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When Is a conflict Really a Conflict? Outing and the Law

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

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

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

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¹ Larry Gross, Contested Closets: The Politics and Ethics of Outing 1 (1993); see Michelangelo Signorile, Queer in America 70–77 (1993).
⁴ See infra notes 202–09 and accompanying text; see generally Gross, supra note 1; Signorile, supra note 1. The most recent outing involves publisher Jann Wenner. See Richard Goldstein, "Wink Wink, Nudge Nudge," Village Voice, Mar. 14, 1995, at 8.
⁵ Arguably, this Note engages in outing. The names appearing in the text are limited to a few representative examples, all of which were widely publicized. Some direct quotes within the footnotes include less-publicized names. In all cases, however, the names contained in this Note have appeared in a number of sources. Accordingly, the use of these names represents only a limited further invasion of privacy.
⁶ See Gross, supra note 1, at 2. Some commentators argue that, if nothing is wrong with being gay, then nothing should be wrong with the world knowing it. See infra notes 175–76 and accompanying text. Civil rights attorney and Harvard Law Professor Alan Dershowitz has answered this by saying, in regard to bringing a defamation claim for outing, "No court is going to say that calling someone gay is legally defamatory, because to say that is to buy into the notion that being gay is somehow bad. On the other hand, you and I know that being exposed as gay can be harmful to a person." Pat H. Broeske & John M. Wilson, Outing Targets Hollywood, L.A. Times, July 22, 1990, at 6.
⁷ See Gross, supra note 1, at 20. The issues within this Note apply equally to gays, lesbians and bisexuals. For simplicity, the Note will use the term "gay." Many academics and activists have started to use the term "queer," which distinguishes itself from the normal, as opposed to the heterosexual. Michael Warner, Introduction to Fear of a Queer Planet: Queer Politics and Social Theory, vii, xxi (Michael Warner ed., 1993). "Queer" points to normalization, rather
ponents reason, will make homosexuality visible. Visibility, they contend, represents an important and necessary step on the path toward equality. Opponents of outing claim that the practice invades the ousted person's individual freedom.

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

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

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


12 Id.


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

15 See infra notes 254-64 and accompanying text.

16 See infra notes 265-67 and accompanying text.
Part I of this Note provides a brief overview of First Amendment theory, and then traces the relevant United States Supreme Court First Amendment cases. Part II provides an overview of the right to privacy, and then examines two representative privacy cases. Part III tells the story of outing, explains the political importance of coming out, explores arguments for and against the practice, and examines a case that approximates an outing. Finally, this Note concludes that outing, because it illustrates the convergence of privacy and political speech, shows the need to reexamine the invasion of privacy tort in relation to the First Amendment.

I. THE FIRST AMENDMENT

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

A. The Theory

Current First Amendment jurisprudence is a relatively new phenomenon. Modern First Amendment theory in the United States Supreme Court began in 1919 with a series of well-known opinions by two notable Justices of that Court: Oliver Wendell Holmes and Louis D. Brandeis. From these opinions, as well as from subsequent commentators, three general justifications for First Amendment protections have evolved: the marketplace of ideas, self-fulfillment and self-government.
Justice Holmes explained the marketplace of ideas in his dissent in *Abrams v. United States*. According to this justification, the best way to find and test ideas is through "the competition of the market." Truth is most likely to be found when all opinions are expressed openly and the public may compare and contrast opposing opinions. Freedom of expression, therefore, derives value from its role in discovering truth. Since *Abrams*, the marketplace of ideas paradigm has had a continuous influence on First Amendment jurisprudence.

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

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

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

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

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


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

29 Solum, *supra* note 27, at 69.


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

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

the First Amendment might be not only of minimal value, but also, in some cases, detrimental.\textsuperscript{55} In the context of pornography, Professor Catharine MacKinnon argues that the First Amendment is used to guarantee the continued speech of the dominant group (men) at the expense of the dominated (women), who are silenced.\textsuperscript{56} Similarly, in the context of racism, commentators have argued that hate speech silences minorities, thereby distorting the marketplace of ideas.\textsuperscript{57}

The second and third justifications, self-fulfillment and self-government, derive from Justice Brandeis's concurring opinion in \textit{Whitney v. California}.\textsuperscript{58} Self-fulfillment, as a justification for the First Amendment, rests on the belief that a proper goal for human life is the full realization of human character and potential.\textsuperscript{59} Because achievement of this goal requires the mind to be free, restriction on expression should be prevented.\textsuperscript{60} Self-fulfillment requires "the freedom to communicate."\textsuperscript{61} Although to a lesser extent than the marketplace theory, self-fulfillment also relies on counter-speech, rather than state regulation, to best answer offensive or harmful speech.\textsuperscript{62}

\textsuperscript{55} See Kairys, \textit{supra} note 24, at 264–66 (freedom of speech validates and legitimizes existing social and power relations and masks lack of real participation and democracy).

\textsuperscript{56} MacKinnon, \textit{supra} note 34, at 156.

\textsuperscript{57} See Charles R. Lawrence III, \textit{If He Hollers Let Him Go: Regulating Racist Speech on Campus, in Words That Wound} 53, 78 (1993). Obvious differences exist between outing and racist speech. Racist speech is used by the majority, according to Lawrence, to subhumanize the minority. \textit{Id.} at 68. When gays out gays in order to create role models, it is more difficult to argue that the outed are subhumanized.

\textsuperscript{58} 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see Lahav, \textit{supra} note 25, at 459. Brandeis wrote:

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

\textit{Whitney}, 274 U.S. at 375 (Brandeis, J., concurring).

\textsuperscript{59} Thomas I. Emerson, \textit{The System of Freedom of Expression} 6 (1970). As Justice Thurgood Marshall wrote:

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


\textsuperscript{60} Emerson, \textit{supra} note 39, at 6. "[S]uppression of belief, opinion, or other expression is an affront to the dignity of man." \textit{Id.}

\textsuperscript{61} Solum, \textit{supra} note 27, at 80.

\textsuperscript{62} Emerson, \textit{supra} note 39, at 8. As Emerson wrote:

The theory asserts that freedom of expression, while not the sole or sufficient end of society, is a good in itself, or at least an essential element in a good society. The society may seek to achieve other or more inclusive ends—such as virtue, justice,
The third justification, self-government, is most closely associated with the work of Alexander Meiklejohn. For Meiklejohn, the First Amendment is not a device for finding the truth. Rather, the First Amendment assures that every member of the body politic has access to the information necessary for a full understanding of, and participation in, self-government. Thus, for Meiklejohn, no idea, opinion, belief or any other type of information may be withheld from any citizen, and no citizen may be restrained from participating fully in self-government.

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

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

Id.

43 Solum, supra note 27, at 72; see MEIKLEJOHN, supra note 32, at 24. Meiklejohn's model of freedom is the "traditional American town meeting." MEIKLEJOHN, supra note 32, at 24. In the town meeting the people of a community assemble to discuss and to act upon the matters of public interest . . . Every man is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. The basic principle is that the freedom of speech shall be unbridged. And yet the meeting cannot even be opened unless, by common consent, speech is abridged. A chairman or moderator . . . "calls the meeting to order." . . . His business on its negative side is to abridge speech . . . The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged . . . It is a group of free and equal men, cooperating in a common enterprise, and using for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.

Id. at 24-25.

44 MEIKLEJOHN, supra note 32, at 75.

45 Id.

46 Id.

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

48 CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 40-41 (1993). Rather than embracing the battle of the marketplace, Sunstein invokes the liberalism of Kant, Mill and Rawls, and the commitment to "government by discussion." Id. at 248-49.
guarantee that people from every different perspective and position found in the United States have equal access to the political process. This conception echoes Brandeis's opinion in Whitney, with its ideal of democratic deliberation, founded on a norm of political equality. The First Amendment, according to these justifications, ought to ensure every citizen's ability to participate in the country's political discussion. In sum, the latter two justifications would require a new model of free speech, which, rather than protecting social dominance, would recognize specific experiences, notice who is being hurt and provide equal opportunity to speak.

B. The Cases

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

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

49 Id. at 241-42.
50 Id. at 244-45.
51 Id. at 241.
53 See supra notes 24-52 and accompanying text.
55 Id. at 283.
56 Id. at 256-57.
57 Id. at 271-72.
58 Id. at 285-86, 292.
59 Sullivan, 376 U.S. at 256-58.
60 Id. at 258, 261.
61 Id. at 262.
The Supreme Court reversed, holding that a public official, in order to bring a successful action, must prove that a defamatory statement was made with "actual malice."62 The First Amendment, according to the Court, assured freedom of discussion and a government that was responsive to the political and social goals of the people.63 The Court characterized the right to speak one's mind as "a prized American privilege," unaffected by the content of that speech.64 The Court observed that allowing too many defamation suits would detract from the marketplace of ideas upon which democracy rests.65 Moreover, the Court reasoned that an "erroneous statement is inevitable" and protecting the press is instrumental in providing the "breathing space" necessary for free debate.66 The Court concluded that, absent actual malice, the First Amendment limited a state's ability to award libel damages in actions brought by public officials.67

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

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

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62 *Id.* at 283. A finding of actual malice required that the publisher had knowledge that the statement was false, or else acted with reckless disregard for whether it was true or false. *Id.* at 279–80.
63 *Id.* at 269.
64 *Sullivan*, 376 U.S. at 269.
65 *See id.* at 270. Justice Brennan wrote, "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.*
66 *Id.* at 271–72.
67 *Id.* at 283.
70 *Id.* at 377–78.
71 *Id.* at 389.
72 *Id.* at 387–88.
73 *Id.* at 377.
periences of the Hill family, who had involuntarily become a subject of public interest. The Hills sued under a New York privacy statute. The Court held that the First Amendment precluded liability for printing matters of public interest absent proof of actual malice. The Court ruled that the risk of public exposure is a necessary evil in a society that highly values freedom of speech and press. Freedom of the press, the Court reasoned, assures the continued well-being of the political system. Although the Court recognized the possibility of revelations that might be so private as to warrant protection, the decision protected the press.

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

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

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74 *Hill*, 385 U.S. at 377-78.
75 Id. at 378. New York Civil Rights Law § 50 provided that any use for advertising or trade purposes, of the name, portrait or picture of any living person, without permission, is a misdemeanor. Id. at 376 n.1. New York Civil Rights Law § 51 allowed the victim to bring a civil suit. Id.
76 *Hill*, 385 U.S. at 387-88.
77 Id. at 388.
78 Id. at 389.
79 See id. at 383 n.7. Speaking of a New York Court of Appeals decision interpreting the New York statute, the Court said:

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

80 Id. (quoting *Sidis v. F-R Pub. Corp.*, 113 F.2d 806, 809 (2d Cir.), *cert. denied*, 311 U.S. 711 (1940)).
81 *Hill*, 385 U.S. at 412 (Fortas, J., dissenting). Justice Fortas wrote:

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

82 Id. at 412-15.
83 Id. at 415-16.
84 420 U.S. 469, 496 (1975).
85 Id. at 471-74.
was sufficiently private to be entitled to protection.\textsuperscript{85} The Court concluded that private information, if it is to be protected, must not become part of the public record.\textsuperscript{86}

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

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

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

\begin{footnotesize}
\begin{enumerate}
\item Id. at 492-94.
\item Id. at 496.
\item Id. at 471.
\item Cox, 420 U.S. at 471.
\item Id. at 472.
\item Id. at 473.
\item Id. at 474.
\item Id. at 475.
\item Cox, 420 U.S. at 496.
\item See id. at 489, 491.
\item See id. at 491.
\item See id. at 491-92.
\item Id. at 496.
\item See 491 U.S. 524, 530, 541 (1989).
\end{enumerate}
\end{footnotesize}
a rape victim.\textsuperscript{99} After B.J.F. reported the rape, the local police office prepared a report that identified her.\textsuperscript{100} Florida law prohibited the identification of rape victims in the public record.\textsuperscript{101} A reporter trainee copied the report, including B.J.F.'s name.\textsuperscript{102} Later, the newspaper included B.J.F.'s name in its weekly compilation of crimes.\textsuperscript{103} B.J.F. and her family were subsequently threatened and forced to change their phone number and residence, after which B.J.F. sued the newspaper.\textsuperscript{104} Although the Florida Circuit Court and the Florida District Court of Appeal found for the plaintiff, the United States Supreme Court reversed.\textsuperscript{105}

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

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

\textsuperscript{99}Id. at 527.
\textsuperscript{100}Id.
\textsuperscript{101}Id. at 526.
\textsuperscript{102}Id. at 527.
\textsuperscript{103}Florida Star, 491 U.S. at 527.
\textsuperscript{104}Id. at 528.
\textsuperscript{105}Id. at 529. The Supreme Court of Florida denied discretionary review. Id.
\textsuperscript{106}Id. at 530.
\textsuperscript{107}Id. at 537, 541.
\textsuperscript{108}See Florida Star, 491 U.S. at 535. "[W]here the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release." Id.
\textsuperscript{109}Id. at 541.
\textsuperscript{110}See id. at 543–46 (White, J., dissenting). Justice White distinguished Florida Star from Cox because in Florida Star the name was not in the public record. Florida Star, 491 U.S. at 543 (White, J., dissenting). Justice White further argued that the majority's reliance on Smith v. Daily Mail Publishing Co. was misplaced. Florida Star, 491 U.S. at 544–45 (White, J., dissenting) (citing Daily Mail, 443 U.S. 97, 104 (1979) (publication of lawfully obtained, truthful information may not be punished absent state interest of highest order)). Daily Mail, according to Justice White, involved the rights of someone accused of a crime, not of someone who was the victim of a crime. Florida Star, 491 U.S. at 545 (White, J., dissenting). Further, Justice White argued, Daily Mail was a narrow
White, Florida’s statute was sufficiently narrowly tailored to withstand First Amendment scrutiny. Justice White expressed his willingness to balance the needs of a free press against other important interests, and condemned the Court for placing too little weight on the side of B.J.F. The result, according to Justice White, was one further step toward the inevitable obliteration of the tort of publication of private facts.

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

II. THE RIGHT TO PRIVACY

A. The Theory

In contrast to the right to free speech, the right to privacy has a less certain origin and a more elusive definition. In 1890, in their seminal article The Right to Privacy, Samuel D. Warren and Louis D.
Brandeis explained what the right to privacy ought to protect. Warren and Brandeis hypothesized the existence of a right to be let alone, which ought to protect citizens from seeing their lives subjected to public scrutiny through unwanted attention from the media. Although privacy has no clear definition, it is understood to protect a zone of individual will from intrusion by the collective society. The broadest definitions of privacy include allowing control of how information about an individual is communicated to others. Commentators aiming at narrower definitions contend that the right to privacy protects autonomy, identity and intimacy, or secrecy, anonymity and solitude.

Under any formulation, privacy's aim is to separate individuals from society. The justifications for this protection are the same as two of the justifications for the First Amendment: privacy allows...
viduals to become fully realized and allows society to govern itself democratically. Without privacy, people would be less likely to produce creative and insightful ideas. Instead, everyone’s ideas would tend to be identical, stifling individual self-fulfillment, as well as development of political ideas. Privacy also ought to protect sufficient personal information to insure each individual autonomy in important life choices.

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


129 Smolla, supra note 26, at 120.

130 See Bloustein, supra note 128, at 1003.

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


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

134 id.

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

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

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

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

B. Privacy Cases

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

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

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134 Fetcher & Rubin, supra note 13, at 1579, 1592.
135 See id. at 1585.
138 Id. at 336.
139 Zimmerman, supra note 132, at 293.
140 Id. at 362.
141 See 113 F.2d 806, 809 (2d Cir.), cert. denied, 311 U.S. 711 (1940).
142 Id. at 807.
143 Id. at 809.
144 See id. at 809-10.
145 Id. at 807.
146 *Sidis*, 113 F.2d at 807.
147 Id.
Thereafter, he chose to live his life away from public scrutiny, working as an "insignificant" clerk.\(^{148}\) In 1937, *The New Yorker* printed a biographical sketch of Sidis, which he had not approved, and which traced Sidis' life since he had receded from public view.\(^{149}\) Sidis did not contend that the story was untrue or unfriendly.\(^{150}\) Rather, he objected to the publication of private details of his personal life.\(^{151}\) He sued, including among his claims violation of his right to privacy.\(^{152}\)

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

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

In contrast, in 1969, in *Commonwealth v. Wiseman*, the Supreme Judicial Court of Massachusetts held that protecting privacy was a reasonable interference with publication of matters of public concern.\(^{161}\) A documentary filmmaker filmed inmates in embarrassing situations, and intended to show the film to the public.\(^{162}\) The court reasoned that the film was an unnecessary invasion of the inmates'
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privacy. 163 The Supreme Judicial Court allowed a limited injunction to protect the privacy of inmates at the correctional institution. 164

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

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

163 Id. at 615.
164 See id. at 618.
165 Id. at 612. Wiseman had originally been denied permission. Id. When permission was granted, it was subject to the receipt of a letter from the Attorney General, as well as various conditions to protect the rights and privacy of the institution and the inmates. Id.
166 See Wiseman, 249 N.E.2d at 613. This is according to Wiseman’s statement to the Commissioner and Superintendent before he received permission to film. Id.
167 Id.
168 Id. The Attorney General also maintained that the releases that Wiseman had obtained from the mental patients, pursuant to the grant of permission to film, were not valid. Id.
169 Id.
170 Id. at 614.
171 Wiseman, 249 N.E.2d at 615.
172 Id.
173 Id. at 616.
174 Id. at 617.
175 Id. The court upheld the injunction against showing the film to the general public, but
publication of matters of public concern, the court concluded that preventing publication did not represent an unreasonable interference with speech.\textsuperscript{176}

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

III. Outing

A. The Politics of Outing

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

Within the gay community, though, tension has always existed between the right to free choice and the fact that most gay people do not come out.\textsuperscript{182} The gay liberation movement is founded on the idea that "coming out" is a powerful political act.\textsuperscript{183} Gays in the closet remain hidden from society and confirm for heterosexuals how to treat
homosexuals: by hiding the people they love, the argument goes, gay people convey the message that they are ashamed of their own identities.\(^{184}\) On the other hand, by living their lives openly, gay people force heterosexual society to recognize the pervasiveness of homosexuality.\(^{185}\) Some argue that only by living openly, and not hiding, will gay people ever gain freedom and civil rights.\(^{186}\) Thus, a gay liberation slogan proclaims, "out of the closets and into the streets."\(^{187}\) From the start, though, the strategy of self-disclosure contained a rift between those who are openly gay and those who remain in the closet.\(^{188}\) For an openly gay person, the question is not whether outing is ethical, but rather, whether hiding one's sexuality is ethical.\(^{189}\)

According to Gross' book, the AIDS crisis was an important development on the path to outing because of two lessons learned by the gay community.\(^{186}\) First, a "gay" disease will not receive adequate attention from mainstream press or politics.\(^{191}\) Second, the country will only pay attention to the disease if famous and important people are associated with the cause.\(^{187}\) Thus, for groups which battled AIDS, using

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\(^{184}\) Steve Warren, "Telling 'Thies' about Celebrity Closets," an interview with Armistead Maupin, Au Courant, Oct. 23, 1989, reprinted in Gross, supra note 1, at 200, 201-02. Armistead Maupin is quoted saying:

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

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

\(^{185}\) Id. at 202. Maupin also said, "the only way to attack the homophobia is to refuse to maintain the secret of homosexuality, either your own or anyone else's." \(^{186}\) Id.

\(^{186}\) As one gay man said, at New York City's first gay pride march, "We're probably the most harassed, persecuted minority group in history, but we'll never have the freedom and civil rights we deserve as human beings unless we stop hiding in closets and in the shelter of anonymity." Toby Marotta, The Politics of Homosexuality 170 (1981).

\(^{187}\) Gross, supra note 1, at 21.

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

\(^{189}\) Victoria Brownworth, Campus Queer Query, OutWeek, May 16, 1990, reprinted in Gross, supra note 1, at 249, 251. Brownworth asked, "Is it ethical to stay in the closet, pass for straight, assume the mantle of heterosexual privilege and enjoy its benefits while those who are openly gay suffer the oppression of their minority status?" \(^{186}\) Id.

\(^{186}\) Gross, supra note 1, at 34.

\(^{187}\) Id.

\(^{188}\) Id.
the media to advertise homosexuality and to show the human faces of AIDS became essential.\textsuperscript{193}

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

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

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

Why am I doing this?

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

SIGNORILE, Gossip Watch, OutWeek, Dec. 17, 1989, reprinted in Gross, supra note 1, 197, 199.

\textsuperscript{195}See Crimp, supra note 7, at 311.

\textsuperscript{196}Responding to the criticism of other journalists, Signorile said:

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

SIGNORILE, supra note 1, at 75.

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

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

Id.

\textsuperscript{198}SIGNORILE, supra note 1, at 75. “I smelled homophobia. It seemed to me that the American media didn’t report about the lives of famous queers because they saw homosexuality as the most
According to those in favor of outing, not only does the media not report homosexuality, but also, it actively participates in an elaborate cover-up in order to make gay celebrities appear heterosexual. \(^{199}\) Thus, the outing movement might be considered a journalistic movement aimed at treating homosexuality as equal to heterosexuality. \(^{200}\) Given that heterosexuality is not hidden by the press, or treated as private and unbroachable, outers ask why homosexuality should be so treated. \(^{201}\)

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

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\(^{199}\) See Gross, supra note 1, at 45–56. Gross argues that gossip and celebrity columnists engage in what he calls “inning,” which is to actively lie in order to make homosexuals appear to be heterosexual. Id. at 46–47. Examples include speculation about the romances of gay men, such as Malcolm Forbes and Merv Griffin, or the use of phrases such as “confirmed,” “eligible” and “lifelong” bachelor. Id. at 50–53. Nor is this process restricted to famous people, as Gross demonstrates by quoting Lindsay Van Gelder’s observation about photos from the 1989 Bay Area earthquake, showing a survivor pounding the earth . . . so riveting . . . that they were sent around the world . . . but nowhere was there a mention that the body under the building was anyone more intimate than a “friend.” Later I learned that the woman, a long-time lesbian activist, had been widely interviewed and completely open about the nature of their relationship; indeed, she had insisted that it should be acknowledged. Most reporters refused. Id. at 55.

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

\(^{201}\) Rotello, supra note 200, at 278. Signorile wrote:

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


\(^{202}\) Signorile, Gossip Watch, OUTWEEK, July 18, 1990, reprinted in Gross, supra note 1, at 289.

\(^{203}\) See Signorile, supra note 1, at 104–10.
institution whose anti-gay policies are pervasive—a very appropriate figure to be outed. 204

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

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

205 Signorile, Gossip Watch, OUTWEEK, July 18, 1990, reprinted in Gross, supra note 1, at 289, 290-91.

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

Id.


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

Id.


HOLLYWOOD DISGUSTS ME! ALL OF YOU LYING FREAKS MAKE ME WANT TO VOMIT. Jodie Foster, TIME'S UP! If lesbianism is too sacred, too private, too
people who have power, and who use that power to hurt other gay people, lose their right to invoke the code of silence.\textsuperscript{208} Public figures who pretend to be straight reinforce the idea that America is straight, and thereby harm the gay community.\textsuperscript{209}

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

\textsuperscript{208} See Gross, supra note 1, at 182.
\textsuperscript{209} Larry Bush, Naming Gay Names, Village Voice, Apr. 27, 1982, reprinted in Gross, supra note 1, at 177, 181. As Vito Russo, gay activist and author of The Celluloid Closet, explained: “Every star who is in the public eye does the community a disservice by pretending to be straight . . . . By their silence, they are reinforcing the idea that America is straight.” Id.
\textsuperscript{210} See Hunter Madsen, Tattle Tale Traps, OutWeek, May 16, 1990, reprinted in Gross, supra note 1, at 236, 238; see also Ayofemi Folayan, Whose Life Is It Anyway, OutWeek, May 16, 1990, reprinted in Gross, supra note 1, at 248, 249.
\textsuperscript{212} Madsen, supra note 210, at 237. Hunter Madsen, author of After the Ball, wrote in an OutWeek symposium on outing:

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

\textsuperscript{213} Dirk Johnson, Privacy vs. the Pursuit of Gay Rights, N.Y. Times, Mar. 27, 1990, reprinted in Gross, supra note 1, at 222, 225.
\textsuperscript{214} Bush, supra note 209, at 234; Carr, supra note 211, at 274. Randy Shilts, the well-known author and journalist, said the following:

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

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

\textsuperscript{215} Signorile, supra note 1, at 152. Signorile’s response was that Shilts failed to realize that outing is simply a part of journalism, because journalism’s business is to tell the truth, not to protect people or their feelings. Id.
ers, a bedrock principle of gay rights has always been privacy; outing is a violation of the right to privacy. The uncertain and speculative benefit of outing is simply not great enough to justify the outing.

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

B. The Case Law

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

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215 See Madsen, supra note 210, at 238.
216 Carr, supra note 211, at 276. As one lesbian columnist wrote, "I'm still waiting for the news of Malcolm Forbes's homosexuality to improve my life." Id.
217 Gross, supra note 1, at 148 (quoting Scott Tucker).

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

Id.
218 Id. at 67.
219 Id.; Crimp, supra note 7, at 305 (closet is function of compulsory and mandatory heterosexuality).
220 See Signorile, supra note 1, at 79-80. In his book, Signorile quotes at length a pro-outing piece by Marshal Alan Phillips, which appeared opposite the Randy Shilts piece quoted above.

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

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

Signorile, supra note 1, at 157.
221 Id. at 80. Therefore, one might say that outing "outs" the media's homophobia, not the sexual orientation of gay people. See Crimp, supra note 7, at 307.
222 Gross, supra note 1, at 168-69.
that publication of a man's well-known homosexuality was not cause for liability.\footnote{223}{201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984).} Sipple was identified in newspapers as a gay man after he helped to thwart an attempted assassination of President Gerald Ford.\footnote{224}{Id. at 666.} The court reasoned that private facts had not been exposed, because the man's homosexuality was well known.\footnote{225}{Id. at 669.} Therefore, the court concluded that liability could not be imposed.\footnote{226}{Id. at 671.}

In 1975, Oliver W. Sipple, an ex-marine, became a focus of media attention when he obstructed an attempt to assassinate President Gerald R. Ford.\footnote{227}{Id. at 666.} Two days after the event, a column in the \textit{San Francisco Chronicle} identified Sipple as a prominent member of the city's gay community.\footnote{228}{Sipple, 201 Cal. Rptr. at 666.} Newspapers around the country picked up the report, some speculating that President Ford had treated Sipple shabbily because of Sipple's sexual orientation.\footnote{229}{Id.} Sipple sued the \textit{Chronicle} for invasion of privacy.\footnote{230}{Id. at 671.} He claimed that the paper had published private facts, without authorization.\footnote{231}{Id. at 666.} Sipple claimed the publication was highly offensive because his family had learned about his homosexuality through the papers.\footnote{232}{Id.} As a consequence of publication, according to Sipple, he had been abandoned by his family, as well as exposed to contempt and ridicule which caused mental anguish, embarrassment and humiliation.\footnote{233}{Sipple, 201 Cal. Rptr. at 667.} The San Francisco County Superior Court granted summary judgment for the newspaper.\footnote{234}{Id.}

The California Court of Appeal listed the elements of a tortious public disclosure, but noted that the First Amendment exempted the press from liability if the disclosure is truthful and newsworthy.\footnote{235}{Id. at 669.} The court determined that Sipple's sexual orientation and participation in the gay community was well-known, therefore private facts had not been disclosed.\footnote{236}{Id.} His sexual orientation was "in the public domain" and "open to the eye of the public."\footnote{237}{Id. at 667-68.} In addition, the court reasoned that Sipple's sexual orientation was newsworthy.\footnote{238}{Id.} The publications
were not motivated by sensationalism, but rather, were motivated by legitimate political considerations, because Sipple might combat the false stereotypes of gays. The court concluded that Sipple's story was genuine news, and was therefore protected from liability.

IV. IS THE CONFLICT REALLY A CONFLICT?

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

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

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239 Id. at 670.
240 Id.
241 See Edelman, supra note 11, at 1195. Most recently, Justice Marshall wrote: "Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." The Florida Star v. B.J.F., 491 U.S. 524, 532 (1989).
242 Edelman, supra note 11, at 1198.
243 Id.; Florida Star, 491 U.S. at 530 (Court's decisions have "without exception" upheld the press's right to publish).
244 See Wick, supra note 10, at 419.
245 See Elwood, supra note 10; Grant, supra note 3; Pollack, supra note 10; Wick, supra note 10.
246 The true/false dichotomy stems from New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Sexual orientation is ungovernable by this dichotomy because sexual orientation is not so simply identified as either "true" or "false." Grant, supra note 3, at 121. When can someone be considered gay? Id. at 122. How many sexual acts constitute homosexuality? Id. Or, rather, is homosexuality defined by a lifestyle? Id. Courts might be forced to differentiate between statements such as "X is a homosexual," and "X was seen performing a homosexual act." Id. at 124.
sible, term to define. Finally, the line between public and private is not only difficult to draw, but also, tends to be drawn to the detriment of gay people.

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

As long as sexuality and sexual identity are not defined by static, clear lines, the Court's true/false dichotomy will encounter difficulty when used to analyze questions of sexual orientation. See Mary C. Dunlap, The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy, 90 Hastings L.J. 1191, 1191-39 (1979); Rhonda Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 90 Hastings L.J. 799, 800-02 (1979).

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

In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.


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

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

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

It is problematic to argue that any fact that the press has discovered is still a private fact. See Wick, supra note 10, at 492. It is also problematic to argue that sexual orientation—the way in which we relate to others—can ever be a private fact. See Pollack, supra note 10, at 730.

As applied to gay people, it is clear that the Supreme Court's interpretation of privacy is not a beneficial interpretation. See Bowers v. Hardwick, 478 U.S. 186 (1986). For a general discussion of Bowers and its impact on privacy rights, see Rhonda Copelon, A Crime Not Fit to be Named: Sex Lies and the Constitution, in The Politics of Law 177 (David Kairys ed., rev. ed. 1982) (privacy is not tolerable when it protects proud alternative to social norms).
First Amendment, would protect the press in the name of robust, open debate. While the damage done to outing individuals might be recognized, it would be considered a necessary evil in a society which places so much value on the speech of the press. An outing person’s remedy, under the marketplace theory, would be in speaking for herself.

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


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

Writing for the Advocate, Stuart Byron offered this assessment of outing:

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

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

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

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

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

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

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

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

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

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

256 Mohr, supra note 183, at 327-28, 331.

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

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

259 See Lawrence, supra note 37, at 78.

260 Id. at 79.

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

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

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

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

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

\textsuperscript{264} See MacKinnon, supra note 52, at 30–31.

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

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

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

\textsuperscript{268} See Lauren Berlant & Elizabeth Freeman, Queer Nationality, in Fear of a Queer Planet 198, 199 (Michael Warner ed., 1999). Berlant and Freeman argue that Queer Nation's policy of making homosexuality visible attempts to shift from "silent absence into present speech, from nothingness into collectivity." Id. Although this is a worthy goal, outing creates more than present speech. Because the outed individual has not chosen to speak, the outing also creates a present, spoken for, silence.
they are exposing those who believe “they’ll never get marched to the gas chambers because ‘nobody knows.’” Anti-outers correct the analogy, saying that theouters are “Jews lining up other Jews to go to a concentration camp.” Outing is a situation in which the speech of the individual is at least as weighty as the speech of the press. Recognizing this equality of interests would require the Supreme Court to refocus the supposed conflict between the First Amendment and privacy on the mutual justifications of self-fulfillment and self-government.

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

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

263 Brownworth, supra note 189, at 251.
270 Gross, supra note 1, at 127.
272 “Both intrusion and publication of private facts implicate ‘invasions’ of interests distinct from mere outrage at a speaker’s message; they are forms, so to speak, of ‘psychic trespass.’” Smolla, supra note 26, at 380 n.2; see also, MacKinnon, supra note 52, at 105.
273 See Tucker, supra note 128, at 118.
274 For instance, Tom Gerety argues that by using his strong, yet limited definition of privacy, we gain a concept that requires "some strong argument of policy or urgency to justify us in overriding it." Gerety, supra note 124, at 281.
275 Scott Tucker characterizes this as a Rawlsian approach, wherein every citizen’s right to equal concern and respect in the design of political institutions is fundamental to all other rights. Tucker, supra note 128, at 59.
In current privacy versus First Amendment jurisprudence, the marketplace theory is dominant, and the press' right to speak is protected. In a self-fulfillment and self-government based First Amendment jurisprudence, privacy and the First Amendment would not necessarily be pitted against each other. Under the current law, an outing individual's right to achieve self-fulfillment and to participate in government would not be protected, because the press and the marketplace are overly protected. Outing, therefore, shows the need to further develop the common law right to privacy tort in conjunction with the First Amendment.

V. CONCLUSION

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

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

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