed" person is a public figure, and gay activists intend to make that person a role model.[174] As a result, information about sexual orientation is constitutive of the person's publicness. Conversely, the "outed" plaintiff would argue that such a position is mere bootstrapping; sexual orientation may be made public but it is not a public attribute in and of itself. Although arguments exist on both sides, the debate illustrates the problems inherent in the rigid dichotomy of public/private spheres when sexual orientation is at issue. Consequently, "outing" requires the Court to rethink its definitions

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and general purpose public figure. *Gertz*, 418 U.S. at 351-52; *see* TRIBE, *supra* note 65, at 871-88.

169 *Gertz*, 418 U.S. at 351.

170 *Id.* at 352 (a court must look "to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation"). In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court decided that a prominent socialite was not a general purpose public figure even though she was generally famous and had easy access to the media. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985), the Court used the policy rationale of *Sullivan* to hold that for private plaintiffs the issue must involve a topic of general public concern. *Id.* at 755-56. The perpetuation of the *Sullivan* policy rationale only makes sense if the definition of a general purpose public figure in *Gertz* is limited to "all purposes" dealing with matters of public concern. This vagueness of the *Gertz* definition of public figure explains why the Court has failed to find a public figure in any of its cases since *Gertz*.

171 *Gertz*, 418 U.S. at 352.

172 For a discussion of how sexuality differs from sexual activities, and how "outing" focuses on sexuality, see *supra* text accompanying notes 28-33.

173 In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court's holding stems from the evaluation that gossip about the rich and famous is not a matter of legitimate public interest. *Id.* at 454-55. Consequently, it is hard to see how the topic of "outing" could generate any First Amendment protection even if the plaintiff is a general purpose public figure.

174 *See supra* note 10 and accompanying text.

of the public and the private, and whether that dichotomy remains useful.

B. "Outing" and the Rethinking of Privacy

1. *Sexual Orientation's Relationship to Privacy*

Sexuality not only calls for a rethinking of the notion of defamation,[175] but also demands a reassessment of privacy protection. The Supreme Court decided whether the right of privacy extended to homosexuality in *Bowers v. Hardwick*,[176] a case challenging the Georgia state statute criminalizing sodomy. Though recognizing the right to privacy, the majority held that homosexual activities did not fall within the purview of protected private, intimate relations.[177] The precedential scope of the holding has generated great debate,[178] and the opinion has thrown the right of privacy into doubt. Read narrowly, the opinion only states that the privacy right excludes the "right [of] homosexuals to engage in acts of consensual sodomy."[179] Given such a reading, the precedential force of the opinion, while seemingly of narrower scope, still bears on the issue of "outing," because the Court denied that the right to privacy protects homosexuality.[180] On the other hand, the dissent read the *Bowers* issue broadly as raising the general right to be let alone.[181] Either interpretation of *Bowers* demonstrates the Court's unwillingness to recognize a sphere of privacy for homosexuality. Further-

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175 *See supra* notes 136-74 and accompanying text.

176 478 U.S. 186 (1986). For a general discussion of *Bowers* and privacy rights, see Norman Vieira, Hardwick *and the Right of Privacy*, 55 U. CHI. L. REV. 1181 (1988).

177 The right of privacy encompasses rights related to "family, marriage, or procreation," not the right of "homosexuals to engage in acts of sodomy." *Bowers*, 478 U.S. at 191. In his dissent, however, Justice Blackmun stressed that the issue was not about sodomy but about the "right to be let alone." *Id.* at 199 (Blackmun, J., dissenting) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

178 *See, e.g.*, BORK, *supra* note 105, at 116-26 (no general right to privacy exists in the Constitution); TRIBE, *supra* note 65, at 1428 ("it becomes clear that a proscription on private acts of sodomy should not survive"); Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L. J. 215, 216 (1987) ("Deviating sharply from the Court's own precedents, *Bowers* necessarily works to undercut the theoretical underpinnings of the modern Court's substantive due process doctrine."); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 649, 656 (1987) (arguing that the case is merely "judicial self-indulgence" and represents the Court's "collective distaste of [homosexuality]"); Sunstein, *supra* note 136, at 1163 ("The disagreement over the meaning of *Hardwick* contains a larger lesson for the relationship between the Due Process and Equal Protection Clauses.").

179 *Bowers*, 478 U.S. at 192. *See* TRIBE, *supra* note 65, at 1422-29 (proposing this narrow reading).

180 For a discussion of the relationship between constitutional issues of privacy and the tort of invasion of privacy, see *supra* text accompanying notes 100-03; for a discussion of the distinction between limiting governmental action and private action, see *infra* note 199.

181 *See supra* note 177.

more, since the Court did not differentiate sexual orientation from homosexual activities, when faced with an "outed" plaintiff, the court might have difficulty defining the contours of the private self that the press allegedly invaded. Sexual orientation may unsettle the Court's basic methodological approach to invasion of privacy suits and force the Court to question the parameters of privacy.

Sipple v. Chronicle Publishing Co.[182] was the first case that forced a court to rethink and adjudicate invasion of privacy, sexual orientation, and freedom of the press. Oliver Sipple, an ex-Marine, grabbed the arm of Sara Jane Moore when she attempted to shoot President Ford.[183] After Sipple's act of heroism, the *San Francisco Chronicle* published the story, which exposed details of Sipple's life as a prominent member of the gay community in San Francisco.[184] Finding the story offensive to his private life, Sipple sued the paper for invasion of privacy, alleging that the defendant, without authorization, published private facts that led to family ostracism and social embarrassment.[185] The court held that in order to constitute an invasion of privacy, the information disclosed must be private and its public exposure must be offensive.[186] In Sipple's case, the court determined that his sexuality was public knowledge.[187] Additionally, the court stated that because the publication was truthful, the defendant only needed to show that the story was newsworthy to negate the invasion of privacy claim.[188] The court relied on *Cox Broadcasting Corp. v. Cohn*[189] for its balancing of the freedom of the press against the individual's privacy.[190] The paper argued that the article legitimated gay people and was "prompted by legitimate political considerations."[191] The court held that the story was newsworthy.

Sipple was the first "outing" case to go to trial,[192] and as such, it

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182 201 Cal. Rptr. 665 (Cal. Ct. App. 1984).

183 *Id.* at 666.

184 *Id.* ("A husky ex-marine who was a hero in the attempted assassination of President Ford emerged Wednesday as a prominent figure in the gay community.") (quoting L.A. TIMES, Sept. 25, 1975).

185 *Id.* at 667.

186 *Id.* ("[T]he facts disclosed must be private . . . [and] must be [facts] which would be offensive and objectionable to a reasonable person.").

187 "[A]ppellant's homosexual orientation and participation in gay community activities had been known by hundreds. . . ." *Id.* at 669.

188 "[A] truthful publication is protected if (1) it is newsworthy and (2) it does not reveal facts so offensive as to shock the community['s] notions of decency." *Id.*

189 420 U.S. 469 (1975). For discussion of this case, see *supra* notes 101-03 and accompanying text.

190 "When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." *Sipple*, 201 Cal. Rptr. at 668 (quoting RESTATEMENT (SECOND) OF TORTS § 652D).

191 *Id.* at 670. (The publication was "not motivated by a morbid and sensational prying . . . but rather [was] prompted by legitimate political considerations.").

192 This case differs from the type of "outing" discussed by the recent trend of news

illustrates the extent to which courts can consider the press's probing as newsworthy. Of course, Sipple was known in San Francisco as a proponent of Harvey Milk and as a man who had thrust himself and his sexuality into the limelight.[193] The court focused on Sipple's status as a public figure and, therefore, publication of even minimally newsworthy facts about him was considered within the scope of the press's protection.[194] The court, however, did not attempt to discuss the issue of sexuality in the context of privacy because the plaintiff's sexual orientation was already public and, therefore, privacy was not an issue.[195]

Although plaintiffs have brought no other cases of "outing," the numerous instances of gay newspapers "outing" famous people suggest a strong likelihood for future litigation and a need for courts to reassess invasion of privacy analysis. The *Sipple* court never addressed the question of whether a plaintiff, whose sexual orientation is not public knowledge, could bring a successful suit. Consequently, although the court discusses sexual orientation and privacy, the *Sipple* decision offers no answer to whether the sexual orientation of a public figure is generally a private fact. Future courts will have to systematically address the specialized issue of sexuality when confronting these cases of invasion of privacy. Sexual orientation also may prove particularly challenging to the preexisting categories that the Supreme Court has set forth to determine invasion of privacy suits.

2. *"Outing": The Court's Rethinking of the Privacy Sphere*

In the area of invasion of privacy, sexual orientation unsettles the Supreme Court's categorical jurisprudence of the mutually exclusive public and private spheres.[196] Privacy is the line that defines, as well as the mechanism that regulates, the relationship between the individual and society,[197] but the precise contours of the con-

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articles. *See supra* notes 10-14. The difference is that "outing" has been equated with the practice of gay papers discussing one's sexuality. This difference is important because it focuses on the reasons why the article is written, and in *Sipple*, the court's determination of invasion of privacy focuses on whether it is newsworthy or mere gossip. Of course, though a national newspaper, the San Francisco Chronicle does have a large gay readership, and therefore one could argue that this is an example of "outing."

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

194 "[T]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. . . ." *Id.*

195 The court never addressed the issue of defamation because Sipple never raised it. Outing cases may very well raise both concerns.

196 For a discussion of the Court's jurisprudential approach to privacy, see *supra* notes 104-35 and accompanying text.

197 *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423-25 (1980).

cept remain vague.[198] The First Amendment, however, is the major constitutional factor determining the scope of the privacy right in the context of the press.[199] This constitutional dimension has caused the Court to define the scope of privacy as a balance between the private attributes of an individual and whether those facts are of any public concern.[200] Although facts about a public figure might belong in the realm of public concern, a case of "outing" raises the issue of sexual orientation, which need not ever be realized in public activities, and seems to have little relation to public issues. The issue of "outing" disrupts the Court's sharp dichotomy of the public and private. The sexual orientation of a public figure,[201] like thoughts or beliefs, need not be part of public activity or of a person's public presence.[202] Newspaper stories about a person being seen in a gay bar are different from stories commenting on that person's sexuality.[203] Given the Court's balancing of public and private concerns, one could argue that if there were to be an area where the newsworthiness of the press ends, it should end with the mental

198 Brandeis and Warren defined the privacy tort as the legal power to control the dissemination of information about oneself. Warren & Brandeis, *supra* note 104, at 196.

For discussion that reveals the fundamental vagueness of privacy, see Raymond Wacks, *The Poverty of "Privacy"*, 96 LAW Q. REV. 73, 75 (1980) (any attempt to define privacy is an ultimately futile search); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962 (1964) (As opposed to Prosser's argument for a four-part division of the term privacy, Bloustein proposes a unitary theory of privacy that is connected to notions of the preservation of human dignity.).

199 Because invasion of privacy is a tort, there is some difficulty in equating the common law notion of privacy with the constitutional principle. Although both are based on the requirements of balancing private facts against the public concern for knowledge, the crucial distinction is that the common law tort operates to control private action, while the constitutional right is at least indirectly a limitation on governmental action. *See* Note, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1409-10 (1976).

200 *See* Cox Broadcasting, Corp. v. Cohn, 420 U.S. 469, 495 (1975); Time, Inc. v. Hill 385 U.S. 374, 388 (1967). Both cases represent the Court's desire to maintain the dichotomy first set forth by Brandeis and Warren that privacy involves the tension between concealing personal facts and the public's right to know. For further discussion of *Hill*, see *supra* notes 112-20 and accompanying text. For further discussion of *Cox*, see *supra* notes 101-03 and accompanying text.

201 "Outing" concerns only the sexual orientation of public figures. For a definition of public figures, see the discussion of *Gertz*, *supra* notes 90-95 and accompanying text. Because the gay papers that practice "outing" have political agendas of promoting role models, they have no need to prey on private citizens and their secret lives. Consequently, in the case of "outing" and privacy, the issue involves, in part, private facts about public figures that are of public concern, but the problem concerns the difficulty of placing the concept of sexual orientation somewhere in the dichotomy.

202 *Cf.* Sipple v. Chronicle Publishing Co., 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (court denied the invasion of privacy claim because the plaintiff's private fact, his sexuality, was already public due to his activities). *See supra* note 187 and accompanying text.

203 For further discussion of this difference and the reasons "outing" concerns only issues of sexuality, not sexual activity, see *supra* notes 28-33 and accompanying text.

processes of a person.[204] Further, the possibility for falsity is great when discussing something as nebulous as sexual orientation, and therefore dissemination of falsity diminishes the potential newsworthiness of the publication.[205] Privacy is necessary for democratic reasons because it exemplifies personal autonomy.[206] The notion of a representative democracy is fundamentally based on the idea of people forming preferences and judgments—the freedom of thought.[207] Allowing the press to enter the minds of its citizens erodes that freedom of thought. One commentator has said that the invasion of privacy intrudes upon the "intimacy and inner space necessary to individuality and human dignity."[208] When newspapers "out" someone by publishing that person's sexual orientation, they may violate the private and personal freedom of individuality.

Newspapers engaging in "outing" would argne that the issue is not about privacy but about secrecy, and, therefore, because it is secrecy they hope to dispel, the public/private dichotomy may not apply.[209] "Outers" would argne that secrecy inequitably applies to gay people and that society requires the secrecy of homosexuals.[210] In response, "outing" breaks through that secrecy and forces peo-

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204 The Court has held that activities taking place within one's mind are beyond government control. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49, 67 (1973) ("fantasies of a drug addict are his own and beyond the reach of government"); Stanley v. Georgia, 394 U.S. 557, 565-66 (1969) (the government cannot "control the moral content of a person's thoughts"). Though these cases also concern governmental intrusion into an individual's privacy, the underlying pbilosophy of these cases seems to be that a person has autonomy over his or her mind. "Outing" would demand that the press, as an agent of the public concern, also has no right of access to the mind. Because sexuality is a mental or psychological state, the topic of sexual orientation would seemingly be outside the scope of the press's freedom.

205 The policy behind the expansive freedom of the press lies in the idea of promoting the free exchange of ideas and criticisms of public officials that are necessary for a democracy. For a discussion of truth and freedom of the press, see *supra* note 64 and accompanying text. Thus, if the potential for falsity is great, then its publication has less public value according to the constitution because the ideas sought to be disseminated potentially have no inherent value.

206 In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court stated that certain privacy rights are included in the "penumbras" of rights emanating from "guarantees in the Bill of Rights," and those rights are the foundation of democracy. *Griswold*, 381 U.S. at 484.

207 New York Times Co. v. Sullivan, 376 U.S. 254, 273-77 (1964) (discussion of the necessity for free trade in ideas through speech and how this is the foundation of democracy).

208 Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41, 53 (1974).

209 *See* Siguorile, *supra* note 12, at 45.

210 *See* MOHR, *supra* note 136, at 98-100 (Mohr, although not an "outer," argues that the lack of gay characters in television and the fact that public kissing is socially allowed only among heterosexuals are two examples of how homosexuals are relegated to secrecy within our culture).

ple to confront their unsubstantiated fears of gay people.[211] Although this argument may be appealing on a social level, it fails to confront its legal inadequacies. The Court has never differentiated secrecy from privacy,[212] and Professor Richard Posner has argued that secrecy is one distinct interest that privacy encompasses.[213] Secrecy concerns the concealment of information, and it is this sense of privacy that Professor Posner argues underlies the federal Privacy Act[214] and most state statutes, because they limit the personal information to which the public has access.[215] Consequently, although a political or theoretical reason may exist for discussing secrecy, no legal basis for a distinction between privacy and secrecy exists.

3. *"Outing's" Ability to Invade Privacy*

This Note has assumed that if an "outing" were true, a court would still have to redefine the private and public dichotomy in order to support a claim of invasion of privacy. In four recent cases, however, the Supreme Court has left open the question of whether truthful speech can ever invade one's privacy.[216] Though the Court denied recovery in each case, it read the circumstances of the cases narrowly and, therefore, presented some possibility for future recovery for invasions due to truthful speech. In the first case, *Cox Broadcasting Corp. v. Cohn*,[217] a television report mentioned a rape victim's name on the air. The victim's name, however, had already been mentioned in publicly available trial records.[218] Although the victim was not a public figure, the Court held that the First Amendment protected the press in cases where public records supplied the

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211 *See Should the Closet be Forced Open*, CHI. TRIB., May 6, 1990, at 3 (public figures exposed as gay establishes the gay presence in society and presents it as normal and prevalent).

212 When the Court interpreted the record-keeping requirements of the Bank Secrecy Act of 1970, it saw privacy as the relevant issue, although the Act itself referred to secrecy. United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

213 RICHARD POSNER, THE ECONOMICS OF JUSTICE 299-309 (1981). Posner's analysis stems from reading federal and state statutes and the way they use the terms secrecy and privacy.

214 5 U.S.C. § 552(a) (1988).

215 POSNER, *supra* note 213, at 299-301.

216 *See* Florida Star v. B.J.F., 491 U.S. 524 (1989); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). For a discussion of these cases and the Court's present view of truthful speech and its potential ability to invade privacy, see Edelman, *supra* note 103, at 1197-1233 (stating that these four cases represent the Court's view of the potential for truthful speech invading privacy, although he never discussed these cases in terms of their importance for "outing" suits).

217 420 U.S. 469 (1975). For a general discussion of the case, see Zimmerman, *supra* note 49, at 303-06.

218 *Cox*, 420 U.S. at 472.

news story: "publishing the contents of public records [is] simply not within the reach of . . . privacy actions."[219] This narrow holding avoided the larger constitutional issue of whether truthful speech generally could invade privacy.[220]

Similarly, in *Smith v. Daily Mail Publishing*,[221] the Court affirmed the protected nature of truthful press publications. Here, a newspaper published the name of a juvenile murderer; the paper had obtained the suspect's name from the police.[222] The Court held that because the police had freely divulged the assailant's name at the scene of the crime, it was in the public domain, and that once "truthful information was . . . in the public domain[,] the court could not constitutionally restrain its dissemination."[223] The Court admitted that its holding in the case was narrow, as it again construed a case to apply only to a particular fact situation.[224]

In *Oklahoma Publishing Co. v. District Court*,[225] the Court again failed to write an opinion that broadly addressed the balance between truthful press information and the privacy of the individual. Petitioner's three newspapers in Oklahoma City published the name and photograph of a child charged with second-degree murder.[226] The newspapers acquired this information lawfully when attending the boy's detention hearings; the "name and picture of the juvenile . . . were 'publicly revealed in connection with the prosecution of the crime.' "[227] As in the other two cases, the Court skirted the larger constitutional issue with a restrictive holding: courts cannot prohibit the press from "truthfully publishing information [already] released to the public."[228] In keeping with *Cox* and *Daily Mail*, the Court merely established that once information becomes public knowledge, violation of a privacy interest is not possible because that privacy no longer exists.

The Court's most recent analysis of the ability of truthful publications to invade privacy came in *Florida Star v. B.J.F.*[229] Police in

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219 *Id.* at 494.

220 Edelman refers to this case, as well as *Smith*, as the Court's avoidance of a collision between the press and the individual, a collision that, according to Edelman, occurred in *Florida Star* (discussed *infra* notes 229-36 and accompanying text). Edelman, *supra* note 103, at 1197-1202.

221 443 U.S. 97 (1979).

222 *Id.* at 99.

223 *Id.* at 103. Edelman sees this decision as part of the Court's movement toward establishing its "lawfully obtained" doctrine. Edelman, *supra* note 103, at 1202.

224 *Smith*, 443 U.S. at 105.

225 430 U.S. 308 (1977).

226 *Id.* at 309.

227 *Id.* at 311.

228 *Id.* at 310 (quoting Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975)).

229 491 U.S. 524 (1989). For a thorough discussion of this case and the cases leading up to it, see Edelman, *supra* note 103.

Florida disclosed a rape victim's name in a departmental report that was later placed in the press room.[230] A Florida statute prohibited publication of the names of sexual assault victims in public documents.[231] Ignoring the law, the *Florida Star* published the name by copying the entire report.[232] The Supreme Court reversed a decision against the paper noting that the information was "lawfully obtained."[233] The Court, emphasizing its narrow holding, stated that it did "not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press."[234] Again, the Court failed to address the constitutional issue of when truthful speech may invade privacy and to establish any applicable legal standard.[235]

The status of the law after *Florida Star* may allow the Court to accommodate "outing" without trying to fit it into the Court's rigid categories of privacy. One commentator has argued that if the press legally obtains information, then no available sanction can be imposed against them.[236] This argument is flawed, however, because the commentator fails to read the *Florida Star* opinion as narrowly as the Court read the state privacy statute and fails to see this case in conjunction with the previous three cases. In all four cases, the information published fell, arguably, within the public domain. In *Cox* and *Florida Star*, the information was in a public record. In *Oklahoma* and *Daily Mail*, the press obtained the information from the police who acted as public officials disseminating public information. These cases, however, focus less on how the information was obtained than on the status of that information when obtained. Even if they support protection of "lawfully obtained" material, that does not mean, as some critics suggest, that the reign of the press is infinite.[237] In the area of sexuality, for example, the notion of lawfully obtained information is problematic if applicable at all. Given the internalized nature of the information,[238] if the press must obtain

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230 *Florida Star*, 491 U.S. at 527.

231 *Id.* at 564.

232 *Id.* at 527.

233 *Id.* at 541.

234 *Id.* Edelman discusses this passage as indicating a limitation on the Court's holding, but also notes that the Court provided "little legal guidance about the applicable legal standard" that results from this case. Edelman, *supra* note 103, at 1201.

235 *Florida Star*, 491 U.S. at 532 ("Our cases have carefully eschewed reaching this ultimate question [of whether truthful publication may ever be punished consistent with the First Amendment].").

236 *See* Edelman, *supra* note 103, at 1202-07.

237 *Id.* at 1198 ("the Court virtually extinguished privacy plaintiffs' chances of recovery"); Zimmerman, *supra* note 49, at 362.

238 For a discussion of what sexuality means, see *supra* notes 28-33 and accompanying text.

the information from the person, it is doubtful that the press could do so legally and yet still suffer a claim of invasion of privacy by that person.

The Court, by virtue of these narrow holdings, has left open the possibility of recovery in cases of "outing." If the element favoring the press is the already public nature of the information, then the balance of interests may tip in favor of an individual's privacy when the press has "outed" that individual.[239] When sexual orientation is at issue, generally no information previously existed in the public domain from which to generate the claim of homosexuality.[240] In light of the highly personal and internal nature of the topic, one can imagine a strong democratic interest in preserving these individual feelings and thoughts. Consequently, when the Court balances the public interest in knowing this highly speculative information against the value of protecting the privacy of an individual's mental and psychological processes, the public's need for such information seems slight.

III
POSSIBLE SOLUTIONS TO AND REPERCUSSIONS OF DEFAMATION OR INVASION OF PRIVACY SUITS BASED ON SEXUAL ORIENTATION

A. Solutions for a Successful "Outing" Claim

1. *A Successful Defamation Suit*

If the Court allows a claim based on sexual orientation to succeed, repercussions may result, both in terms of future cases and constitutional values. As this Note has set forth, the viability of a defamation suit based on "outing" turns on the inability of the Court's methodology to accommodate an element of sexuality that does not fit within the rigid categories of truth and falsity.[241] Instead of seeing defamation in these rigid terms that might prevent a claim based on sexual orientation, the Court must realize that certain issues do not fall squarely within either category. Consequently, the Court must develop the capacity to allow suits that

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239 The notion of balancing comes from these four cases in which the Court balanced the right to privacy against information already public and determined that the balance was in favor of the press because, in effect, there was no privacy interest to maintain. *See Florida Star*, 491 U.S. at 533; *Daily Mail*, 443 U.S. at 103; *Oklahoma*, 430 U.S. at 310; *Cox*, 420 U.S. at 496. For a discussion of balancing in *Florida Star*, see Edelman, *supra* note 103, at 1211-18.

240 This is not obvious. If sexuality does not equal sexual activities, one would have had to make his or her private mental state known publicly; given Mohr's notion of the secrecy of homosexuals, MOHR, *supra* note 136, at 98-100, it is doubtful that any information, other than speculation, could be in the public domain.

241 *See supra* notes 137-60 and accompanying text.

appear barred based on conventional epistemology. "Outing" calls on the Court to rethink the truth/falsity dichotomy.[242] Thus, the Court's standard of proof must change to accommodate the hybrid status of sexual orientation which defies easy categorization. Requiring a plaintiff to prove falsity is unrealistic when that issue may not apply, or at the very least lies beyond the scope of proof.[243]

One procedural mechanism to circumvent this problem of proof is to require the plaintiff to establish merely a prima facie showing of the falsity of the publication and then have the defendant rebut it. This method may still evoke the same difficulties in proving the veracity of an "outing" claim, although perhaps to a lesser degree. Alternatively, courts may wish to dispense with the truth/falsity standard altogether and instead return to the older common-law notion of reputation.[244] By only requiring a showing that the publication damaged the plaintiff's reputation, without questioning the publication's truthfulness, the plaintiff could succeed in a defamation suit, yet avoid the seemingly endemic proof problems.

Another method to avoid the problems of the Court's methodological approach to defamation is to characterize "outing" claims as publicity rights suits. Closely akin to the notion of a property right in reputation, publicity rights legally recognize the value of one's name, voice, or personality.[245] To recover for such a violation, plaintiffs need to establish a prima facie showing of the unauthorized use of their names or likenesses for commercial purposes and that this use violated the individual's right to privacy.[246] Plaintiffs could claim publicity rights since "outing" deals with the reputation of public figures and through the exercise of these publicity rights, plaintiffs could avoid defamation's methodological difficulties. The right of publicity avoids discussion of the defamation categories of truth/falsity and public/private, which have proven so problematic for issues of sexual orientation.

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242 *See supra* notes 140-51 and accompanying text.

243 *See supra* notes 151-56 and accompanying text.

244 *See supra* notes 34-44 and accompanying text.

245 For cases detailing the unauthorized use of one's name or picture, see Carson v. Here's Johnny Portable Toilets, 698 F.2d 831 (6th Cir. 1983); Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953).

246 *See* Hicks v. Casablanca Records, 464 F. Supp. 426 (S.D.N.Y. 1978) (where defendant does not use the name for commercial gain, there is no actionable claim of publicity rights); Fairfield v. American Photocopy, 291 P.2d 194 (Cal. Ct. App. 1955) (plaintiff is entitled to recovery based on invasion of one's right to be let alone); Palmer v. Schonhorn, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (right of privacy involves right to be free from unmandated appropriation or exploitation of one's personality). For a general discussion of the right of publicity, see Patti T. Cotten, Note, *Torts—The Right of Publicity—Protecting A Celebrity's Identity*, 52 TENN. L. REV. 123 (1984).

The Supreme Court only considered the conflict between the First Amendment and publicity rights once in *Zacchini v. Scripps-Howard Broadcasting*.[247] In *Zacchini* the plaintiff claimed that a news telecast of a "human cannonball" act violated the right to publicity when the telecast illegally videotaped the plaintiff's entire performance.[248] The Court stated that the right to publicity did not directly involve the First Amendment; when defendants use a newsworthy plaintiff's name or likeness for their own commercial gain, they may not elicit constitutional protections.[249] The Court, however, failed to specify the precise relationship between publicity rights and freedom of the press.[250] Consequently, publicity rights still present an open constitutional question.

In the case of "outing," given society's discrimination against homosexuals,[251] one could argue that an individual's success as a public figure suffers damage from a public revelation of homosexuality.[252] Heterosexuality is implicitly a part of the financially or socially lucrative public image.[253] When a newspaper discusses a public figure's hidden sexuality, it sells newspapers at the expense of that person's own marketability. In addition, one could characterize "outing" as an unauthorized portrayal of the person. The newspaper's appropriation of the person's public image, therefore, seems to violate the right to publicity.

2. *A Successful Invasion of Privacy Suit*

Successful privacy suits based on "outings" similarly require

247 433 U.S. 562 (1977). For discussion of this case, see Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity, and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1590-91 (1979).

248 *Zacchini*, 433 U.S. at 563-64.

249 *Id.* at 578. The Court did state that in this case the telecast was not immunized by the First Amendment because the "broadcast [was of] a performer's entire act without his consent." *Id.* at 575. Although not a clear standard, the holding does suggest that there is a constitutional limitation on the extent of publicity rights.

250 *Id.* at 575.

251 *See* 8 U.S.C. § 1182(a)(4) (1988) (immigration may deny entry into the United States based on "sexual deviation"); Gay Rights Coalition of Georgetown Univ. Law Center v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (school authorities denied a gay student organization official recognition); EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW (1990).

252 *See "Closet" Politicians Targeted*, CHI. TRIB., Mar. 29, 1990 at 11 (the debate focuses on gay militants threatening to "out" politicians who vote against gay causes). The essence of this article, and of the gays' threat, underscores the knowledge that public exposure can ruin a public career.

253 This claim is supported, in part, by studies showing the amount of employment discrimination against gays and lesbians which in turn implies that one is made generally more marketable by presenting an image or facade of heterosexuality. *See* MOHR, *supra* note 136, at 22-39 (lower social status of gays and lesbians due to society's bigotries); Rivera, *supra* note 29, at 805-29 (employment discrimination against gays and lesbians).

the Court to rethink its private/public epistemology and its inability to fit sexuality into the dichotomy. For invasion of privacy claims, the Court should recognize that although certain issues appear public, when characterized differently—*i.e.*, as sexual orientation instead of sexual activity—a supposedly public event may actually be a private aspect of the individual. Consequently, even in the case of a public figure, some aspects of an individual's life defy any connection to that individual's public character.[254]

Policy concerns also may provide a basis for a successful invasion of privacy claim. In reading the *Florida Star* line of cases narrowly, one notices that the Court has not constitutionally restricted the possibility of an invasion of privacy suit when the information is truthful. If the decisions protecting truthful speech are read as applying only to information already in the public domain, one must determine the status of the law by looking to policy. In cases where the information is already public,[255] the policies of privacy do not apply. The need for control over the self and protection of autonomy[256] does not exist when the information is already public. Consequently, any balancing against the First Amendment results in the protection of the press.

B. Repercussions

Although fitting sexual orientation into the legal framework for defamation and invasion of privacy suits calls for the Court to expand its methodological approach, these changes would not seriously undermine the core First Amendment principles. From the constitutional perspective, the free exchange of information should not be inhibited.[257] Admittedly, successful "outing" cases would limit the press's access to certain private information. The real concern, however, is not that the press will have limitations, but whether these limitations will have damaging effects on constitutional values. One might argue that allowing people to bring charges for the publication of their sexual orientation may have a certain "chilling" effect on the press.[258] This, however, seems doubtful. In cases of "outing" and defamation suits, the press would already be aware of the possible falsity of the claim simply because the press can never obtain definite proof in this area. In invasion of privacy suits the question is more difficult. One might

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254 *See supra* notes 168-74 and accompanying text.

255 For a discussion of the Court's failure to determine what degree of "publicness" constitutes "public" information, see *supra* note 170.

256 *See supra* notes 110-11 and accompanying text.

257 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964).

258 *See* Schaffner, *supra* note 55, at 443.

argue that because no bright line rule results from such an extension of the privacy right, it's vagueness may "chill" the press. This retort also lacks merit because of sexuality's position on the spectrum of privacy concerns. If one envisions such a spectrum, and if sexual orientation is conceived, as this Note argues, as an internal mental disposition, then sexual orientation constitutes the most private interest of an individual. Nothing about sexual orientation ever need become public. Consequently, if the Court, as it suggested in *Florida Star*,[259] does imagine a realm of privacy protected from even truthful speech, sexual orientation must lie within that realm.

The other concern focuses on the precedential value of a defamation or invasion of privacy decision that protects the "outed" individual. Although prophecy is inherently problematic, if the Court were to decide a case as this Note has suggested, two bright lines emerge. First, assuming that the news story was in fact true, a successful "outing" action would establish a claim for invasion of privacy by truthful publications. This claim would force the Court to directly confront a truthful publication's power to invade privacy.[260] However, the Court need not paint this bright line so broadly as to allow an action against all truthful publications. Only truthful publications that seek access to the inner workings of a person's mind or internal thought processes would become actionable on account of such a ruling. This standard would merely establish a theoretically undisputable demarcation of the privacy line. In the case of defamation, the Court's line between recklessly false and truthful publications would still stand. "Outing" merely calls for an exception in cases that defy this distinction. Like privacy issues, defamation suits would succeed when the press publishes internal analyses of people.[261] This argument does not foreclose all discussion of sexuality since the press could still discuss sexual orientation once a person reveals it. As a result, the Court would not establish a new basis for defamation but would instead simply recognize exceptions that cannot fit within the preexisting decisions.

Given that any such decisions would not radically affect the constitutional climate, the state's interest in preserving the rights of the

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259 "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press. . . . " *Florida Star*, 491 U.S. 524, 541 (1989).

260 *See supra* notes 216-35 and accompanying text.

261 One might argue that this analysis would extend to political figures and their "political orientation." The argument would further state that if this realm of knowledge were off limits to the press, then a major value of the press—its ability to criticize political or governmental figures—would be nullified. This contention, however, is without merit. The politics of governmental figures is important in so far as they are acted upon. Consequently, this "political orientation" would only be of concern to the press if it were actualized. Sexual orientation, however, need not have any such public element.

press appears insignificant when balanced against the individual concerns of personal autonomy and control over the self—two values inherent in constitutional issues.[262] Balancing this equation is more difficult, however, when one factors in the politics for "outing" advanced by the gay community. This gay perspective holds that the state's interest in protecting the press is based on the free—perhaps vital—exchange of information. Individuals within the gay community have argued that such exposure is necessary to promote public awareness, provide young individuals with positive role models, instill feelings of self-worth in other gay people, and thereby end homophobia and its resultant hate crimes.[263]

One might respond that such arguments are political, not legal. Of course, this ignores everything that the Realists and the Critical Legal Studies scholars have argued regarding the highly politicized nature of the law and of the Court in particular.[264] A siguificant problem with this political argument stems from its lack of a foreseeable limit. Any group could legitimately argue that limits on the press rnn counter to its concerns. If this became the case, the only potential limit to the press's freedom would concern private individuals engaging in private acts. If we have a commitment to privacy, then we must maintain it. "Outing" does not force us to change the bounds of the privacy right, it merely questions what that right includes. Supporting the political argument would result in reformulating the boundaries of the category itself every time a new political issue arose. Thus, if the law is to have any precedential value, the claims of those who support "outing"must give way to the sounder legal position of allowing defamation and invasion of privacy suits.

CONCLUSION

This Note has analyzed the difficulties that courts and attorneys will face when presented with "outing" claims of defamation and invasion of privacy. The Supreme Court's present methodological approach to defamation and privacy suits cannot accommodate issues of sexual orientation. This Note proposes that the Court dispense with its categorical analysis and instead, for defamation, return to the common-law malice standard based on reputation, and for invasion of privacy, recognize an internal, mental sphere of the individual where the press does not have constitutional protection.

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262 *See supra* notes 104-11 and accompanying text.

263 For a discussion of these political views, see *supra* notes 9-11 and accompanying text.

264 *See e.g.*, RICHARD ABEL, THE POLITICS OF INFORMAL JUSTICE (1982); ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); Karl Llewellyn, *Law and the Modern Mind*, 31 COLUM. L. REV. 90 (1931); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984).

In both cases, this Note urges a limitation on the freedom of the press, but also argues that any such curtailment of the press's freedom does not undermine the First Amendment. This Note merely asks for a rethinking of the balance between the rights of the press and the rights of those individuals subjected to that press.

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