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# Lock the Closet Door: Does Private Mean Secret

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# Lock the Closet Door: Does Private Mean Secret?

Whitney Kirsten McBride\*

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## I. INTRODUCTION

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\* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2011; B.A. Political Science, California Polytechnic State University, San Luis Obispo, 2007. I would like to thank Professor Amy Landers for her help in developing this Comment. I would also like to thank Patrick and Darcy McBride, Chris Cavagnaro, and the members of the *McGeorge Law Review* for all of their love and support throughout this process. Finally, I would like to thank Professor Michael Vitiello for his mentorship and support throughout law school.

After Oliver Sipple thwarted an assassination attempt against Gerald Ford on September 22, 1975, he received considerable national attention including an article published by the *San Francisco Chronicle*.<sup>1</sup> While the article portrayed him as a national hero, it also included strong suggestions that he was gay.<sup>2</sup> Soon after, the *Los Angeles Times*, along with out-of-state newspapers, printed pieces describing Sipple as a “prominent member of the San Francisco gay community.”<sup>3</sup> Sipple filed a public disclosure of private facts claim against the *Chronicle*, alleging it published a private fact “disclosing that plaintiff was a homosexual in his personal and private sexual orientations.”<sup>4</sup>

A California court of appeal held that Sipple’s sexual orientation did not constitute a private fact.<sup>5</sup> The court reasoned that Sipple’s “homosexual orientation and participation in gay community activities had been known by hundreds of people in a variety of cities . . . .”<sup>6</sup> However, the court neglected to acknowledge the fact that his entire family, including his parents, brothers, and sisters, did not know he was gay.<sup>7</sup> After the article was published, Sipple’s family abandoned him.<sup>8</sup>

Public disclosure of private facts is a tort that protects an individual’s right to privacy regarding true facts about him- or herself.<sup>9</sup> The tort is triggered by the publication of a private fact or matter that is highly offensive to a reasonable person, and is not of legitimate public concern.<sup>10</sup> However, may a person disclose his or her sexual orientation to a defined group of people and still protect it as a

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1. Sipple v. Chronicle Publ’g Co., 201 Cal. Rptr. 665, 666 (Ct. App. 1984).

2. *Id.*

One of the heroes of the day, Oliver ‘Bill’ Sipple, the ex-Marine who grabbed Sara Jane Moore’s arm just as her gun was fired and thereby may have saved the President’s life, was the center of midnight attention at the Red Lantern, a Golden Gate Ave. bar he favors. The Rev. Ray Broshears, head of Helping Hands, and Gay Politico, Harvey Milk, who claim to be among Sipple’s close friends, describe themselves as “proud—maybe this will help break the stereotype.” Sipple is among the workers in Milk’s campaign for Supervisor.

*Id.*

3. *Id.*

4. *Id.* at 667.

5. *Id.* at 669.

6. *Id.*

7. *Id.* at 667.

8. *Id.* Sipple’s father and brother were both taunted at the factory they worked at, and his mother suffered harassment from her neighbors after the story broke. After the family had time to “absorb” Sipple’s homosexual orientation, they eventually allowed him back into their lives. Lynne Duke, *Caught in Fate’s Trajectory, Along With Gerald Ford*, WASH. POST, Dec. 31, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000160.html> (on file with the *McGeorge Law Review*).

9. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 392 (2007).

10. Sipple, 201 Cal. Rptr. at 668; RESTATEMENT (SECOND) OF TORTS § 652D (1977); DIAMOND ET AL., *supra* note 9 at 392; *see also*, RESTATEMENT (SECOND) OF TORTS § 588 (defining defamation as a tort that protects individuals from “false defamatory statements” whereas public disclosure of private facts protects dissemination of true facts).

private fact for the purposes of tort liability? *Sipple* “left open the question as to whether sexual orientation is ever a private fact . . . .”<sup>11</sup>

Specifically, this Comment addresses whether sexual orientation can satisfy the element of “private fact” once this fact is disseminated to a small group of people. This Comment primarily argues that courts should adopt the concept of “limited privacy” when considering the tort of public disclosure of private facts. Further, as a corollary, this Comment asserts that sexual orientation is an inherently private fact.<sup>12</sup> Therefore, an individual should be able to disclose his or her sexual orientation to a specific group of people and have it still constitute a “private fact” if divulged beyond the scope of the initial disclosure. A right to privacy is not “so much one of total secrecy as it is of the right to *define* one’s circle of intimacy—to choose who shall see beneath the quotidian mask.”<sup>13</sup> Unfortunately, in a majority of jurisdictions, if the court finds that a defendant has simply provided further publicity to a fact that was already “public,” a plaintiff will be barred from recovery.<sup>14</sup> In other words, once a fact has been disclosed, it can no longer satisfy the requisite element of being “private.”<sup>15</sup>

Part II of this Comment provides a brief history of the tort of public disclosure of private facts. It discusses the constitutional right to privacy in the United States, and asserts that sexual orientation is an inherently private fact. Part III overviews the jurisdictional approaches regarding what constitutes a private fact. Part IV discusses the First Amendment implications of limiting the publication rights of newspapers, and covers the dissemination of information obtained through both government and non-government sources. Part V provides a detailed analysis of how courts should interpret “private fact” by pointing to other bodies of law, including: the doctrine of limited privacy as applied in other privacy torts; the European Union’s (EU) privacy protections, and a short discussion of how “duty” has been defined for the tort of negligent infliction of emotional distress. Moving forward, each of these doctrines can help shape the proper application for the private fact element of public disclosure of private facts.

## II. HISTORICAL BACKGROUND OF PUBLIC DISCLOSURE OF PRIVATE FACTS

The tort of public disclosure of private facts was born in 1890 when Samuel

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11. Eric K.M. Yatar, *Defamation, Privacy and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence*, 12 LAW & SEXUALITY 119, 134 (2003).

12. See *infra* Part II.B; see generally *Sterling v. Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (finding that sexual orientation is an inherently private fact stating, “[i]t is difficult to imagine a more private matter than one’s sexuality . . .”).

13. *Moreno v. Hanford Sentinel*, 91 Cal. Rptr. 3d 858, 863 (Ct. App. 2009); see MSN ENCARTA DICTIONARY (2009) (defining quotidian as “commonplace: of the most ordinary everyday kind”).

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

15. *Id.*

Warren and Louis Brandeis wrote their renowned article, *The Right to Privacy*.<sup>16</sup> Warren and Brandeis appealed to the common law to find “the right to be let alone.”<sup>17</sup> They stated “[t]he common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments and emotions shall be communicated to others.”<sup>18</sup> Warren and Brandeis argued that each individual can limit the scope of what is communicated to others because “[an individual] generally retains the power to fix the limits of the publicity which shall be given them.”<sup>19</sup> Therefore, when a person confides in another, the right of privacy is not terminated. After analyzing different court opinions, Warren and Brandeis noted, “the law had gradually expanded its protection of the individual from property and person to include reputation and emotional well-being.”<sup>20</sup> They further argued “[t]he same protection is accorded to a casual letter or an entry in a diary . . . . In every such case the individual is entitled to decide whether that which is his shall be given to the public.”<sup>21</sup> In sum, the authors argued for an “implied right of privacy,” and that “violation of such a right should give rise to a distinct cause of action.”<sup>22</sup> Today, the cause of action that protects the reputation and well-being of an individual is known as public disclosure of private true facts.

#### A. *The Constitutional Right to Privacy*

In *Griswold v. Connecticut*, the United States Supreme Court held that citizens have a fundamental right to privacy.<sup>23</sup> Although the Court decided that a state law barring “the use and distribution of contraceptives” was unconstitutional,<sup>24</sup> it declined to base its decision on the due process clause.<sup>25</sup> Instead, it made the right to privacy an explicit constitutional provision, finding “that privacy was implicit in many of the specific provisions of the Bill of Rights, such as the First, Third, Fourth, and Fifth Amendments.”<sup>26</sup> In the majority opinion, Justice Douglas stated that “[t]he forgoing cases suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance.”<sup>27</sup> The various

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16. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (establishing the tort we now know as public disclosure of private facts).

17. *Id.* at 193.

18. *Id.* at 198.

19. *Id.*

20. Warren & Brandeis, *supra* note 16, at 197.

21. *Id.* at 199.

22. John P. Elwood, Note, *Outing, Privacy, and the First Amendment*, 102 YALE L.J. 747, 752.

23. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

24. *Id.*; ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 815 (2006).

25. *Griswold*, 381 U.S. at 481–82; CHERMERINSKY, *supra* note 24.

26. *Griswold*, 381 U.S. at 485 (discussing the Bill of Rights); CHERMERINSKY, *supra* note 24.

27. *Griswold*, 381 U.S. at 484.

constitutional guarantees form “a zone of privacy which government may not force him to surrender to his detriment.”<sup>28</sup> Douglas concluded that “[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”<sup>29</sup>

Although freedom of speech is an explicit right in the Constitution, *Griswold* establishes an implied right to privacy.<sup>30</sup> This indicates that freedom of speech does not automatically trump an individual’s right to privacy.<sup>31</sup> An individual’s right to privacy and the ability to determine one’s zone of privacy is essential to a democratic society.<sup>32</sup> Further, it is necessary to protect those who do not wish for their sexual orientation to define who they are as individuals.<sup>33</sup>

*B. Effects of Outing and Why Courts Should Rule Sexual Orientation Is an Inherently Private Fact*

Because of the First Amendment implications,<sup>34</sup> sexual orientation must be distinguished from other categories of facts. Essentially, a news reporter or potential defendant should *know* that disclosure of a private fact is different than discussing what the plaintiff had for breakfast because the fundamental *nature* of this fact is inherently different. This type of disclosure, commonly known as an “outing,” involves accusations and proof, sometimes consisting of photos and details, about someone’s “sexual activities, desires, fantasies or preferences—matters that are essentially private.”<sup>35</sup> When one speaks about an outing, it generally involves “an allegation that a secretly homosexual party is masquerading as a heterosexual.”<sup>36</sup>

One commentator argues that outing one’s gay or lesbian orientation should justifiably be treated differently because the general presumption in society is that an individual is heterosexual.<sup>37</sup> Therefore, “communicat[ing] to others that he does not share this status is revealing facts that normally are shared only with

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28. *Id.*

29. *Id.* at 486 (linking the fundamental right to use contraceptives to preserving the marital relationship and further noting that laws forbidding the use of contraceptives have a “maximum destructive impact” on the sacrosanct relationship of man and wife).

30. *Id.* at 483.

31. See *infra* Part III (discussing the First Amendment implications in public disclosure of private facts cases).

32. Barbara Moretti, *Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation*, 11 CARDOZO ARTS & ENT. L.J. 857, 882 (1993).

33. See *infra* Part II.B (discussing sexual orientation as an inherently private fact).

34. See *infra* Part III (noting the tension between the first amendment and privacy tort claims).

35. Moretti, *supra* note 32, at 863.

36. *Id.*

37. *Id.* at 864; see also *Watkins v. U.S. Army*, 875 F.2d 699, 727 (9th Cir. 1989) (finding that historically homosexuals have been “underrepresented in and victimized by political bodies” and that as a group they are “handicapped by structural barriers that operate to make effective political participation unlikely if not impossible”).

intimates. It is private information, just as information about any other unusual or unique personal characteristic that is not readily observable is private.”<sup>38</sup>

Alternately, some members of the gay and lesbian community promote outing, believing that “forcing gay people out of the closet is beneficial because it purges the gay community of self-hatred and homophobia.”<sup>39</sup> Furthermore, defenders of outing point to the need for role models in the gay community.<sup>40</sup> Advocates of outing believe that concealing and refusing to acknowledge one’s sexual orientation is “tantamount to the oppression of homosexuals.”<sup>41</sup> In addition, “‘outing’ purportedly helps to eliminate opposition to gay political causes exposing the secret, hypocritical lives of proponents of anti-gay legislation.”<sup>42</sup>

Despite the supposed benefits of outing,<sup>43</sup> sexual orientation should be considered an inherently private fact. A report about sexual orientation is intrinsically different than a newspaper report discussing that “[t]he ordinary reasonable man . . . [has] gone camping in the woods or given a party at his house for his friends.”<sup>44</sup> The *Restatement (Second) of Torts* provides a definition of intrinsically private facts that focuses on whether the reasonable person “would feel justified in feeling seriously aggrieved” by their disclosure.<sup>45</sup> For example, courts have held that “nudity, sex, and health” are facts that are inherently private.<sup>46</sup>

Sexual orientation “is at the very core of a person’s identity.”<sup>47</sup> For that reason, labeling a person as a homosexual without his or her consent constitutes a denial of that person’s right to self-identity.”<sup>48</sup> Furthermore, the person outed is denied the chance to share “core information about himself to the most important people

38. *Id.*

39. David H. Pollack, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of “Outing,”* 46 U. MIAMI L. REV. 711, 719 (1992).

40. *Id.* at 720.

41. *Id.* at 721.

42. Jon E. Grant, “Outing” and Freedom of the Press: Sexual Orientation’s Challenge to the Supreme Court’s Categorical Jurisprudence, 77 CORNELL L. REV. 103, 104 (1991).

43. See *supra* Pollack, note 39, at 719–20 (undermining the supposed psychological benefits of outing and arguing that outing has a damaging psychological impact and violates personal autonomy).

44. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977) (discussing the reasonable person’s expectation of privacy, and commenting that this reasonable person does not expect complete privacy “except in a desert” and what kind of facts the “ordinary reasonable man” would not take offense to).

45. *Id.*

46. Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 439 (1996).

47. See Moretti, *supra* note 32, at 865 (noting that “[o]uting differs from other forms of political protest precisely because the damage it causes is irrevocable”); see also *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (concluding that sexual orientation constitutes an immutable characteristic whether it be that “the class [is] physically unable to change or mask the trait defining their class” or “those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”).

48. Moretti, *supra* note 32, at 865.

in his life . . . . [This] may seem like a small price . . . in the name of combating prejudice and educating people about homosexuality, but to those affected by it, the damage is often incalculable.”<sup>49</sup>

The conflicted sides of this argument “can best be summed up by two disparate images: the image of the closeted gay teenager, desperately in search of role models to help him develop a sense of self-esteem, and the image of the outed employee, stripped of his livelihood, his friends, and his right to determine the direction of his life.”<sup>50</sup> Because “an outed homosexual can never go back into the closet once his sexual orientation has been revealed,”<sup>51</sup> this balance should swing in favor of privacy and protecting personal autonomy, instead of offering potential role models.

In *Sterling v. Minersville*, the Third Circuit recently handed down a decision supporting the view that sexual orientation is an inherently private fact, stating “[i]t is difficult to imagine a more private matter than one’s sexuality . . . .”<sup>52</sup> In *Sterling*, a teen committed suicide<sup>53</sup> after a police officer arrested him and threatened to out him to his grandfather.<sup>54</sup> The court concluded that “[the teen’s] sexual orientation was an intimate aspect of his personality entitled to privacy protection . . . .”<sup>55</sup> The court based its decision largely on the officer’s own testimony.<sup>56</sup> The officer initially arrested the teen and his companion for underage drinking, but when he discovered two condoms, the police officer inquired as to their sexual orientation.<sup>57</sup> However, the officer admitted “he did not include suspicion of homosexual activity in his police report because of the confidential nature of the information.”<sup>58</sup> The court determined, based on his testimony, that

49. *Id.* at 749; see also Jesse McKinley, *Suicides Put Light on Pressures of Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9 (discussing the recent gay suicides throughout the United States due to bullying and harassment, in person and online).

50. Pollack, *supra* note 39, at 750.

51. *Id.* at 749.

52. *Sterling v. Minersville*, 232 F.3d 190, 196 (3d. Cir. 2000).

53. Recently, a wave of gay suicides took place across the country. See McKinley, *supra* note 49 (noting that a recent survey indicates “nearly 9 of 10 gay, lesbian, transgender or bisexual middle and high school students suffered physical or verbal harassment in 2009, ranging from taunts to outright beatings”); Michelle Burford, *The Surge in Gay Teen Suicide*, AOLHEALTH.COM, <http://www.aolhealth.com/2010/10/12/gay-teen-suicide-surge/> (last visited Mar. 14, 2011) (on file with the *McGeorge Law Review*).

In September 2010 alone, at least six gay youth . . . ended their own lives. Among those bullied to death: Rutgers University freshman Tyler Clementi, who committed suicide after his sexual encounter with another man was broadcast on the internet . . . ; Justin Aaberg, 15 . . . and Asher Brown, 13 . . . who killed themselves following severe harassment by their peers.

*Id.*

54. *Sterling*, 232 F.3d at 193.

55. *Id.* at 196.

56. *Id.* at 197–98.

57. *Id.* at 192–93.

58. *Id.* at 197–98; see also Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 924–25 (2005) (suggesting that intimate relationships would cease to exist if the utmost privacy was insisted upon since, “no one among us [guards] . . . embarrassing information with maximum diligence . . . .



the officer “was aware that one’s sexual orientation is intrinsically personal” and “the confidential and private nature of the information was obvious.”<sup>59</sup>

Outing a person without their consent “violates [the] right to personal autonomy,”<sup>60</sup> and can cause “serious damage to their self-esteem if forced to come out before they are ready . . . .”<sup>61</sup> Advocates touting the psychological benefits of outing a homosexual individual, neglect the social and professional hazards associated with outing.<sup>62</sup> The impact on the relationship between the “outed” individual and his or her family and friends is “very real, as is the emotional trauma [that] often accompanies disclosure.”<sup>63</sup> Further, labeling a gay or lesbian as such can often “influenc[e] others to judge an individual not by that individual’s capacity for kindness, intelligence, achievement, humor or integrity, but rather by a resort to ugly stereotypes.”<sup>64</sup>

Certain categories of true facts are inherently different than others. There is generally an expectation that facts such as sexual orientation, fantasies, or feelings will not be subjected to public scrutiny.<sup>65</sup> In conclusion, one’s sexual orientation is intrinsically unique, and therefore should trigger the presumption of “private fact” for purposes of a public disclosure of private facts claim.

### III. THE CONFLICT

A jurisdictional split of authority exists in determining whether a fact is “private” for the purposes of public disclosure of private facts. A majority of courts examine the facts of the case, decide if the plaintiff disclosed this fact to someone else, and determine whether the defendant merely “furthered” the publicity of that fact.<sup>66</sup> The minority of courts look beyond counting the number

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Virtually everyone feels the need to unburden himself by confessing embarrassing acts to another . . . sharing our most intimate information with those who we expect to keep it secret promotes further friendship and intimacy”).

59. *Sterling*, 232 F.3d at 198.

60. Pollack, *supra* note 39, at 722.

61. *Id.* at 721.

62. *Id.*; Burford, *supra* note 53.

Coming out . . . —or . . . being perceived as homosexual—can exacerbate the stresses of adolescence. The Trevor Project—an organization that operates the only 24/7 crisis line for lesbian, gay, bisexual, transgender and questioning youth—reports that gay teens are . . . four times more likely to attempt suicide than their heterosexual peers; nine out of 10 teen LGBT students have experienced harassment at school.

*Id.*

63. Pollack, *supra* note 39, at 721–22.

64. Moretti, *supra* note 32, at 866.

65. *Id.* at 864–65.

66. *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984); *see* RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

of individuals to know the fact,<sup>67</sup> and instead focus whether the “plaintiff has a special relationship with the ‘public’ to whom the information is disclosed.”<sup>68</sup>

A *The Majority Approach: Sipple v. Chronicle Publishing Co.*

The 1984 holding in *Sipple v. Chronicle Publishing Co.* represents the majority view on interpreting what constitutes a “private fact” or alternatively what constitutes the “public.”<sup>69</sup> *Sipple* determined “there can be no privacy with respect to a matter which is already public or which has previously become part of the ‘public domain.’”<sup>70</sup> The court emphasized that the disclosed facts at issue must be private, stating that “when the defendant merely gives further publicity to information about the plaintiff which is already public” he or she will not be subject to liability.<sup>71</sup> This approach focuses on “the location (or source) of the fact before disclosure,”<sup>72</sup> reasoning that “once facts have appeared in public, privacy interests fade to the point of not being protectable at all.”<sup>73</sup>

The *Restatement (Second) of Torts* adopts a parallel position. It provides that “there is no liability for giving publicity of facts about a plaintiff’s life that are matters of public record.”<sup>74</sup> “Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.”<sup>75</sup> Thus, *Sipple* and the Restatement positions are seemingly consistent. The underlying justification for the numerical publicity requirement<sup>76</sup> “appears to be that one’s privacy in the disclosure context exists only in opposition to the knowledge of society.”<sup>77</sup>

67. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990).

68. *Id.* at 903.

69. *Sipple*, 201 Cal. Rptr. at 666–68.

70. *Id.* at 669.

71. *Id.*; see also Pollack, *supra* note 39, at 727 (“[T]he court maintained that when a person’s sexual orientation is held open to the public eye, it necessarily loses the essence of its ‘privateness.’”).

72. Mintz, *supra* note 46, at 440.

73. *Id.* at 441.

74. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977); see also Mintz, *supra* note 46, at 440 (discussing the legal fiction of implied waiver).

Publicizing facts that already appear in some zone of the public does not give rise to liability under the disclosure tort, even if the facts are ‘private by nature.’ Thus any facts found in public records, on public streets, in public places of business, inside a public hotel, at school sporting events, or facts that either are public knowledge or have already been publicized are not actionably private, regardless of their nature.

*Id.*

75. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (stating that matters of public record include date of birth, marriage, military records, the fact that a plaintiff is licensed to practice medicine, whether the plaintiff is licensed to drive a taxi, and pleadings that a plaintiff has filed in a lawsuit).

76. Mintz, *supra* note 46, at 437 (discussing the publicity requirement in public disclosure of private fact, requiring that the fact at issue be disseminated to the public to satisfy a court’s numerical requirement for dissemination, essentially focusing on the number of people aware of that fact).

77. *Id.*

However, the reasoning in *Sipple* is flawed. Sexual orientation is different than many categories of facts because it is inherently private.<sup>78</sup> Therefore, it is inappropriate for the court to validate its decision with the principle that privacy interests fade once facts have been made public.<sup>79</sup> One commentator has noted that although “privacy interests fade when the public already has access to information, it is clearly wrong to say that those privacy interests therefore cease to exist and are not worthy of protection.”<sup>80</sup>

Furthermore, the court’s focus in *Sipple*—that “hundreds of people in a variety of cities” knew of Sipple’s sexual orientation<sup>81</sup>—was misguided and inappropriate for determining whether the fact was “already public” or simply providing “further publicity” to information that was already public.<sup>82</sup> The court spotlighted the facts that Sipple spent a considerable amount of time in both the Tenderloin and Castro districts of San Francisco, and that he attended “homosexual gatherings” such as gay pride parades.<sup>83</sup> These facts indicate that the “public” who was actually aware of his sexual orientation was limited in scope to the gay community, not the public at large.<sup>84</sup> The court failed to acknowledge that a significant number of people outside of the gay community were unaware of Sipple’s homosexuality.<sup>85</sup> Therefore, the court contradicted itself because it ultimately used facts that show the limited scope of Sipple’s disclosure in deciding his sexual orientation was publicly known. Nevertheless, *Sipple* established, essentially, that once a fact is in the public domain, it can no longer be considered private in the context of a public disclosure of private facts claim.

#### B. *The Minority Approach to Interpreting “Private Fact”*

A minority of courts embrace a more holistic approach for evaluating whether a fact is private,<sup>86</sup> relying “upon the nature of the particular audience’s relationship to the plaintiff.”<sup>87</sup> For example, an Illinois appellate court looked to indicia of “privacy” beyond the sheer quantity of people aware of the “private

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78. See *supra* Part II.B (analyzing sexual orientation as an inherently private fact).

79. *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984).

80. Mintz, *supra* note 46, at 441.

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

82. *Id.* at 669.

83. *Id.*

84. *Id.*

85. *Id.*

86. See generally *Miller v. Motorola, Inc.*, 560 N.E.2d 900 (Ill. App. Ct. 1990) (rejecting the pure numerical approach to the private fact element); *Ozer v. Borquez*, 940 P.2d 371, 378 (Colo. 1997) (“[T]he disclosure must be made to the general public or to a large number of persons, there is no threshold number which constitutes ‘a large number’ of persons. Rather the facts and circumstances of a particular case must be taken into consideration . . .”).

87. Mintz, *supra* note 46, at 437.

fact,” and rejected the pure “numerical approach.”<sup>88</sup> In *Miller v. Motorola Inc.*, plaintiff Joy V. Miller brought an action against her employer Motorola, Inc. for public disclosure of private facts when Motorola disclosed her mastectomy surgery to other employees.<sup>89</sup> The court refused to adopt an interpretation that was limited to quantifying the number of individuals with knowledge of a particular fact.<sup>90</sup> Instead, the court declared “the public disclosure requirement may be satisfied by proof that the plaintiff has a special relationship with the ‘public’ to whom the information is disclosed.”<sup>91</sup> Recognizing that disclosure may be equally devastating even if it was “made to a limited number of people,”<sup>92</sup> the court defined “public” in terms of the outed individual’s status in the community.<sup>93</sup> “Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family or neighbors if the person were not a public figure.”<sup>94</sup>

### C. *The Quotidian Mask and the Internet*

More recently, a California appellate court decided a case about a MySpace posting.<sup>95</sup> After visiting the small town of Coalinga, California, plaintiff Cynthia Moreno complained over her MySpace blog about how much she hated her hometown “mak[ing] a number of extremely negative comments about Coalinga and its inhabitants.”<sup>96</sup> When the high school principal submitted a copy of the blog, which was dubbed “An ode to Coalinga,” to the local newspaper, Moreno brought suit against him.<sup>97</sup>

The court held that because the blog was published on the Internet, it failed to be “private” for purposes of a public disclosure of private facts claim.<sup>98</sup> Placing the comments onto MySpace “made [them] available to any person with a computer and thus opened it to the public eye.”<sup>99</sup> The court focused on the fact that the “potential audience was vast,”<sup>100</sup> and concluded that Moreno had no reasonable expectation of privacy.<sup>101</sup> This approach is misguided because analyzing the private fact element of the tort focuses on the plaintiff and whether

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88. *Id.* at 437 n.59.

89. *Miller*, 560 N.E. 2d at 901.

90. *Id.* at 903.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Moreno v. Hanford Sentinel, Inc.*, 91 Cal. Rptr. 3d 858, 860 (Ct. App. 2009).

96. *Id.* at 861.

97. *Id.*

98. *Id.* at 862.

99. *Id.*

100. *Id.* at 863.

101. *Id.* at 862.

the matter is “already public.”<sup>102</sup> Instead of focusing on the “potential audience,” the court should have focused on Moreno’s conduct and how many people she invited to read her blog post. Moreover, depending on her privacy settings, it is arguable that her MySpace profile and blog were not public.<sup>103</sup>

Although the court ultimately held against Moreno, language in the opinion supports the idea that privacy is not an all-or-nothing proposition. The court stated, “[p]rivate is not equivalent to secret. . . . [T]he claim of a right to privacy is not so much one of total secrecy as it is of the right to *define* one’s circle of intimacy—to choose who shall see beneath the quotidian mask.”<sup>104</sup>

These various jurisdictional approaches play a huge role in either the success or failure of plaintiffs’ potential public disclosure of private facts claims. In the majority of jurisdictions that use the *Sipple* approach, if a court finds a plaintiff has previously disclosed a fact to several people, it will likely determine the fact is already in the public sphere and thus a defendant can further disseminate it without fear of liability.<sup>105</sup> In the minority of jurisdictions, however, if a plaintiff disclosed a private fact to a limited group and the further dissemination of this fact went far beyond the scope of that initial disclosure, a defendant can be held liable.<sup>106</sup> This is because the initial disclosure of that fact would not make it “public” and it would still satisfy the “private fact” element of this tort.<sup>107</sup>

#### IV. FIRST AMENDMENT RESTRICTIONS ON PUBLIC DISCLOSURE OF PRIVATE FACTS PLAINTIFFS’ RECOVERY

The First Amendment limits a claimant’s recovery for public disclosure of private facts to an inquiry of whether the disclosed information is from government or non-government sources.<sup>108</sup> This section discusses the most seminal Supreme Court cases, as they relate to public disclosure of private facts and the inter-relationship with First Amendment restrictions, ultimately concluding that the First Amendment should not prevent recovery in situations where a person’s sexual orientation has been involuntarily disclosed.

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102. *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984).

103. The relationship of public disclosure of private facts and the Internet is beyond the scope of this Comment. However, it is arguable that with the correct use of privacy settings, this blog was nowhere near “public.” See generally, Richard. M. Guo, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH. L.J. 617 (2008) (discussing the various privacy settings that both MySpace and Facebook offer its users such as only allowing those in the same network to view your profile and restricting profile viewing to only those you approve).

104. *Moreno*, 91 Cal. Rptr. 3d at 862–63.

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

106. See generally *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (adopting a more holistic view of the public and allowing the plaintiff to recover).

107. *Moreno*, 91 Cal. Rptr. 3d at 863.

108. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

A. *Restricting Recovery when Information Is "Lawfully Obtained" from a Government Source*

In 1989, the Supreme Court curtailed a plaintiff's ability to recover for public disclosure of private facts in situations where information is obtained from government sources of public records. In *Florida Star v. B.J.F.*, a weekly newspaper printed rape victim B.J.F.'s full name in its "Police Reports" section.<sup>109</sup> The newspaper obtained her name through a "publicly released police report."<sup>110</sup> B.J.F. argued that the newspaper not only violated its own policy against publishing the names of rape victims, but also disclosed a private fact (her name) for the purposes of the tort of public disclosure of private facts.<sup>111</sup> B.J.F. testified that "her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection and to obtain mental health counseling."<sup>112</sup>

The Court held against B.J.F. and stated that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ."<sup>113</sup> The Court reasoned that punishing truthful speech was an "extreme step."<sup>114</sup>

In this decision, the First Amendment seems to have trumped the right of privacy. "[T]he conflict between privacy and freedom of press is typically a lopsided conflict between common law and constitutional law."<sup>115</sup> *Florida Star* reflects the current First Amendment jurisprudence that sharing private true facts will yield to the right to freedom of speech.<sup>116</sup> Although *Florida Star* faces fierce criticism, the Restatement has adopted a similar position.<sup>117</sup>

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109. *Id.* at 526.

110. *Id.* See also CHERMERINSKY, *supra* note 24, at 1059 (discussing the First Amendment limitations on information that was obtained from a public record, here it was a police report).

111. *Florida Star*, 491 U.S. at 528.

112. *Id.*

113. *Id.* at 541.

114. *Id.* at 538.

115. Mintz, *supra* note 46, at 442 ("Once a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into the plaintiff's privacy rights, which generally are not viewed as possessing constitutional roots.").

116. See CHERMERINSKY, *supra* note 24, at 1059 (discussing the various criticisms of this opinion).

117. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) ("It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law or freedom of the press and freedom of speech.").

B. *Non-Government Sources: The Supreme Court Further Restricts Public Disclosure of Private Facts Plaintiffs' Recovery*

In *Bartnicki v. Vopper*, the Supreme Court established that First Amendment protection extends to information obtained from non-government sources.<sup>118</sup> During controversial "collective bargaining" negotiations between the school board and a Pennsylvania high school, an unknown third party intercepted phone conversations between plaintiff Gloria Bartnicki, who was involved with negotiations for the local teachers' union, and the union president.<sup>119</sup> The defendant, Frederick Vopper, obtained the tape and played it on his public affairs talk show.<sup>120</sup> This recording violated both state and federal wire-tapping laws,<sup>121</sup> and Bartnicki filed suit.

The Court determined that liability could not attach under these circumstances without violating the First Amendment.<sup>122</sup> Justice Stevens for the majority stated:

In this case, privacy concerns give way when balanced against the interest in publishing matters of public importance . . . . One of the costs associated with participation in public affairs is an attendant loss of privacy. We think it clear that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.<sup>123</sup>

After *Bartnicki*, it appears that, on matters of public concern, there can be no liability "for invasion of privacy when the information was obtained from private sources."<sup>124</sup>

*Sipple* and other cases involving the disclosure of sexual orientation can be distinguished from both *Florida Star* and *Bartnicki*. First, unlike *Bartnicki*, there is a lack of newsworthiness or public importance.<sup>125</sup> Something is "newsworthy" if it is of legitimate concern to the public.<sup>126</sup> Disclosing an individual's sexual

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118. *Bartnicki v. Vopper*, 532 U.S. 514 (2001); CHERMERINSKY, *supra* note 24, at 1060.

119. *Bartnicki*, 532 U.S. at 514.

120. *Id.*

121. *Id.*

122. CHERMERINSKY, *supra* note 24, at 1060.

123. *Id.* at 1061.

This is the first time that the Court has considered a privacy claim when the information comes from non government sources. Also it is the first time that the Court has dealt with information that was illegally obtained. Nonetheless, the Court found that freedom of speech and press outweigh the privacy interests involved.

*Id.*

124. *Id.* at 1060.

125. *Id.* at 1061.

126. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

orientation simply perpetuates stereotypes and places undue influence on a single, personal characteristic. Second, unlike *Florida Star*, sexual orientation cannot be found in the public record or in a recorded document.<sup>127</sup> Further, outside this context, it is arguable that a name, which was the fact at issue in *Florida Star*, can be learned via public records whereas sexual orientation cannot. Sexual orientation is a unique trait “not readily observable”<sup>128</sup> to the public. Therefore, the First Amendment should not protect outing an individual’s sexual orientation.

## V. HOW COURTS SHOULD INTERPRET THE “PRIVATE FACT” ELEMENT

There are several doctrines that support, by analogy, the notion of creating a “zone” of privacy. First, courts have used the doctrine of limited privacy to narrow the scope of permissible disclosure in privacy torts. Further, because of America’s common law history, the European Union Privacy Directive and the European Union Convention on Human Rights should act as a guide for domestic courts. Finally, a recent decision from the Maine Supreme Court addressed the standard of care and duty one owes in the context of the tort of negligent infliction of emotional distress.<sup>129</sup> This case supports the notion of altering the analysis for what constitutes a private fact, focusing on whether the reasonable person would wish to keep the fact private and out of the public domain.

Together, these areas of law present a consistent theme about defining “public” in a more holistic manner and respecting individual rights to privacy. The ability to share an intimate fact with a close group of friends or a specified community should not obliterate the right to maintain privacy as to another group in society. In other words, a plaintiff’s “waiver” of his or her privacy right is limited by the scope of the prior disclosures of the plaintiff.

### A. The Doctrine of “Limited Privacy”

Courts have adopted the doctrine of “limited privacy” in other privacy tort causes of action and should adopt it in the context of public disclosure of private facts claims.<sup>130</sup> “‘Limited privacy’ is the idea that when an individual reveals

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127. *Id.* § 652D cmt. b (1977) (stating that matters of public record include date of birth, marriage, military records, the fact that a plaintiff is licensed to practice medicine, whether the plaintiff is licensed to drive a taxi, and pleadings that a plaintiff has filed in a lawsuit).

128. Moretti, *supra* note 32, at 864.

129. *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282 (Me. 1987).

130. See generally *Sanders v. ABC, Inc.*, 20 Cal.4th 907 (Cal. 1999) (adopting the idea of limited privacy for the tort of intrusion); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994) (declining to accept that the plaintiff “waived” his right to bring a public disclosure of private facts claim when the court found he had disclosed his condition to close family and friends); see also *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990) (holding that a couple has a right to privacy action and did not waive that right simply because they attended an event where others are present including media outlets).



private information about herself to one or more persons, she may retain a reasonable expectation that the recipients of the information will not disseminate it further.”<sup>131</sup> Case law embraces the position “that even if a plaintiff reveals information about himself to dozens of people, and even if there are no legal or contractual constraints on those people’s ability to disseminate the information further, the information can remain ‘private’ for the purposes of privacy tort law.”<sup>132</sup> The information remains private because the scope of the disclosure limits who constitutes the public. People should maintain a reasonable expectation of privacy even after telling a close-knit group of people an intimate fact about themselves.

The California Supreme Court paved the way for limited privacy actions in *Sanders v. ABC Inc.*<sup>133</sup> During an undercover stint as a “telepsychic,” the defendant-reporter videotaped conversations with fellow employees, including plaintiff Mark Sanders.<sup>134</sup> Sanders brought an intrusion claim against the reporter and ABC broadcasters<sup>135</sup> to determine “whether the fact that a workplace interaction might be witnessed by others on the premises necessarily defeats, for purposes of tort law, any reasonable expectation of privacy the participants have against covert videotaping by a journalist.”<sup>136</sup>

*Sanders* established that “[i]n an office or . . . workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate expectation that their conversations . . . will not be secretly videotaped by undercover . . . reporters, even though those conversations may not [be] completely private from the participants’ coworkers.”<sup>137</sup> Furthermore, “the possibility of being overheard by coworkers, does not, as a matter of law, render unreasonable an employee’s expectation that his or her interactions within a non-public workplace will not be videotaped in secret by a journalist.”<sup>138</sup> However, the court limited this decision to “nonpublic” workplaces by noting the expectation of privacy would be more limited in a “workplace [that] is regularly open to entry or observation by the public or press . . . .”<sup>139</sup>

*Sanders* interpreted privacy on a continuum, as opposed to labeling it as “a binary, all-or-nothing characteristic.”<sup>140</sup> The court stated, “the seclusion referred to need not be absolute,” which supports the idea that privacy is relative.<sup>141</sup> The

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131. Strahilevitz, *supra* note 58, at 939.

132. *Id.* at 942–43.

133. *Sanders*, 20 Cal.4th at 907.

134. *Id.* at 910.

135. *Id.*

136. *Id.* at 911.

137. *Id.*

138. *Id.* at 923.

139. *Id.*

140. *Id.* at 916.

141. *Id.*

court went on to state that “[t]he mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.”<sup>142</sup>

In *Multimedia WMAS, Inc. v. Kubach* a Georgia appellate court also adopted the concept of “limited privacy.”<sup>143</sup> Plaintiff Kubach was HIV positive and disclosed his condition to a small number of people (friends, relatives, and members of an HIV support group).<sup>144</sup> Kubach agreed to appear on a local television station and discuss AIDS issues, so long as they disguised his identity.<sup>145</sup> When the broadcast aired, however, his face was inadequately digitized and his identity was revealed.<sup>146</sup> The television station asserted that because Kubach disclosed his condition to family members and friends, he no longer had a right to privacy in his HIV-positive status and waived his ability to bring a public disclosure of private facts claim.<sup>147</sup>

The court found that Kubach disclosed his HIV-positive status to specific people because “they cared about him and/or they also had AIDS.”<sup>148</sup> The court embraced the idea of disclosing private true facts to specific communities, but nevertheless retaining private fact status in the public domain.<sup>149</sup> The court concluded that Kubach had not absolutely waived his right to bring a public disclosure of private facts claim.<sup>150</sup>

*Kubach* established that “[the right of privacy] may be waived for one purpose and still asserted for another; it may be waived in behalf of one class and retained as against another class.”<sup>151</sup> The court further stated that “[a]lthough there was testimony that [Kubach] did not explicitly tell his friends and family not to tell anyone else, there was also testimony that they understood that plaintiff’s condition was not something they would discuss indiscriminately.”<sup>152</sup> Kubach’s waiver was “related to and limited by the scope of the actions on which the waiver is based.”<sup>153</sup> The court concluded that “[u]nder these circumstances the

142. *Id.*

143. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994).

144. *Id.* at 493.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 494.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Multimedia WMAZ Inc.*, 443 S.E.2d at 494; *see also* Strahilevitz, *supra* note 58, at 925) (“[People] are constantly disclosing embarrassing information about [them]selves to third parties, yet . . . often harbor strong subjective expectations of privacy when doing so . . . . [M]ost jurisdictions have determined that the benefits associated with fostering this intimacy justify the costs of constraining communication.”).

153. *Multimedia WMAZ, Inc.*, 443 S.E.2d at 494; *see also* *Diaz v. Oakland Tribune, Inc.*, 188 Cal Rptr. 762 (Ct. App. 1983) (finding that a transsexual female had a case of public disclosure of private true facts after the Oakland Tribune revealed she was a transsexual. Similarly, the court found she “kept the surgery a secret from all but her immediate family and closest friends” and therefore stated a valid claim for public disclosure of

jury was authorized to find . . . the fact that plaintiff had AIDS was not public prior to defendant's broadcast . . . ."<sup>154</sup>

In sum, *Kubach* embraced the view that prior disclosures by a plaintiff limit the scope of what another may disclose.<sup>155</sup> Therefore, when Sipple disclosed his sexual orientation to the gay community in San Francisco, the *Chronicle* would have been limited to disclosing only to that segment of society to avoid liability. The court in *Kubach* found that the news broadcast "went far beyond the scope of any prior disclosure by plaintiff, in terms of both audience and purpose."<sup>156</sup>

Similarly, a Missouri appellate court also recognized a form of limited privacy in *Y.G. v. Jewish Hospital of St. Louis*,<sup>157</sup> which concerned a couple that participated in in vitro fertilization. The couple's religion did not approve of the procedure,<sup>158</sup> and outside of the hospital staff the couple only disclosed their use of in vitro fertilization to the wife's mother.<sup>159</sup> The hospital decided to host a "social gathering" to honor the hospital's in vitro fertilization program,<sup>160</sup> and promised the couple they would not be subject to publicity.<sup>161</sup> When a film crew arrived, the couple refused to give an interview and "made every 'reasonable effort' to avoid being filmed or interviewed by the representatives of the electronic media."<sup>162</sup> Despite their efforts to avoid the media spotlight, the couple was shown on television and described as "expecting triplets by reason of their participation in [the] Hospital's *in vitro* program."<sup>163</sup>

The couple brought an invasion of privacy claim against the hospital.<sup>164</sup> The hospital argued that the couple had waived their right to privacy by simply attending the event.<sup>165</sup> The court rejected this argument and stated that "[t]he mere fact that an event takes place where others are present does not waive the right to privacy."<sup>166</sup> "By attending such a function [plaintiffs] clearly chose to disclose their participation to only the other *in vitro* couples. By so attending this limited

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private true facts); Ronald F. Wick, *Out of the Closet and Into the Headlines: "Outing" and the Private Facts Tort*, 80 GEO. L.J. 413, 422 (1991) (discussing the ramifications of stating that although no case [at the time] had stated homosexuality was a private fact, the *Diaz* decision provides some support for this proposition. "Given the socially sensitive nature of both sex change operations and sexual orientation, the reasoning of this case suggests that homosexuality can be a private fact.").

154. *Multimedia WMAZ, Inc.*, 443 S.E.2d at 494.

155. *Id.*

156. *Id.*

157. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 498 (Mo. Ct. App. 1990).

158. *Id.* at 493.

159. *Id.* at 492.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 502.

166. *Id.*

gathering, they did not waive their right to keep their condition and the process of *in vitro* private, in respect to the general public.”<sup>167</sup>

*Y.G. v. Jewish Hospital of St. Louis* elaborated on the issue of disclosing private facts to a member of the press,<sup>168</sup> explaining that the disclosure of “private facts to an individual, even a member of the press, is not ‘consent’ to publication since a ‘selective disclosure’ is ‘based on a judgment as to whether knowledge by that person would be felt to be objectionable.’”<sup>169</sup> Furthermore, this court referenced a Ninth Circuit case, which established that “talking freely to a member of the press, knowing the listener to be a member of the press, is not then in itself making public.”<sup>170</sup> Finally, the court determined that a newspaper is similar to a member of the public, with “the same ‘right to find out’ as the rest of the public . . . [and] the same right to publish as the rest of the public . . . [with] no greater right[s] to intrude to obtain information . . . .”<sup>171</sup> This court was sensitive to the idea of people choosing select groups to disclose personal information to, and having it constitute a private fact to the general public or individuals who were unaware of the private fact.

Together, these three cases stand for the proposition that people can limit the scope of what they disclose to specific groups or individuals, and disclosure beyond that scope is actionable.<sup>172</sup> Hypothetically, a plaintiff should be able to disclose certain facts to close friends and those within the same community and have it still constitute a private fact. Private does not mean secret.<sup>173</sup> Similarly in the case of Sipple and his sexual orientation, the mere fact that a segment of society was aware of his sexual orientation does not translate into a right for everyone to know of this private fact.<sup>174</sup>

Arguably, when Sipple attended a gay pride parade “he would have forfeited his right to privacy, at least within the confines of his neighborhood.”<sup>175</sup> However, simply because he revealed his sexual orientation to his “close friends and those in the gay community, it does not follow that he necessarily intended for his homosexuality to be disclosed in other areas of his life.”<sup>176</sup> *Sipple* would be

167. *Id.*

168. *Id.* at 499.

169. *Id.*

170. *Id.*; *Virgil v. Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975).

171. *Jewish Hosp. of St. Louis*, 795 S.W.2d at 502 (quoting *Rafferty v. Hartford Courant Company*, 416 A.2d 1215 (Conn. 1980)).

172. *Id.* at 488 (upholding a claim by plaintiffs for invasion of their right to privacy based on limited privacy); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994) (holding that limited privacy is an appropriate doctrine in a public disclosure of private facts case because the defendant disclosed this intimate fact beyond the scope of the disclosure of the plaintiff); *Sanders v. ABC, Inc.*, 978 P.2d 67, 20 Cal.4th 907, 916 (Cal. 1999) (finding that the idea of limited privacy is appropriate for the privacy tort of intrusion).

173. *Moreno v. Hanford Sentinal, Inc.*, 91 Cal. Rptr. 3d 858, 862 (2009).

174. *Sanders*, 20 Cal. 4th at 916.

175. Pollack, *supra* note 39, at 728.

176. *Id.*

decided differently if California courts adopted this same reasoning for public disclosure of private facts cases. The reasoning the court relied upon in *Sipple* is no longer sensible and undercuts the spirit of the tort, created more than one hundred years ago.<sup>177</sup> If the California Supreme Court embraced the notion of limiting the scope of the disclosure to the same “public” as the person bringing the public disclosure of private facts claim, *Sipple* likely would be decided differently.

The doctrine of limited privacy should be adapted to the tort of public disclosure of private facts when dealing with sexual orientation cases. Due to the sensitive nature of this particular fact, there is a higher probability that gay or lesbian individuals would reveal this intimate detail to a small number of people.<sup>178</sup> People should not feel as if they have waived<sup>179</sup> their right to privacy when they choose to share an intimate fact about themselves to a select group of individuals, and it is unsound and unreasonable for a court to expect people to keep all intimate facts to themselves.<sup>180</sup> A provisional and implied waiver can be inferred to a restricted public, such as those people already aware of the “private” fact.<sup>181</sup> For example, in *Sipple*, the restricted public included a parade and the San Francisco gay community.<sup>182</sup> Therefore, if courts adopt the concept of “limited privacy” within the tort of public disclosure of private facts, they will strike a reasonable and appropriate balance between a plaintiff’s right of privacy and a judicially workable standard for determining what satisfies the private fact element.

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A closeted homosexual might be willing to risk subscribing to a gay newsmagazine delivered to his home in a plain brown envelope (assuming the magazine’s mailing list was kept confidential), but would probably not keep a picture of his lover on his desk at work, where the chances of someone seeing it are greater.

*Id.* at 729.

177. See Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1223–24 (1993) (establishing the tort of public disclosure of private facts).

178. See Pollack, *supra* note 39, at 721–22 (undermining the supposed psychological benefits of outing and arguing that outing has a damaging psychological impact and violates personal autonomy).

179. *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 502 (Mo. Ct. App. 1990) (rejecting the notion that plaintiffs waived their right to privacy by merely showing up to a hospital function).

180. Strahilevitz, *supra* note 58, at 924–25 (suggesting that intimate relationships would cease to exist if the utmost privacy was insisted upon since, “no one among us [guards] . . . embarrassing information with maximum diligence. . . . Virtually everyone feels the need to unburden himself by confessing embarrassing acts to another . . . sharing our most intimate information with those who we expect to keep it secret promotes further friendship and intimacy”).

181. See generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (discussing the continental law concept of “revealing oneself to a restricted public”).

182. See *id.* (discussing the continental law concept of “revealing oneself to a restricted public”).

## B. The European Union Privacy Directive

Some may argue that analyzing European law is irrelevant when American courts are interpreting either common law or the Constitution.<sup>183</sup> In seminal cases, however, the United States Supreme Court is among many courts to look to European law when making decisions on tough issues.<sup>184</sup> It is likely that our courts may look abroad when deciding an issue of common law, specifically for how to interpret tort laws relating to privacy. Because the Supreme Court has looked to cases decided by the European Court of Human Rights before, it is important to understand European privacy law moving forward.

The EU Privacy Directive focuses on the right to privacy of personal data moving across national borders through the EU.<sup>185</sup> “[T]he Directive seeks to promote the free flow of personal information within the European Union while assuring a common, high level of privacy protection.”<sup>186</sup> The Privacy Directive is “based upon the premise that privacy is a human right and data protection is an essential means to protect that right through a coherent and enforceable legal regime.”<sup>187</sup> Critics contend that the European Union Privacy Directive’s limitations on data gathering “are cumbersome and put Europe at a competitive disadvantage.”<sup>188</sup> American privacy values focus more on market efficiency<sup>189</sup> rather than protecting personal dignity or of “the integrity of the person.”<sup>190</sup> Cases with nearly identical facts are decided in a divergent manner in the United States and Europe.<sup>191</sup>

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183. See generally *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (objecting to the use of foreign law in interpreting the United States Constitution, believing that it is irrelevant to the interpretation of both the laws of the United States and the Constitution).

184. See generally *id.* at 560 (noting that the reasoning and holding in *Bowers* was inconsistent with a European Court of Human Rights case showing that the reasoning in United States case law is inconsistent “with a wider civilization”).

185. Bob Sullivan, *Privacy Lost: EU, U.S. Laws Differ Greatly*, MSNBC.COM, <http://www.msnbc.msn.com/id/15221111/> (last visited Mar. 14, 2011) (on file with the *McGeorge Law Review*).

186. JEFF COLLMAN, MANAGING INFORMATION PRIVACY & SECURITY IN HEALTHCARE, EUROPEAN UNION PRIVACY DIRECTIVE, RECONCILING EUROPEAN AND AMERICAN APPROACHES TO PRIVACY (2007) available at [http://www.himss.org/content/files/CPRIToolkit/version6/v6%20pdf/D33\\_European\\_Union\\_Privacy\\_Directive.pdf](http://www.himss.org/content/files/CPRIToolkit/version6/v6%20pdf/D33_European_Union_Privacy_Directive.pdf) (on file with the *McGeorge Law Review*).

187. Graham Pierce & Nicholas Platten, *Orchestrating Transatlantic Approaches to Personal Data Protection: A European Perspective*, 22 FORDHAM INT’L L.J. 2024, 2026 (1999).

188. Sullivan, *supra* note 185.

189. *Id.*

190. Whitman, *supra* note 181, at 1163.

191. See *infra* notes 214–24 and accompanying text.

C. *The European Convention on Human Rights*

American privacy protections are sparse when compared to the protections the European Union has erected to protect its citizens.<sup>192</sup> Article Eight of the European Convention on Human Rights states, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”<sup>193</sup> Furthermore, Articles Seven and Eight of the Charter of Fundamental Rights of the European Union provide that people “[have] the right to respect for his or her private and family life, home and communications [and] the right to protection of personal data.”<sup>194</sup>

In the article, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, James Whitman writes that when compared to “the standards of those great documents, American privacy law seems, from the European point of view, simply to have ‘failed.’”<sup>195</sup> “To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy,”<sup>196</sup> and “allows parties to rummage around in each other’s records in a way that seems obnoxious and manifestly unacceptable to Europeans.”<sup>197</sup>

When it comes to notions of privacy, Europeans’ sensibilities are fundamentally different than Americans’.<sup>198</sup> “When continental lawyers speak of ‘privacy’ as a set of rights over the control of one’s image, name, and reputation, and over the public disclosure of information about oneself, they are speaking to these selfsame continental sensibilities.”<sup>199</sup> Continental views on privacy are “at their core, a form of protection of a right to respect and personal dignity.”<sup>200</sup> European views on social etiquette tend to influence privacy laws.<sup>201</sup> Whitman continues, “[i]t is not an accident that both etiquette and privacy law show the same anxious preoccupation with ‘public image.’”<sup>202</sup> European privacy law diverges from American laws by viewing the media as the primary source of

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192. Whitman, *supra* note 181, at 1151 (comparing the United States approach to privacy versus the European’s more protective view of privacy and protecting the individual).

193. Council of Europe, The European Convention on Human Rights, Mar. 20, 1952, <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf> [hereinafter Human Rights Convention].

194. Charter of Fundamental Rights of the European Union art. 7–8, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (on file with the *McGeorge Law Review*).

195. See generally Whitman, *supra* note 181 (comparing the United States approach to privacy versus the European’s more protective view of privacy and protecting the individual).

196. *Id.* at 1156.

197. *Id.* at 1157.

198. See *id.* (comparing the European views on everything from everyday behavior to how Europeans deal with protecting personal data with American privacy sensibilities).

199. *Id.* at 1167.

200. *Id.* at 1161.

201. *Id.* at 1168.

202. *Id.*

privacy evil.<sup>203</sup> In the United States, “courts [grant] wide leeway over publication, even of intimate photographs and personal details.”<sup>204</sup>

In two separate cases concerning the disclosure of one’s sexual orientation, the Paris Court of Appeals held “that outing, the public disclosure of a person’s sexual orientation, is a violation of Article 9.”<sup>205</sup> In a 1984 case, “a journalist published an article describing [the plaintiff] as a homosexual.”<sup>206</sup> Contrary to the California’s decision in *Sipple* just a few years earlier, “a gay man successfully sued a French publication to prevent publication of a photo of him at a gay pride parade in Paris.”<sup>207</sup> In the French case, a man was photographed at a gay pride parade, “dressed in a way that made it clear that he was himself gay.”<sup>208</sup> Similar to *Sipple*, “his homosexuality [was revealed] to family and colleagues who were previously unaware . . . .”<sup>209</sup> Continental law dictates “that persons appearing in public may be photographed, but that no photograph may be published that focuses on them as individuals, unless they consent.”<sup>210</sup> The court found that “the article could have been illustrated with a group photo” instead of a close-up focusing specifically on the plaintiff.<sup>211</sup> Likewise in France, “the fact that one has revealed oneself to a restricted public—say, the gay community of Paris—does not imply that one has lost all protections before the larger public.”<sup>212</sup> As opposed to *Sipple*, the court in France “acknowledged the plaintiff’s right to oppose publication of his image.”<sup>213</sup> In Europe, “personal honor very often wins out.”<sup>214</sup>

In contrast, the United States “is much more oriented toward values of liberty, and especially liberty against the state.”<sup>215</sup> Americans worry about

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203. *Id.* at 1161.

204. Sullivan, *supra* note 185; *see also* Whitman, *supra* note 181, at 1198–99 (2004).

Many more examples can be offered—most especially involving nudity. . . . One ought to have control over one’s nude image . . . nevertheless there are limits. In one 1974 case, for example, a French actress was permitted to suppress movie scenes in which she had willingly appeared naked: one’s nude image is simply not definitively alienable under continental norms.

*Id.* Essentially, with facts that are inherently private such as one’s nudity consent can be provisional and republication of such photos can be suppressed. *Id.* Whitman further states “[t]here is no absolute control over the dissemination of one’s nude image in continental law.” *Id.*

205. Jeanne M. Hauch, *Protecting Private Facts in France: The Warren & Brandeis Tort is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1254 (1993); *see* Human Rights Convention, *supra* note 193 (providing the Article 9 “freedom of thought, conscience, and religion”).

206. Hauch, *supra* note 205, at 1254.

207. Sullivan, *supra* note 185.

208. Whitman, *supra* note 181, at 1197.

209. Hauch, *supra* note 205, at 1254.

210. Whitman, *supra* note 181, at 1197.

211. Hauch, *supra* note 205, at 1255 (“This case surprised even French commentators who, although accepting as a given that sexual orientation was a protected private fact, questioned whether the press should be held liable when a person was so clearly in public view.”).

212. Whitman, *supra* note 181, at 1197.

213. *Id.*

214. *Id.*

215. *Id.* at 1161.



intrusions from the state and have “[anxiety] about maintaining a kind of private sovereignty within our own walls.”<sup>216</sup> The focus is on protecting the sanctity of the home.<sup>217</sup> The fundamental problem is, “once a person leaves the home—physically or virtually—the right to privacy quickly dissipates.”<sup>218</sup>

*D. Negligent Infliction of Emotional Distress Standards as a Guide for Future Public Disclosure of Private Facts Claims*

Similar to the courts in the “limited privacy” cases, the Supreme Court of Maine was open to a more liberal construction of one person’s duty to another when considering a negligent infliction of emotional distress case,<sup>219</sup> comparable to European ideals of protecting the individual and their right to privacy. Courts in public disclosure of private facts cases should take note of this forward-thinking construction of one’s duty to others and allow plaintiffs to recover under a more liberal theory of public disclosure of private facts.

In *Gammon v. Osteopathic Hospital of Maine, Inc.*, plaintiff Gerald Gammon brought a negligent infliction of severe emotional distress claim following his father’s death.<sup>220</sup> After Gammon’s father died, hospital personnel directed the funeral home to his body in the morgue and to the bags containing his personal effects.<sup>221</sup> The funeral home director found two plastic bags placed inside the same cooler as the body.<sup>222</sup> Believing that both bags contained personal effects, he delivered both bags to Gammon.<sup>223</sup> Upon returning to his father’s home, Gammon opened the bags and found a severed leg.<sup>224</sup> Believing the leg belonged to his father, Gammon suffered from emotional distress following the incident.<sup>225</sup>

The Supreme Court of Maine reversed the lower court’s directed verdict for the hospital because it “reasonably *should have* foreseen that mental distress would result from [its] negligence.”<sup>226</sup> *Gammon* adopted a broad and sweeping

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216. *Id.* at 1162.

217. Sullivan, *supra* note 185.

218. *Id.*; Whitman, *supra* note 181, at 1197.

The contrast between the treatment of Sipple and the treatment of this French victim of publicity is typical of a much deeper contrast in attitude, which one commenter on the supposed ‘failure’ of American privacy law describes this way: [P]rivacy is not the only cherished American value. We also cherish information, and candour, and freedom of speech. . . . The law protects these expectations too—and when they collide with expectations of privacy, privacy almost always loses.

*Id.*

219. *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282 (Me. 1987).

220. *Id.* at 1282.

221. *Id.* at 1283.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 1285.

standard regarding emotional distress claims, stating that if a reasonable person would suffer emotional harm as a result of another's behavior, then liability could be imposed for negligent infliction of emotional distress.<sup>227</sup>

In applying a more expansive standard of duty to a public disclosure of private facts claim, it is important to note that this claim protects information that people wish to keep private. However, this standard can be altered to represent the difference in tort claims: analysis of public disclosure of private facts should hinge on whether a reasonable person wishes to keep this information private. Currently, a court decides whether the fact at issue has been disseminated into the public, and once the court determines that the plaintiff disclosed this fact to someone, it is no longer considered private. There is support for this proposition in the *Restatement (Second) of Torts*, discussing the "highly offensive" element of the tort. Although it discusses a different element of public disclosure of private facts, it states "when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, [] the cause of action arises."<sup>228</sup> Although *Gammon* was dealing with a non-privacy related tort, the similar "reasonableness" standard provides a starting point for expanding recovery under a claim of public disclosure of private facts.

## VI. CONCLUSION

The tort of public disclosure of private facts should protect people from the dissemination of their sexual orientation. Even if people share their sexual orientation with a specific group, the law should protect against publication to segments of society that did not fit within the original "scope" of their disclosure.<sup>229</sup>

The private fact element should be interpreted broadly, instead of purely focusing on the quantity of people who are aware of this fact.<sup>230</sup> Oliver Sipple had a completely different "public" that was unaware of his sexual orientation, and the newspaper article had an adverse impact on Sipple's life and relationship with his family.<sup>231</sup> The argument that "once facts have appeared in public, privacy

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227. *Id.*

228. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

229. *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994) (determining whether there was "publicity" to a "private" fact by examining the original scope of the prior disclosures by the plaintiff).

230. *See generally Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 669 (Ct. App. 1984) (focusing on the fact that "hundreds of people in a variety of cities" were aware of Sipple's participation in gay community activities).

231. *Id.* at 667. Sipple's father and brother were both taunted at the factory they worked at and his mother suffered harassment from her neighbors after the story broke. After the family had time to "absorb" Sipple's homosexual orientation, they eventually allowed him back into their lives. Lynne Duke, *Caught in Fate's Trajectory, Along With Gerald Ford*, WASH. POST, Dec. 31, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000160.html> (on file with the *McGeorge*

interests fade to the point of not being protectable at all” is flawed.<sup>232</sup> Analogizing to the notions of “limited privacy,”<sup>233</sup> gay and lesbian individuals should be able to disclose their sexual orientation to a group of people and still be able to recover under public disclosure of private facts. From a psychological standpoint, sexual orientation merits special protection because of the need to control one’s very identity.<sup>234</sup> Defamation law does not protect this harm, because defamation claims are not actionable against the truth. Furthermore, the inherently personal nature of sexual orientation makes it different than other facts that one may wish to disclose.<sup>235</sup> Therefore, if courts adopt the concept of “limited privacy” within the public disclosure of private facts doctrine, they will be striking a reasonable and appropriate balance between a plaintiff’s right of privacy and a judicially workable standard for the private fact element.

Looking to privacy standards outside the United States, Europe has heightened sensibilities toward protecting an individual’s right to be left alone.<sup>236</sup> Europe’s privacy laws protect individuals outside of their homes.<sup>237</sup> In the United States, man is king of his castle, but once he leaves, privacy protection is far from absolute.<sup>238</sup>

The legal remedies for public disclosure of private facts claims should be tailored to the facts that were ultimately disclosed. It would be a profound flaw if future courts chose to treat the disclosure of all facts in an equivalent manner. There is a fundamental difference between “outing” an individual’s sexual orientation and disclosing what the individual ate for breakfast that morning.

In conclusion, courts should incorporate the concepts of limited privacy and a more expansive construction of peoples’ duty to one another, already recognized in other tort doctrines, to public disclosure of private facts.

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*Law Review*).

232. Mintz, *supra* note 46, at 441.

233. See generally *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 502 (Mo. Ct. App. 1990); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994); *Sanders v. ABC, Inc.*, 20 Cal.4th 907, 916 (Cal. 1999) (finding that the notion of limited privacy is appropriate in different privacy tort cases).

234. See *Yatar*, *supra* note 11, at 122–23 (stating that to prevail in a defamation cause of action “[t]he requirement that the statement be false is utterly fundamental to the cause of action”).

This ‘public disclosure of private facts’ form of invasion of privacy possibly offers a route to recovery for the individual who is accused of or revealed as being a homosexual where such accusation or revelation is in fact true . . . [b]ecause truth is an absolute defense to a claim of defamation, the individual whose homosexuality is involuntarily given public exposure may have possible recourse under such a theory of invasion of privacy.

*Id.* at 127.

235. See *supra* Part II.B (discussing why sexual orientation as opposed to other facts is private by nature).

236. See *Warren & Brandeis*, *supra* note 16 (establishing the tort we now know as public disclosure of private facts).

237. *Sullivan*, *supra* note 185.

238. *Id.*

Incorporating these concepts to the analysis of the private fact element of public disclosure of private facts strikes a reasonable and appropriate balance between a plaintiff's right of privacy and a judicially workable standard for determining what satisfies the private fact element.

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