

# A Right with No Remedy: Forced Disclosure of Sexual Orientation and Public Outing under 42 U.S.C. 1983

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## NOTE

### A RIGHT WITH NO REMEDY: FORCED DISCLOSURE OF SEXUAL ORIENTATION AND PUBLIC "OUTING" UNDER 42 U.S.C. § 1983

*Brad S. Weinstein*†

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## INTRODUCTION

Prior to April 18, 1997, Marcus Wayman lived a life typical of a high school senior. He was set to graduate from Minersville Area High School in about a month.<sup>1</sup> He was an athlete—a member of his high school football team.<sup>2</sup> Wayman's life took a tragic turn on April 18, however, when he walked into his home, located the keys to the family's gun cabinet, removed a revolver, and shot himself in the face.<sup>3</sup> His suicide note read: "I'm sorry grandpa, I found my future. I won't let everyone's life be ruined by mine."<sup>4</sup>

The circumstances surrounding the death of Marcus Wayman are as shocking as they are tragic. Earlier that evening, in the small borough of Minersville, Pennsylvania, Marcus Wayman and a seventeen-year-old male companion parked their car in the lot adjacent to a local beer distributor.<sup>5</sup> The beer distributor had recently been burglarized, so the automobile, with its headlights off, aroused the suspicions of Minersville police officer F. Scott Wilinsky.<sup>6</sup> Wilinsky called for backup, and Officer Thomas Hoban soon joined him.<sup>7</sup> Though there were no indications of a break-in at the beer distributor, the officers approached the car and interrogated the two boys.<sup>8</sup> It was clear that the students had been drinking alcohol.<sup>9</sup> The officers searched the vehicle and the boys, believing that they were in possession of marijuana, and demanded that the boys empty their pockets.<sup>10</sup> Wayman and his companion complied, at which time the officers discovered that the boys were carrying condoms.<sup>11</sup> What happened next is unclear. Officer Wilinsky testified that after further questioning the teens admitted to the officers that they were gay and planning on engaging in sexual relations.<sup>12</sup> Wayman's companion testified otherwise, however, claiming that the boys never indicated a plan to have consensual intercourse.<sup>13</sup> Instead, according to Wayman's compan-

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1 Victoria Scanlan Stefanakos, *Death Without Justice*, *ADVOCATE*, Dec. 25, 2001, at 32.

2 *See id.*

3 *See id.*

4 *Id.*

5 *Sterling v. Borough of Minersville*, 232 F.3d 190, 192 (3d Cir. 2000).

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *See* Press Release, Lambda Legal, *Mother Can Take Police to Court Over Son's Suicide* (Nov. 7, 2000), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=740> (last visited Jan. 26, 2005).

11 *See Sterling*, 232 F.3d at 192.

12 *Id.*; *see* Brief for Appellants at 6, *Sterling* (No. 94-1768), available at 2000 WL 33982455.

13 *See Sterling*, 232 F.3d at 192; *Mother Settles Lawsuit Against Police Over Suicide of Teenage Son*, *MIAMI HERALD*, Sept. 14, 2003, at 24A [hereinafter *Mother Settles Lawsuit*].

ion, the officers jumped to an erroneous conclusion once they found the condoms.<sup>14</sup>

The officers arrested Marcus Wayman and his companion for underage drinking and brought them to the Minersville Police Station for questioning.<sup>15</sup> At the station, Officer Wilinsky lectured the two boys about the biblical prohibition against homosexuality,<sup>16</sup> called them “queers,”<sup>17</sup> and threatened Wayman that if he did not inform his grandfather that he was gay, Wilinsky would do so himself.<sup>18</sup> After Wayman heard this threat, he informed his companion that he was going to kill himself.<sup>19</sup> Indeed, upon his release from police custody later that night, and on the heels of Wilinsky’s threats, Wayman took the only path that he saw fit at the time—he took his own life.<sup>20</sup> Wayman’s fear of public outing was well-founded; the police officers later forced Wayman’s seventeen-year-old companion to tell his mother that he was gay.<sup>21</sup>

Marcus Wayman’s tragic suicide prompted his mother, Madonna Sterling, to file a federal civil rights action under 42 U.S.C. § 1983 against the officers, the police department, and the Borough of Minersville.<sup>22</sup> The basis of Ms. Sterling’s civil rights claim was that the police officers unconstitutionally deprived Marcus Wayman of his Fourteenth Amendment right to privacy when they threatened to “out” him to his family.<sup>23</sup> Following discovery, the defendants filed a motion for summary judgment, claiming that they were immune from suit.<sup>24</sup> The district court denied summary judgment, ruling that the doctrine of qualified immunity did not protect the officers.<sup>25</sup> On interlocutory appeal to the Third Circuit, the defendants challenged the qualified immunity ruling.<sup>26</sup> The Third Circuit found that the officers were not entitled to qualified immunity because the right to privacy in

<sup>14</sup> See *Mother Settles Lawsuit*, *supra* note 13, at 24A.

<sup>15</sup> See *Sterling*, 232 F.3d at 192.

<sup>16</sup> See *id.* at 192–93; Press Release, American Civil Liberties Union, Pennsylvania Town Must Pay \$100,000 for Threatening to Tell Teen’s Family He Was Gay (Sept. 12, 2003) [hereinafter *ACLU Press Release*], at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=13577&C=106> (last visited Jan. 26, 2005).

<sup>17</sup> See Marieclaire Dale, *Lawsuit Over Teen-ager’s Suicide Raises Issue of Gays and Privacy*, *LEGAL INTELLIGENCER*, Nov. 6, 2001, at 4.

<sup>18</sup> See *Sterling*, 232 F.3d at 193.

<sup>19</sup> *Id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *New Trial Ordered in Suit Over Teen’s Suicide*, *PENN. L. WKLY.*, July 1, 2002, at 6.

<sup>22</sup> See *Sterling*, 232 F.3d at 193.

<sup>23</sup> *Id.* Sterling’s complaint also alleged that the officers and the Borough of Minersville violated Wayman’s Fourth Amendment right against illegal arrest, his Fourteenth Amendment right to equal protection, and the Pennsylvania Constitution. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* For a discussion of the immunity doctrine as it relates to outing claims, see *infra* Part II.E.

<sup>26</sup> *Sterling*, 232 F.3d at 193.

personal information, including sexual orientation, was a clearly established constitutional right at the time of the incident.<sup>27</sup>

When the case went to trial, the jury found that the officers were not liable for any wrongdoing.<sup>28</sup> In a twenty-three page opinion, however, U.S. Magistrate Judge Arnold C. Rapoport set aside the verdict, stating that he was "convinced that the weight of the evidence in this case is against the defendants."<sup>29</sup> While the new trial was pending, the parties settled the dispute for a mere \$100,000.<sup>30</sup>

This unsettling case raises important questions about the remedial scheme available to victims of public outings, threats of disclosure, and forced disclosures of sexual orientation. Victims of forced disclosure or the threat of disclosure by government officials are not without legal recourse; 42 U.S.C. § 1983 provides a remedy for constitutional violations of this sort. The question, however, is how courts compensate victims or families in a case like *Sterling*. While the *Sterling* Court expressly held that people injured by government officials who threaten to reveal their sexual orientation are entitled to damages under federal law,<sup>31</sup> the court offered no guidance for the lower courts about how to fashion a remedy in the event that plaintiffs eventually prevailed on the merits. Thus, the holding in *Sterling* may have established a constitutional right, but the recent settlement between Madonna Sterling and the Borough of Minersville prevented the court from reaching the more complicated question of damages and how they should be calculated in such a case.

This Note focuses on the application of § 1983 to instances of outing, threats of outing, or forced disclosure of sexual orientation by public officials. Part I provides background on the Third Circuit decision in *Sterling v. Borough of Minersville* and discusses the broad remedial scheme for other constitutional tort claims brought under § 1983. Part II analyzes each of the requirements of a prima facie constitutional tort claim for public outing, highlighting particular hurdles unique to cases of this kind. In addition to the duty, breach, actual injury, and causation requirements, Part II discusses how official immunity insulates many possible defendants from suit under § 1983.

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<sup>27</sup> *Id.* at 197–98.

<sup>28</sup> *See New Trial Ordered in Suit Over Teen's Suicide*, *supra* note 21, at 16.

<sup>29</sup> *See Shannon P. Duffy, New Trial Ordered in Suit Over Man's Suicide*, LEGAL INTELLIGENCER, June 27, 2002, at 1.

<sup>30</sup> *See Elliott Grossman, Minersville Suicide Case is Settled*, MORNING CALL (Allentown, Pa.), Sept. 12, 2003, at B1. Rather than prolong the litigation, Madonna Sterling instead opted for closure, accepting a settlement far less than she may have desired. *See id.* The insurance company that was paying out the settlement for the borough was struggling financially—this was perhaps the impetus for settlement. *See id.* The police department has never officially admitted to any wrongdoing. *See id.*

<sup>31</sup> *See Sterling*, 232 F.3d at 196 (stating that "Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection").

Part III of this Note explores the possible damages available to injured parties and discusses the probability of a successful claim for each. Part IV discusses the future of recovery for public outing, and suggests litigation strategies and policy approaches to facilitate analysis under § 1983.

## I

### STERLING V. BOROUGH OF MINERSVILLE

#### A. The First Barrier to Recovery: Establishing a Constitutional Claim for Forced Disclosure Under § 1983

The Supreme Court first established the right to privacy in *Griswold v. Connecticut*,<sup>32</sup> which expanded explicit constitutional protections to include a right to privacy in intimate associations, including the “intimate relation of husband and wife and their physician.”<sup>33</sup> Over the next several years, the Court extended this right to privacy to include the right to choose whom to marry,<sup>34</sup> the right to terminate a pregnancy,<sup>35</sup> and the right to define family living arrangements without government intrusion.<sup>36</sup>

Before *Sterling*, the expanding scope of substantive due process did not include the right to be free from forced disclosures of sexual orientation. Intuitively, the rights at stake in forced disclosure situations seem linked to the rights at issue in sodomy-related case law<sup>37</sup> because both implicate the rights of homosexual individuals. But the *Sterling* Court took specific care to distinguish forced disclosure from sodomy.<sup>38</sup> In *Bowers v. Hardwick*,<sup>39</sup> the Supreme Court rejected the notion that the Constitution confers a “fundamental right to engage in acts of consensual sodomy.”<sup>40</sup> The *Sterling* Court noted that *Bowers* was not controlling because the sodomy statute in *Bowers* regulated behavior rather than status, an important distinction implicating the Supreme Court’s holding in *Robinson v. California*.<sup>41</sup> In *Robinson*, the Court found that a California law criminalizing the “status” of a narcotic addiction—that is, an individual could be arrested under this statute simply because they were addicted to a narcotic drug—violates

<sup>32</sup> 381 U.S. 479 (1965).

<sup>33</sup> *Id.* at 482.

<sup>34</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>35</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>36</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (invalidating a city housing ordinance that permitted only certain family members to live together in a single family dwelling).

<sup>37</sup> See *Lawrence v. Texas*, 539 U.S. 538 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>38</sup> See *Sterling v. Borough of Minersville*, 232 F.3d 190, 194–95 (3d Cir. 2000).

<sup>39</sup> 478 U.S. 186.

<sup>40</sup> *Id.* at 192.

<sup>41</sup> 370 U.S. 660 (1962).

both the Eighth and Fourteenth Amendments.<sup>42</sup> The *Sterling* Court agreed with this distinction.<sup>43</sup> In contrast, the Fourth Circuit—the only other circuit to rule on unwanted disclosure of sexual orientation—decided in *Walls v. City of Petersburg*<sup>44</sup> that mandatory disclosure on a police questionnaire of sexual activities with members of the same sex did not violate any constitutional right.<sup>45</sup> The *Sterling* majority distinguished the facts of that case from *Walls* and *Bowers*, which refused to grant protection to homosexual activity.<sup>46</sup> The *Sterling* Court found *Bowers* irrelevant because it dealt with homosexual conduct rather than homosexual status.<sup>47</sup> Rejecting the logic of *Bowers* and *Walls*, the *Sterling* Court instead extended the right to informational privacy<sup>48</sup> to forced disclosure of sexual orientation.<sup>49</sup>

In *Sterling*, the court drew an important distinction between the two branches of the right to privacy. The first branch, implicated in *Bowers* and overturned by *Lawrence v. Texas*,<sup>50</sup> is the right to participate in private activities such as consensual intercourse.<sup>51</sup> The second branch prohibits disclosure of personal information.<sup>52</sup> The *Sterling* Court confined its discussion to the second branch and relied on its holdings in several related cases to show that informational privacy can exist in a broad range of matters, including sexual orientation.<sup>53</sup> The right to informational privacy is the focus of this Note, particularly as it applies to 42 U.S.C. § 1983. It must be acknowledged at the outset that neither the Supreme Court nor the other circuits have tested or affirmed the *Sterling* holding as of yet. In light of the expanding right to privacy suggested by the overruling of *Bowers*, this Note treats the *Sterling* holding as the current law on the issue of forced disclosures of sexual orientation as applied to 42 U.S.C. § 1983. This presumption of unconstitutionality will allow this Note to focus

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<sup>42</sup> *Id.*

<sup>43</sup> *Sterling*, 232 F.3d at 194–95.

<sup>44</sup> 895 F.2d 188 (4th Cir. 1990).

<sup>45</sup> *Id.* at 193. The Fourth Circuit cited *Bowers* as controlling precedent, finding that if there was no protected right to engage in consensual sodomy, there was no bar to a police questionnaire asking about the applicant's sexual orientation. *Id.*

<sup>46</sup> *Lawrence v. Texas* reinforces the *Sterling* holding because it resolves any doubt as to whether *Bowers* was controlling precedent. 539 U.S. 558 (2003).

<sup>47</sup> *Sterling*, 232 F.3d at 194–95.

<sup>48</sup> The right to informational privacy is the “right not to have intimate facts concerning one's life disclosed without one's consent.” *Id.* at 195 (quoting *Barunicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999)).

<sup>49</sup> See *id.* at 196 (“Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection.”).

<sup>50</sup> 539 U.S. at 578.

<sup>51</sup> See *id.*; *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986).

<sup>52</sup> See *Sterling*, 232 F.3d at 195.

<sup>53</sup> *Id.* at 195–96 (citing *Gruenke v. Scip*, 225 F.3d 290 (3d Cir. 2000); *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1982); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980)).

on the second, arguably more perplexing (and not yet analyzed), issue raised by *Sterling*—the issue of damages.

### B. The Second Barrier to Recovery: Proving Damages

Establishing a constitutional violation is only half the battle. In order to recover, an injured party must also prove that he or she is entitled to damages under 42 U.S.C. § 1983. While § 1983 provides a civil remedy for aggrieved parties who have suffered a constitutional violation at the hands of a public official,<sup>54</sup> the statute does not set out any specific remedial structure for courts to determine exactly how to compensate an injured party. In the absence of any statutorily mandated remedial structure, the federal courts have looked to common law to fill the gaps.<sup>55</sup> Accordingly, § 1983 claims are often called “constitutional torts” because substantive constitutional rights are wedded to the remedial structure of tort law.<sup>56</sup> The Supreme Court describes § 1983 as “creat[ing] ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.”<sup>57</sup>

Section 1983 actions follow a scheme of common law tort and have many of the same requirements.<sup>58</sup> The court must first determine whether there was a duty and a breach of that duty.<sup>59</sup> To satisfy the duty and breach elements of a constitutional tort claim under § 1983, the plaintiff must establish a valid constitutional claim or fundamental right and prove that an official has violated that right.<sup>60</sup> The *Sterling* Court concluded that there was indeed a duty—respect for Marcus Wayman’s right to privacy—and a breach of that duty—the threat to disclose Wayman’s orientation to his grandfather.<sup>61</sup> Once the plaintiff establishes an affirmative duty and a breach, the court must determine if the complainant suffered any actual injury.<sup>62</sup> Fi-

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<sup>54</sup> Section 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . proper proceeding for redress.

42 U.S.C. § 1983 (2000).

<sup>55</sup> See Wayne C. Beyer, *Police Misconduct: Principles Governing Money Damages and Other Relief Under 42 U.S.C. § 1983*, 32 TORT & INS. L.J. 154, 154 (1996); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 158 (1998).

<sup>56</sup> See Wells, *supra* note 55, at 170.

<sup>57</sup> *Carey v. Phipus*, 435 U.S. 247, 253 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976)).

<sup>58</sup> See Beyer, *supra* note 55, at 154.

<sup>59</sup> See Wells, *supra* note 55, at 160.

<sup>60</sup> *Id.* at 160–61.

<sup>61</sup> See *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000).

<sup>62</sup> See Beyer, *supra* note 55, at 154–55.

nally, the court must ascertain whether there is a causal link between the actions of the defendant and the injury to the plaintiff.<sup>63</sup>

The colorful and extraordinary facts in *Sterling* may obscure the difficulties of establishing damages under § 1983. Where the plaintiff suffers a less tangible harm than in *Sterling*, such as depression or a forced resignation from work, § 1983 analysis is murky and often unmanageable.

There are various environments in which a threat of disclosure may exist, and in each, courts applying § 1983 encounter several serious hurdles. For instance, where does the causal chain begin and end? What kind of injury would suffice for recovery? These questions highlight the barriers to recovery in § 1983 litigation as applied to cases of threatened or actual forced disclosure of sexual orientation.

Even if the plaintiff proves a constitutional violation, the actual damages recoverable under § 1983 wildly vary. Within the framework of common law tort,<sup>64</sup> an aggrieved plaintiff who presents a meritorious constitutional claim may recover either nominal, compensatory, or punitive damages.<sup>65</sup> If the government official violated a constitutional right but inflicted no actual physical or emotional damages, the court will award the plaintiff only nominal damages, usually in the amount of one dollar.<sup>66</sup> Where the plaintiff suffered actual, quantifiable injury, the court may award compensatory damages.<sup>67</sup> Finally, in the more egregious cases, where the court sees fit to punish the wrongdoer, the court may award punitive damages.<sup>68</sup> While this recovery scheme seems relatively simple and easy to decipher, in the context of an outing by a public official, the process of determining which damages apply is fraught with difficulty.

## II

### CONSTITUTIONAL TORT CLAIMS FOR PUBLIC OUTING, THREATS OF OUTING, AND FORCED DISCLOSURE

#### A. Duty—The “Color of Law” Problem

Before the plaintiff may recover monetary damages in a § 1983 action, he must prove the threshold element required of any constitutional tort: the existence of a duty and a breach of that duty. The

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<sup>63</sup> *Id.* at 163.

<sup>64</sup> Some scholars believe that constitutional tort and common law tort should be treated as fundamentally different. See Wells, *supra* note 55, at 159.

<sup>65</sup> See Beyer, *supra* note 55, at 154–55.

<sup>66</sup> See *id.* at 154; see also *Carey v. Piphus*, 435 U.S. 247, 267 & n.24 (1978) (stating that nominal damages should be available for deprivations of constitutional rights and listing other courts that have approved such awards).

<sup>67</sup> See Beyer, *supra* note 55, at 154–55.

<sup>68</sup> See *id.* at 155.

language of § 1983 provides a civil remedy only when there is a deprivation of rights “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.”<sup>69</sup> The phrase “under color of” has come to mean that a plaintiff can bring a § 1983 action only when “the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.”<sup>70</sup> Furthermore, to be held liable, the defendant must have acted in his official capacity at the precise time of the act.<sup>71</sup> Thus, a plaintiff has the burden of establishing the action of some individual or entity, under color of state law,<sup>72</sup> and that this action deprived the plaintiff of a constitutional right or a federal statutory right.<sup>73</sup>

The Third Circuit held in *Sterling* that the defendant was not entitled to summary judgment, but did not expressly discuss whether officers Wilinsky and Hoban acted under color of law.<sup>74</sup> The Supreme Court has previously held, however, that an on-duty police officer, acting in an official capacity (i.e., arresting or processing a suspect), operates under the color of state law.<sup>75</sup> Thus, though not explicit, the holding in *Sterling* suggests that the Third Circuit believed that the defendants acted within their official capacity as officers of the law, thereby satisfying the “color of law” requirement.<sup>76</sup>

Marcus Wayman’s case is arguably an easy one. As officers of the law in the course of carrying out an investigation, Wilinsky and Hoban were undoubtedly state actors. By lecturing Wayman and his companion against homosexuality and threatening to disclose Wayman’s sexual orientation, the officers clearly overstepped the bounds of their authority. Where the offending party is not a police officer, however,

<sup>69</sup> 42 U.S.C. § 1983 (2000).

<sup>70</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (holding that “state action” for purposes of the Fourteenth Amendment also satisfies the “color of law” requirement under 42 U.S.C. § 1983).

<sup>71</sup> *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

<sup>72</sup> 42 U.S.C. § 1983 (2000).

<sup>73</sup> FEDERAL JUDICIAL CENTER, SECTION 1983 LITIGATION 4 (1998).

<sup>74</sup> *Sterling*, 232 F.3d at 197.

<sup>75</sup> *See Monroe v. Pape*, 365 U.S. 167, 184–85 (1961); *accord Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996).

<sup>76</sup> There is some suggestion that Officer Wilinsky may have had a more personal stake in outing Marcus Wayman. At one point, Wilinsky was the high school football coach. He was fired from this position shortly before the incident at issue. There is some evidence that Wilinsky had been seeking revenge on some of the team’s players. *See Eric Ferrero, A Mother’s Legacy for Her Son: Major Court Ruling Recognizes Rights of Rural Gays*, ACLU RURAL GAY REPORT, available at [http://www.geocities.com/mhc\\_humanrights/MinersvilleMother.htm](http://www.geocities.com/mhc_humanrights/MinersvilleMother.htm) (last visited Jan. 26, 2005). Had this fact surfaced at trial, it is unclear whether Wilinsky would have been acting under color of state law. *See Blair v. City of Pomona*, 223 F.3d 1074, 1080 (9th Cir. 2000) (suggesting that acts of misconduct within the police department directed at another officer who had reported prior misconduct were “private acts of revenge” and not performed under color of law).

it is less certain that the plaintiff will be able to satisfy the "color of law" requirement and recover under § 1983.

The "color of law" problem becomes particularly complex in the public school environment. Indeed, it is in this environment that many involuntary disclosures occur.<sup>77</sup> For instance, if a teacher in a public school determined that a student was gay and threatened to disclose that fact to others, it is not clear that the teacher would be acting under color of state law.<sup>78</sup> In fact, in another § 1983 action, the Fifth Circuit rejected a claim against a school official because there was no indication that the school official acted in a public capacity when carrying out the unconstitutional act.<sup>79</sup>

The threat of outing is a problem that pervades many facets of life,<sup>80</sup> but the threat is particularly pronounced in the school context given the unique relationship between a student and a teacher.<sup>81</sup> The teacher often has a dual role: an educator as well as an emotional support system for the student.<sup>82</sup> Given the nature of this relationship, a school official's decision to foist an opinion about homosexuality on a closeted student, threaten to disclose the student's

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<sup>77</sup> See Press Release, ACLU, Court Rules that Tragic Police Outing of Gay Teen Violated Constitutional Rights; ACLU Sees Broad Impact (Nov. 7, 2000), at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=8174&C=106> (last visited Jan. 26, 2005) (suggesting that the problem of forced disclosure of sexual orientation implicates "guidance counselors, teachers, clergy, and law enforcement officials").

<sup>78</sup> See *Smith v. Winter*, 782 F.2d 508, 512 (5th Cir. 1986) ("A purely private act is not considered to be done 'under color of' state law merely because the actor is a public official.").

<sup>79</sup> *Id.*

<sup>80</sup> See *supra* note 77.

<sup>81</sup> Although no court has had the opportunity to decide a § 1983 action based on the improper actions of school teachers or administrators, there is at least one First Amendment case related to involuntary disclosure of sexual orientation. See *McLaughlin v. Bd. of Educ.*, 296 F. Supp.2d 960 (E.D. Ark. 2003). In that case, a school official outed Thomas McLaughlin, a fourteen-year-old student at Jacksonville Junior High School in Jacksonville, Arkansas by calling McLaughlin's parents to tell them their son was gay. *Id.* at 963. McLaughlin later stated that "[m]y school forced me out of the closet when I should have been allowed to come out to my family on my own terms and when I thought it was the right time. And now the school has been trying to shove me back into it ever since." School officials later forced McLaughlin to read passages from the Bible and disciplined him for openly discussing his sexuality. *Id.* The American Civil Liberties Union is currently representing McLaughlin in his injunctive action against the school in order to protect his First Amendment right to discuss his sexuality without fear of repercussion. See Press Release, ACLU: ACLU Warns Arkansas School to Stop Persecuting Gay Student (Mar. 13, 2003), at <http://www.aclu.org/news/newsprint.cfm?ID=12082&c=106> (last visited Jan. 26, 2005). Although McLaughlin has not yet filed a § 1983 action, his case exemplifies the threat of public outing. Such examples highlight the importance of establishing a workable § 1983 scheme.

<sup>82</sup> At least one commentator suggests that "[t]oday's public schools are charged with both the moral and academic development of our young people." Margaret-Ann F. Howie, *A Student's Constitutional Rights in the Public School Setting*, in *SWORD AND SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983*, at 494 (Mary Massaron Ross, ed., 1998).

orientation, or, worse, actually disclose that information to others, can have devastating consequences.<sup>83</sup>

While there is a dearth of case law regarding a teacher or administrator's disclosure of a student's sexual orientation, there is no shortage of § 1983 cases brought against teachers and administrators in other contexts.<sup>84</sup> Under this large body of law, a public school official who discloses or threatens to disclose a student's sexual orientation will only be found to have acted under color of state law if the official made the disclosure or threat of disclosure while carrying out official responsibilities.<sup>85</sup> Compounding the analytic murkiness of the school environment, it is unclear whether the actions of a private school official could ever fulfill the "color of law" requirement of § 1983.<sup>86</sup> Most courts answer this question in the negative<sup>87</sup> unless the state has "insinuated itself" with the school in such a way that it can be considered a "joint participant" in the action.<sup>88</sup>

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<sup>83</sup> One need not consider the maliciousness of the act. The teacher, of course, may be full of good intentions, but the threat of disclosure would nonetheless breach the student's right to privacy under *Sterling* if the teacher knew or should have known the statements violated clearly established law.

<sup>84</sup> See, e.g., *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 n.4 (5th Cir. 1994) (finding that a teacher's sexual misconduct with a student was under color of law where he took advantage of his position as teacher and coach and where acts in question occurred on school grounds during school hours); *Black ex rel. v. Ind. Area Sch. Dist.*, 985 F.2d 707, 710-11 (3d Cir. 1993) (holding that a school bus driver was not a state actor for purposes of a § 1983 action against him); *D.T. ex rel. by M.T. v. Indep. Sch. Dist. No. 16*, 894 F.2d 1176 (10th Cir. 1990) (holding that a teacher who sexually molested students at non-school activities during the summer vacation was not a state actor and therefore was not acting under color of state law for purposes of a § 1983 action).

<sup>85</sup> In *Doe v. Taylor Independent School District*, the Fifth Circuit took a broad approach to § 1983 actions against a school official. 15 F.3d at 452 & n.4. The court, citing the Tenth Circuit's opinion in *D.T.*, found that if there is a real nexus between the activity out of which the constitutional violation occurs and the teacher's duties and obligations as a teacher, the defendant is said to have acted under color of law. *Id.*

<sup>86</sup> 42 U.S.C. § 1983 (2000).

<sup>87</sup> See generally *Rendell-Baker v. Kohn*, 457 U.S. 831 (1982) (holding that state funding and regulation are insufficient to establish state action); *McKeesport Hosp. v. Accreditation Council for Grad. Med. Educ.*, 24 F.3d 519 (3d Cir. 1994) (determining that a private medical school accrediting body was not a state actor even though it derived its power from a state statute and a state official accompanied private surveyors in each school investigation); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) (holding that state involvement with regard to financial aid does not turn a private university into a state actor); *Logiodice v. Trustees of Maine Cent. Inst.*, 170 F. Supp. 2d 16 (D. Me. 2001) (holding that a private high school funded by a local public school was not a state actor); *Morgan v. St. Francis Prep. Sch.*, 326 F. Supp. 1152 (C.D. Pa. 1971) (finding no state action in the expulsion of students at a private preparatory school with no significant financial connection to the State); *Grossner v. Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) (holding that neither receipt of money from the state nor furthering the public interest through education is sufficient to make a private university into a state actor).

<sup>88</sup> See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-26 (1961); *Milonas v. Williams*, 691 F.2d 931, 939-40 (10th Cir. 1982) (finding private school for behaviorally problematic children was a state actor because the State involuntarily placed students at the facility).

## B. Breach—The *Sterling* Precedent

The second element of the complainant's prima facie § 1983 claim is the deprivation of a federal constitutional or statutory right.<sup>89</sup> Here, future litigants benefit most from the *Sterling* holding that the officers' threats amounted to a serious and actionable deprivation of the constitutional right to informational privacy.<sup>90</sup> In fact, the court stated that "Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection."<sup>91</sup> Thus, *Sterling* is quite clear that an individual has a broad right to be free from disclosure without consent of intimate details.<sup>92</sup>

This right to privacy is certainly not absolute.<sup>93</sup> An actor may justify curtailing the right to privacy by setting forth a "genuine, legitimate, and compelling" state interest in disclosing another's sexual preference.<sup>94</sup> In *Sterling*, the defendants offered no state interest, and the court thus quickly dismissed that defense.<sup>95</sup> When *Sterling* was decided in 2000, the defendants could have argued that morality was a valid state interest which justified Wilinsky's threat to disclose Wayman's sexuality.<sup>96</sup> In the wake of *Lawrence v. Texas*, however, such a defense would be unavailing.<sup>97</sup> Absent the morality argument, it seems unlikely that a defendant would be able to maintain any genuine state interest.<sup>98</sup> This analysis highlights *Sterling's* limitations: in fu-

<sup>89</sup> See FEDERAL JUDICIAL CENTER, *supra* note 73, at 4.

<sup>90</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190, 197 (3d Cir. 2000).

<sup>91</sup> *Id.* at 196.

<sup>92</sup> *See id.* at 195 ("[T]he right not to have intimate facts concerning one's life disclosed without one's consent . . . is a venerable one whose constitutional significance we have recognized. . . ." (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999))).

<sup>93</sup> *See id.* at 196 (recognizing that a state interest may be so significant as to override the right to privacy).

<sup>94</sup> *Id.* (citing *Doe v. Southeastern Pa. Transp. Auth.*, 72 F.3d 1133, 1141 (3d Cir. 1995)).

<sup>95</sup> *Id.*

<sup>96</sup> The morality argument stems from *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>97</sup> *Lawrence* held that morality was never a sufficiently compelling interest to satisfy Equal Protection analysis. *See* 539 U.S. at 578. Although the Supreme Court did not reach the issue of whether the Texas sodomy law would survive substantive due process analysis, Justice Kennedy, writing for the majority, expressed confidence that no law of this sort could pass muster in a democratic society. *See id.*

<sup>98</sup> Some defendants could argue that personal security—that is, gay individuals are inherently "safer" when part of a group, rather than feeling socially and sexually isolated—is a significant state interest justifying disclosure. *Cf.* Warren Friedman, *Volunteering and the Decline of Violent Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1453, 1464 (1998) (discussing how individuals in poor communities who work together and engage in "collective efficacy" create generally safer neighborhoods). It is true that there are often tangible social support benefits to coming out. *See* Linda D. Garnets & Anthony R. D'Augelli, *Empowering Lesbian and Gay Communities: A Call for Collaboration with Community Psychology*, 22 AM. J. CMTY. PSYCHOL. 447, 454 (1994). Such benefits, however, are often confined only to urban or other metropolitan areas where there are specific neighborhoods with large populations of gays and lesbians and where there is a social network and infrastructure that is support-

ture § 1983 actions, *Sterling* can be cited only for the threshold proposition that an official had and breached a duty. In addition, *Sterling* has limited jurisdictional reach—until addressed by other circuits or the Supreme Court, there may be no constitutional breach of informational privacy outside of the Third Circuit.

### C. Injury—The Problem of Cognizable Harm

An issue closely linked to the determination of damages<sup>99</sup> is how to assess the injury that the state actor inflicted on the aggrieved party. According to the Supreme Court, “the abstract value of a constitutional right may not form the basis for § 1983 damages.”<sup>100</sup> Certain damages are available under § 1983 only if the action caused some sort of compensable injury.<sup>101</sup> Thus, a court must be able to identify some cognizable injury before the plaintiff may recover,<sup>102</sup> despite the difficulty of doing so.

#### 1. *Emotional Distress*

Although Madonna Sterling could easily make out a case for injury—the death of her son—any variation on the *Sterling* facts yields significantly more nebulous results. For instance, if the plaintiff suffers only emotional strain following an official’s threats, it is unclear to what extent there is a compensable injury. As in any tort claim, emotional distress is notoriously difficult to prove.<sup>103</sup> Integral to any claim of emotional distress is empirical and physical data tracing the psychological effects of the challenged acts. In the growing academic dis-

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ive and helpful for those recently out of the closet. *See id.* Therefore, it is unlikely that one could successfully argue a valid security or community interest because the disclosure of one’s sexual identity in rural locations such as Minersville, Pennsylvania, often does more harm than good. *See* James Donald Smith, *Working With Larger Systems: Rural Lesbians and Gays*, in *RURAL GAYS AND LESBIANS: BUILDING ON THE STRENGTHS OF COMMUNITIES* 13–21 (James Donald Smith & Ronald J. Mancoske eds., 1997) (discussing rural gay individuals’ sense of social rejection and internalized homophobia); Gregory M. Here et al., *Correlates of Internalized Homophobia in a Community Sample of Lesbians and Gay Men*, 2 J. GAY & LESBIAN MED. ASS’N 17–25 (1998) (discussing the relationship between gays, self-esteem, and mental health problems). In fact, disclosure of one’s sexual orientation might, in fact, accomplish the opposite, posing a grave threat to the gay individual’s personal safety. For instance, a recent study measuring the frequency of anti-gay harassment in schools found that 84% of gay students had been verbally harassed in school, 39% of gay students reported that they had been physically harassed, and 64% stated that they felt unsafe at their school because of their sexual orientation. GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, *THE 2003 NATIONAL SCHOOL CLIMATE SURVEY* 12–15 (2004).

<sup>99</sup> For a more in-depth discussion of damages, see *infra* Part III.

<sup>100</sup> *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986).

<sup>101</sup> *See Carey v. Phipus*, 435 U.S. 247, 255 (1978).

<sup>102</sup> *See id.* at 255.

<sup>103</sup> Courts have regarded emotional distress as “too subtle and speculative to be capable of a measurement by any standard known to the law.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 11, at 55 (1941) (internal quotation marks omitted).

course regarding the psychology of coming out of the closet,<sup>104</sup> the focus is placed on the *voluntary* disclosure of sexual orientation, including the process, the aftermath, and the effects on loved ones.<sup>105</sup> There is a growing body of work, however, analyzing the same psychological effects in the more nuanced area of unwanted outing or forced disclosure.<sup>106</sup>

For many individuals, the threat of forced disclosure means revealing and explaining a facet of life that they have worked very hard to conceal for many years.<sup>107</sup> While much of the gay community would certainly extol the virtues of coming out, many individuals, particularly those in rural, conservative, or ethnically or religiously intolerant environments, prefer to remain in the closet.<sup>108</sup> For these individuals, a threat of forced disclosure is even more distressing.<sup>109</sup> Individuals who are presently unable to accept and reveal their homosexuality "may suffer serious damage to their self-esteem if forced to come out before they are ready, and ultimately may retreat even further into the closet."<sup>110</sup> Thus, the emotional strain is undeniably

<sup>104</sup> The expression "coming out" or "coming out of the closet" is a colloquialism used throughout this Note as synonymous with "voluntary disclosure of one's own sexual identity." I use it here because of the active nature of the verb "to come," suggesting an affirmative step to reveal sexual preference; in contrast, involuntary disclosure does not result in "coming out of the closet" because there was no affirmative step taken by the individual—it was an entirely passive and unwanted factual disclosure.

<sup>105</sup> See, e.g., Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21 LAW & INEQ. 65 (2003).

<sup>106</sup> See, e.g., Susanne M. Stronski Huweiler & Gary Remafedi, *Adolescent Homosexuality*, in 45 ADVANCES IN PEDIATRICS 107, 117–20 (Lewis A. Barness et al. eds., 1998) (discussing the stages of coming out of the closet and how premature disclosure can create emotional stress).

<sup>107</sup> There is evidence that some individuals will never choose to come out of the closet. See generally Anthony R. D'Augelli et al., *Lesbian, Gay, and Bisexual Youths and Their Families: Disclosure of Sexual Orientation and its Consequences*, AM. J. ORTHOPSYCHIATRY, July 1998, at 361–71 (concluding that gay, lesbian, and bisexual individuals who assume their families would react negatively to disclosure choose to remain in the closet).

<sup>108</sup> Until recently, many gay men and women chose to keep their sexuality secret because of the negative consequences of revealing one's sexual orientation. Indeed, the "attitude [was] reinforced by the presence of sodomy laws and widespread social and religious disapprobation." David H. Pollack, Comment, *Forced Out of the Closet: Sexual Orientation and the Legal Dilemma of "Outing"*, 46 U. MIAMI L. REV. 711, 717 (1992) (citations omitted).

<sup>109</sup> The degree of emotional trauma felt by gay men and women who are *not* in the position of being "outed" is very high. In fact, in one survey, one in every four lesbians and one in every five gay men who responded to the survey attempted suicide at least once. MARSHALL KIRK & HUNTER MADSEN, *AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90s*, at 60 (1989). When asked why they did so, over half responded that they did so because of the unhappiness they felt about being gay and the difficulty they experienced trying to fit into a hostile world. See *id.* Therefore, if the difficulty of fitting into a hostile environment is chief among the psychological concerns of gay men and women, this fear is only exacerbated by unwanted disclosure of sexual preference.

<sup>110</sup> Pollack, *supra* note 108, at 721 (citing M. SCOTT PECK, *THE ROAD LESS TRAVELED* 61 (1978)).

great. Still, the possible lack of physical symptoms or visible scars makes it difficult to quantify the harm suffered in order to calculate damages.<sup>111</sup>

## 2. *Social and Professional Harm*

Injury following unwanted disclosure of sexual orientation may extend beyond emotional strain to include social and professional risks.<sup>112</sup> A court entertaining a § 1983 claim should consider the harm that forced disclosure has on the individual's relationships within the community, with family, or at school. There are a number of social and professional harms that may result from an individual's decision to come out of the closet, including dismissal from a job,<sup>113</sup> an uncomfortable workplace, or even a risk to the gay individual's personal safety.<sup>114</sup> Involuntary disclosure of a gay person's sexual orientation only exacerbates these risks.

While these social and professional risks are quite real, the injury from involuntary disclosure is nonetheless speculative, and few courts will likely fashion a remedy on the basis of speculative injury.<sup>115</sup> This factor is yet another hurdle to recovery in § 1983 cases.

## D. Causation—The Proximate Cause Problem

As in common law tort, the plaintiff in a § 1983 action has the burden of establishing a causal link between the injury and the unlaw-

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<sup>111</sup> Federal courts can ease the difficulty of quantifying emotional injuries by importing a tort-law structure of presumed damages. See *infra* Part IV.A. While it may be difficult to assign a monetary value to this harm, it should pose no greater challenge than quantifying lost life in a wrongful death claim. A jury must decide the precise value of either form of nonmonetary harm. See generally Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 804–05 (1995) (proposing a method for calculating nonmonetary awards by quantifying how much a reasonable person would pay to eliminate the risk that caused the injury).

<sup>112</sup> This is not pure conjecture. Respondents to a survey gauging the feelings of heterosexuals towards homosexuals revealed that 52% stated that they would prefer not to work with homosexuals, 22% believe it should be completely legal to prevent homosexuals from taking advantage of job and housing opportunities, 35% admitted that they were uncomfortable around gays, and 33% avoid places where gay men and women might be present. KIRK & MADSEN, *supra* note 109, at 82.

<sup>113</sup> Although many employers have implemented anti-discrimination policies that prevent a supervisor from dismissing an employee solely on the basis of sexual orientation or the employee's perceived sexual orientation, most still do not have such policies. See HUMAN RIGHTS CAMPAIGN, RESOURCE GUIDE TO COMING OUT 29 (2004), available at <http://www.hrc.org/Template.cfm?Section=Resources2&Template=/ContentManagement/ContentDisplay.cfm&ContentID=22631> (last visited Jan. 26, 2005).

<sup>114</sup> See generally MICHELANGELO SIGNORILE, *OUTING YOURSELF* 137–54 (1995) (warning that it is crucial to assess the quality and nature of the workplace before coming out of the closet, as the failure to do so may result in an uncomfortable workplace or even physical violence).

<sup>115</sup> See PROSSER, *supra* note 103, § 11, at 55.

ful conduct.<sup>116</sup> Specifically, the plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm[ed] him."<sup>117</sup> Further, the plaintiff must establish a reasonable causal link between the defendant's conduct and the constitutional right deprived.<sup>118</sup> Moreover, where this relationship does not exist, the plaintiff may not even have standing in federal court in an action against that defendant.<sup>119</sup>

The causal link in *Sterling* is self-evident. Marcus Wayman left a note for his grandfather saying: "I'm sorry Grandpa, I found my future. I won't let everyone's life be ruined by mine."<sup>120</sup> The last line of Marcus's note, expressing the fear that disclosure would harm not only his own life, but the lives of his family, provides a clear causal connection. In reality, however, most cases probably do not have this sort of unmistakably expressed statement to satisfy the causal requirement.

One significant problem in determining causation is establishing proximate cause. An intervening event in the causal chain of events destroys proximate cause,<sup>121</sup> as does a situation in which the consequences of the constitutional deprivation is wholly unforeseeable.<sup>122</sup> For instance, if an officer threatens to disclose an individual's sexual orientation and then, prior to doing so, a third party reveals the individual's sexuality, the initial threat may not be seen as the proximate cause of the injury.<sup>123</sup>

<sup>116</sup> See, e.g., *Dixon v. Burke County*, 303 F.3d 1271, 1275 (11th Cir. 2002) (holding that the plaintiff failed to meet the causal requirements because she did not establish any link between the hiring practice and the sexual discrimination).

<sup>117</sup> *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

<sup>118</sup> See *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976); *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999).

<sup>119</sup> The causation requirement for standing in federal court itself constitutes an enormous body of law that exceeds the scope of this Note. It is sufficient to point out that the same causal difficulties arising in a § 1983 claim may, under certain circumstances, prevent the plaintiff from obtaining standing in federal court. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998); see also M. DAVID GELFAND, CONSTITUTIONAL LITIGATION UNDER SECTION 1983, § 6-4(B), at 525 (1996) (discussing *Lujan's* requirement of "a causal connection between the injury and the conduct complained of—that is, the injury must be fairly traceable to defendant's actions; it cannot be the result of independent actions by a third party who is not before the court").

<sup>120</sup> See *Stefanakos*, *supra* note 1, at 32.

<sup>121</sup> See, e.g., *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) ("An 'unforeseen and abnormal' intervention . . . breaks the chain of causality, thus shielding the defendant from [§ 1983] liability." (citation omitted)).

<sup>122</sup> See, e.g., *Dodd v. City of Norwich*, 827 F.2d 1, 6 (2d Cir. 1987) ("[A] policy [is] a proximate cause . . . if intervening actions were within the scope of original risk and therefore foreseeable." (internal quotation marks and citations omitted)).

<sup>123</sup> Cf. *Hygb v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (holding in a false imprisonment action against a police officer that the causal chain extended only as far as plaintiff's arraignment, and that any subsequent injuries must be remedied in a separate claim

In addition, a plaintiff may satisfy the “but-for” test of causation but fail to establish proximate cause because the consequences were nonetheless unforeseeable.<sup>124</sup> In this way, a constitutional tort is no different from a common law tort; the litigant must establish that the consequences of the violation were foreseeable to the defendant at the time the defendant acted.<sup>125</sup> This situation could arise where, for instance, the defendant threatened to disclose the plaintiff’s sexuality, triggering a preexisting depression and a chain of emotional responses.

Even though the proximate cause requirement allows courts to analyze constitutional torts in the same way as common law torts, scholars are split on the question of whether courts should do so. Professor Michael Wells suggests that there are different interests at stake in constitutional tort claims, where more weight is given to the plaintiff’s interest in recovery and there is a special interest in deterrence.<sup>126</sup> To this end, Professor Wells supports the “weaker proximate cause limits on liability” that constitutional torts require as opposed to the more stringent approach of common law tort.<sup>127</sup>

By contrast, Professor John Jeffries suggests limiting liability for constitutional torts because the goal of § 1983 is simply to compensate plaintiff for the wrong perpetrated against them. As Professor Jeffries sees it, “[i]njury unrelated to the constitutional risk [should] be

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against the offending parties); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (finding that the intervening acts of the prosecutor, grand jury, judge, and jury broke the chain of causation that formed the basis of plaintiff’s unreasonable seizure claim).

<sup>124</sup> See, e.g., *Johnson v. Greer*, 477 F.2d 101, 107 (5th Cir. 1973) (holding that an officer acting under color of law should only be liable for reasonably foreseeable injuries).

<sup>125</sup> As one commentator notes, there is limited Supreme Court guidance on this matter. See Wells, *supra* note 55, at 211. The only case arguably on point, *Martinez v. California*, 444 U.S. 277, 284–85 (1980), found that injuries inflicted five months after a parolee’s release can not be attributed to the parole officials in a § 1983 action. See Wells, *supra* note 55, at 53 n.240. Several lower courts treat this case as one of proximate cause. See, e.g., *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) (citing *Martinez* and holding that unforeseeable private acts break the proximate cause chain); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 733 (8th Cir. 1993) (citing *Martinez* and finding that an assault on a mentally retarded student was too remote a consequence of defendant’s actions to be foreseeable); *Arnold v. Int’l Bus. Mach. Corp.*, 637 F.2d 1350, 1355–56 (9th Cir. 1981) (noting *Martinez*’s distinction between state action and proximate cause).

<sup>126</sup> Wells, *supra* note 55, at 212.

<sup>127</sup> *Id.* Wells’s theory is that because constitutional torts involve the deprivation of a constitutional right, the plaintiff’s interest in recovery is greater. *Id.* Furthermore, the goal of § 1983 actions is to deter future wrongdoing. *Id.* More exacting proximate cause standards make this goal harder to achieve. See *id.* Wells does not contend, however, that courts eliminate proximate cause entirely from constitutional tort analysis. He simply suggests “putting a thumb on the scales in the plaintiff’s favor.” *Id.* Wells endorses the approach taken by the Second Circuit in *Warner v. Orange County Department of Probation*, 115 F.3d 1068 (2d Cir. 1997). See Wells, *supra* note 55, at 212–13. Under this approach, because the defendant could not have foreseen the plaintiff’s emotional fragility, he would not be held liable for plaintiff’s depression—or the resulting consequences. *Warner*, 115 F.3d at 1071 (citing *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989)).

treated as all the other myriad harms that result from government action—as a necessary cost of living in an organized society.”<sup>128</sup> Jeffries argues that, when a plaintiff suffers a harm different from that which the constitutional provision aims to prevent, the § 1983 recovery scheme breaks down.<sup>129</sup>

Jeffries’s approach raises specific problems for recovery in disclosure of sexual orientation cases. Substantive due process, however conceived,<sup>130</sup> was not intended to protect individuals from the speculative injuries associated with disclosure. Rather, the Fourteenth Amendment prevents states from depriving “any person of life, liberty, or property, without due process of the laws.”<sup>131</sup> Under the Jeffries approach, if the plaintiff’s injury—emotional distress, for example—is unrelated to the explicit textual protections of the Constitution, the plaintiff will be unable to establish proximate cause. If federal courts adopt this standard of proximate cause, future litigants in forced disclosure cases would have little chance to recover damages for their injuries.

#### E. Immunity—The Qualified or Absolute Immunity Problem

A § 1983 claim may also raise the question of whether a defendant is entitled to qualified or absolute immunity.<sup>132</sup> The Supreme Court employs a “functional approach” in its immunity analysis, “exam[in]g the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . seek[ing] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.”<sup>133</sup> Using this approach, the Court answers the immunity question not according to the title or position that the defendant holds, but by examining the nature of the defendant’s actions.<sup>134</sup> The Court will offer absolute immunity to a government official performing an official act, regard-

<sup>128</sup> John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1484 (1989).

<sup>129</sup> *Id.* at 1481. Jeffries offers the following hypothetical example: Suppose that A owns and operates an adult bookstore that has peep shows, where patrons can pay money to see a live nude sex show. The town shuts down the operation, invoking an unconstitutionally broad zoning ordinance that prevents “live entertainment.” A suffers great economic loss. His injury, the economic loss, is not the sort of injury that the First Amendment is meant to prevent, so A should not recover. *Id.*

<sup>130</sup> See generally Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 539–43 (1990) (offering a broad overview of the Supreme Court’s substantive due process jurisprudence).

<sup>131</sup> U.S. CONST. amend. XIV, § 1.

<sup>132</sup> See Robert F. Brown, *Individual Immunity Defenses Under § 1983*, in *SWORD & SHIELD REVISITED: A PRACTICAL APPROACH TO SECTION 1983*, *supra* note 82, at 510, 513.

<sup>133</sup> *Forrester v. White*, 484 U.S. 219, 224 (1988).

<sup>134</sup> See Brown, *supra* note 132, at 514.

less of whether the act is constitutional or legal.<sup>135</sup> On the other hand, if the government official is performing a discretionary function, the official is entitled to qualified immunity only if “the[ ] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>136</sup>

In analyzing Officer Wilinsky’s qualified immunity claim, the *Sterling* Court first had to “determine if the plaintiff has alleged a deprivation of a clearly established constitutional right.”<sup>137</sup> If a violation exists, a defendant does not have a claim of qualified immunity if “the unlawfulness of the action would have been apparent to a reasonable official.”<sup>138</sup> Based on this framework, the *Sterling* Court had no trouble finding that Wilinsky was not entitled to qualified immunity because he “could not reasonably have believed that his questioned conduct was lawful in light of the established law protecting privacy rights.”<sup>139</sup>

Dissenting in *Sterling*, Judge Stapleton argued that Wilinsky’s conduct was not contrary to clearly established law.<sup>140</sup> The dissent cited *Walls v. City of Petersburg*,<sup>141</sup> the only prior case to discuss the privacy interest in sexual orientation<sup>142</sup>—a case in which the Fourth Circuit held that there was no constitutionally protected right to privacy in one’s sexual orientation.<sup>143</sup> In light of *Walls*, the dissent believed that Wilinsky was entitled to qualified immunity from suit.<sup>144</sup>

<sup>135</sup> *Id.*

<sup>136</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Prior to *Harlow*, qualified immunity analysis embodied both an objective (reasonable grounds for the defendant to believe the conduct was lawful) and subjective (defendant’s belief in good faith) component. See *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974). *Harlow* eliminated the good faith test altogether. See *Harlow*, 457 U.S. at 818. At least one scholar has argued that the elimination of the subjective component is due to the often high costs of § 1983 actions. See Michael T.G. Long, Comment, *The Replying Game: Making the Case for Adopting the Fifth Circuit’s Use of Particularized Replies in § 1983 Actions*, 34 SETON HALL L. REV. 389, 409 (2003) (noting that the good faith analysis inevitably yielded a “genuine issue [of] material fact,” which prevented summary judgment under Federal Rule of Civil Procedure 56(c)). Costs of litigation are certainly a concern for the position taken in this Note, which advocates an expansive view of § 1983 in order to establish coverage for disclosure claims. Judicially crafted remedial structures in hard-to-prove constitutional tort claims can further alleviate these costs. See *infra* Part IV.A.

<sup>137</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000).

<sup>138</sup> *Id.* (citing *Assaf v. Fields*, 178 F.3d 170, 174 (3d Cir. 1999)).

<sup>139</sup> *Id.* at 198. The court did not care that the action had not previously been held unlawful. See *id.* It reached this conclusion because the nature of the information was clearly private and confidential and because the broad right to privacy itself is well-settled. *Id.*

<sup>140</sup> *Id.* (Stapleton, J., dissenting).

<sup>141</sup> 895 F.2d 188 (4th Cir. 1990).

<sup>142</sup> See *Sterling*, 232 F.3d at 198 (Stapleton, J., dissenting).

<sup>143</sup> *Walls*, 895 F.2d at 193.

<sup>144</sup> *Sterling*, 232 F.3d at 198 (Stapleton, J., dissenting).

Because the Supreme Court has not resolved the *Sterling-Walls* split, a defendant may still raise qualified immunity as a defense in other circuits. The possible applicability of both absolute and qualified immunity to § 1983 actions poses an enormous hurdle to recovery. In addition, while Officer Wilinsky was not able to assert immunity as a defense, other situations of forced disclosure might permit such a defense even in the Third Circuit. For example, suppose that a teenager involved in a bitter custody dispute between his parents tells the judge *in camera* that he is gay in an effort to explain why he would rather live with one parent as opposed to the other. If the judge reveals this information during the proceedings, to explain why he awards custody to one parent over the other, the teen will not be able to assert a § 1983 claim against the judge because judges are immune from suits of this kind.<sup>145</sup> As a result of the immunity doctrine, and the unsettled (or, rather, not yet “clearly established”<sup>146</sup>) state of the law on informational privacy, plaintiffs in § 1983 actions may not be able to recover from a sizable number of potential defendants.

### III

#### TYPES OF DAMAGES AND THEIR APPLICABILITY TO FORCED DISCLOSURE, THREATS OF OUTING, AND ACTUAL PUBLIC OUTING

##### A. Compensatory Damages

On September 10, 2003, Madonna Sterling settled her claim against the Borough of Minersville and Officers Wilinsky and Hoban for \$100,000.<sup>147</sup> Ms. Sterling’s decision to settle the case ended the ordeal, but assured that the lower court would never reach the complex question of damages. Had the litigation continued, the court would have addressed the question of what damages an aggrieved party can recover for a threatened disclosure of private information.

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<sup>145</sup> Judges have absolute immunity by virtue of common law and the Civil Rights Act of 1871. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) (exempting judges from civil liability for judicial acts). The Supreme Court recognized absolute judicial immunity for damages under § 1983 in *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967) (“[T]he immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine [when it enacted § 1983].”). Absolute judicial immunity has only two limitations; both acts taken in clear absence of a court’s jurisdiction (although immunity does extend to acts that are in mere excess of jurisdiction) and non-judicial acts do not receive protection. See *Stump v. Sparkman*, 435 U.S. 349, 356–64 (1978); *Brown*, *supra* note 132, at 519. Although judges do not enjoy absolute immunity for administrative or executive authority (as opposed to judicial authority), they are still afforded qualified immunity for their acts in those capacities. See *Long*, *supra* note 136, at 407. In the hypothetical example presented above, the judge is clearly acting within his judicial capacity and within the bounds of the court’s jurisdiction; thus, he is entitled to absolute immunity.

<sup>146</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>147</sup> See *supra* note 30.

This section addresses the remedial framework that a court of law would encounter had Sterling's suit continued and then considers the merits of a claim for each type of damages.

Courts award compensatory damages in common law tort cases in order to compensate plaintiffs for injuries resulting from a defendant's breach of some duty owed to the plaintiff.<sup>148</sup> Federal courts have followed the common law in § 1983 procedural and substantive due process claims.<sup>149</sup> Unlike common law tort claims, however, constitutional tort claims rarely involve physical injury, making "tangible damages" relatively small.<sup>150</sup> Therefore, it is difficult in constitutional tort cases to quantify the harm in order to determine how to make an injured party whole through compensatory damages.

As discussed above,<sup>151</sup> perhaps the most difficult harm to quantify for purposes of a § 1983 action is emotional distress. This difficulty stems from the fact that "[e]motional harms are unquantifiable, irrational, inconsistent, and not easily subjected to a cause and effect analysis [and] . . . [o]ur system of jurisprudence tends to be concerned with quantifiable, rational, consistent and predictable results."<sup>152</sup> Yet, an emotional response is the most likely harm to result from the threat of or actual disclosure of one's sexual orientation.<sup>153</sup> These measurement problems ensure that the emotional distress associated with disclosure of sexual orientation is not likely to be a compensable injury in a § 1983 claim.<sup>154</sup>

Few constitutional tort claimants are successful in establishing compensable emotional distress claims,<sup>155</sup> and, where successful, the plaintiff's recovery is often small.<sup>156</sup> Perhaps this trend can be fairly attributed to the judicial fear that recognizing compensatory damages for emotional distress would "open the floodgates of litigation, giving

<sup>148</sup> See generally Wells, *supra* note 55, at 214 (discussing the damages associated with the common law torts).

<sup>149</sup> See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311-12 (1986) (finding that the complainant is only entitled to quantifiable damages based on actual injuries suffered by the deprivation of substantive due process); *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (holding that if the complainant's procedural due process claim succeeds, on remand the complainant should recover only nominal damages).

<sup>150</sup> See Wells, *supra* note 55, at 215-16. The exceptions, of course, are cases like *Sterling*, in which the constitutional violation results in more serious harm, such as loss of life.

<sup>151</sup> See *supra* Part II.C.1.

<sup>152</sup> Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71, 78-79 (1993) (citation omitted).

<sup>153</sup> See Wells, *supra* note 55, at 215-16.

<sup>154</sup> See *supra* Part II.C.1.

<sup>155</sup> See, e.g., *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996); *Keenan v. City of Philadelphia*, 983 F.2d 459 (3d Cir. 1992).

<sup>156</sup> See *Coleman*, 87 F.3d at 1507 (awarding only \$10,000 for the emotional distress associated with a sex discrimination claim).

rise to liability grossly disproportionate to wrongdoing.”<sup>157</sup> According to feminist theory, the perceived gendered nature of emotional distress claims as “‘subjective’ and ‘intangible,’ which trivializes and marginalizes them[,]” makes courts less likely to award damages.<sup>158</sup> Regardless of the justification, without constitutional tort reform, a court is unlikely to award damages in a new and controversial § 1983 action for violation of informational privacy.<sup>159</sup> Indeed, the Supreme Court indicated in *Carey v. Phipus* that “although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, . . . neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages.”<sup>160</sup> Even in the substantive due process claim established by *Sterling*, the court appeared to be providing a constitutional right without a related remedy.<sup>161</sup>

## B. Punitive Damages

In more extreme cases, when a court sees fit to punish an official for their wrongdoing, it may award plaintiffs punitive damages in their § 1983 actions.<sup>162</sup> Courts award punitive damages only where the defendant was “motivated by evil motive or intent, or when [the defendant’s act] involves reckless or callous indifference to the federally protected rights of others.”<sup>163</sup> Punitive damages hold particular value in forced disclosure cases because they are available when a defendant maliciously violates the plaintiff’s constitutional rights, but the plaintiff is unable to prove a compensable injury.<sup>164</sup>

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<sup>157</sup> Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772, 814 (1985).

<sup>158</sup> See Hepler, *supra* note 152, at 80.

<sup>159</sup> See *infra* Part IV.A.

<sup>160</sup> *Carey v. Phipus*, 435 U.S. 247, 264 (1978).

<sup>161</sup> In cases in which the plaintiff has established a constitutional violation but there is no cognizable injury to remedy, the courts will often award nominal damages, typically in the amount of one dollar. See *id.* at 267. It is irrelevant that a court may view a particular substantive due process as a particularly important one. Since compensatory damages seek to compensate the plaintiff for actual injuries, the damages in such a case will not be any higher. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (“[D]amages based on the abstract ‘value’ or ‘importance’ of constitutional rights are not a permissible element of compensatory damages in [§ 1983] cases.”).

<sup>162</sup> See, e.g., *King v. Macri*, 993 F.2d 294, 297 (2d Cir. 1993) (noting that compensatory damages are available even in absence of compensatory damages); *Hollins v. Powell*, 773 F.2d 191, 197–98 (8th Cir. 1985) (discussing the use of punitive damages in § 1983 actions).

<sup>163</sup> *Smith v. Wade*, 461 U.S. 30, 56 (1983).

<sup>164</sup> See DAVID W. LEE, 2004 HANDBOOK OF SECTION 1983 LITIGATION § 10.02[A] (2004); see also *Carlson v. Green*, 446 U.S. 14, 22 (1980) (granting punitive damages in a case brought on behalf of deceased federal prisoner for Eighth Amendment violation); *Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir. 1991) (upholding a jury award of punitive damages in a police brutality case).

While punitive damages are theoretically available in claims for forced disclosure, recovering punitive damages is difficult.<sup>165</sup> Even though there is some indication that Officer Wilinsky harbored malicious intent toward Marcus Wayman,<sup>166</sup> this is not always going to be the case—particularly because many individuals believe that involuntarily disclosing another's sexual orientation is helpful.<sup>167</sup> For example, anti-homosexual sentiment is often linked to religious beliefs,<sup>168</sup> so potential defendants with strong religious convictions may believe that an individual's sexual orientation should be revealed for religious reasons, without harboring any malicious or evil intent.<sup>169</sup> In these cases, the plaintiff bears the burden of proving that the defendant manifested some reckless or callous indifference to the protected right to privacy.<sup>170</sup> This has not yet been challenged in a § 1983 action, and it remains to be seen how the courts would respond to such a claim. Therefore, punitive damages will most likely be available only in disclosure cases where the defendant has no reason to divulge the information other than his pure distaste for homosexuality.

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<sup>165</sup> There is another hurdle to recovering punitive damages in § 1983 cases. While § 1983 does apply to municipalities, complainants may not recover punitive damages from them. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259–60 (1981) (commenting that “[j]udicial disinclination to award punitive damages against a municipality has persisted to the present day”). Even outside the context of § 1983 actions, most jurisdictions do not award punitive damages against municipalities. See EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.18a (3d rev. ed. 1977).

<sup>166</sup> See *supra* note 76.

<sup>167</sup> See Pollack, *supra* note 108, at 720. Pollack suggests that there is some benefit to outing people—specifically because “it helps to combat the false myths and stereotypes many heterosexuals have about gay people.” *Id.* In the context of politicians and celebrities, one scholar believes that “outing presupposes that all [people] who engage in primarily homosexual conduct . . . owe a minimum obligation to gay society . . . to come out” of the closet. Gabriel Rotello, *Out of the Closet & Into the Fray: Should Gay Politicians and Celebrities be Forced to “Come Out?”*, ON THE ISSUES, Fall 1990, at 23.

<sup>168</sup> See generally William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411 (1997) (discussing the similarities and differences between sexual orientation and religion and analyzing the nature of the conflict between advocates on both sides).

<sup>169</sup> Notwithstanding the grudge that Officer Wilinsky may have had toward the Minersville football team, see *supra* note 76, there is a serious and credible argument that Wilinsky quoted scripture, see *New Trial Ordered in Suit Over Teen’s Suicide*, *supra* note 21, at 16, and may have believed that he was helping “cure” Marcus of his homosexuality. Incidentally, there are several biblical passages that are often cited for the proposition that homosexuality is wrong. For instance, one passage reads: “Thou shalt not lie with mankind, as with womankind; it is abomination.” *Leviticus* 18:22 (King James); see MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 38 (1980).

<sup>170</sup> See LEE, *supra* note 164, § 10.02[A].

## IV

## THE FUTURE OF § 1983 OUTING CLAIMS

## A. Suggested Approaches to § 1983 Claims

The *Sterling* Court conquered the first hurdle to recovery for forced disclosure by establishing a constitutional cause of action. That holding, however, is only half the battle. This Note has argued that each step of the § 1983 analysis is wrought with troubling and potentially fatal barriers.<sup>171</sup> In order for *Sterling* to provide a right *with* a remedy, rather than a noncompensable right, courts must reform the scope and depth of constitutional tort analysis.

First, in order to provide a more adequate remedy to plaintiffs who endure the threat of disclosure or actual disclosure, the lower courts should adopt a system of presumed damages. Presumed damages are a concept derived from tort law<sup>172</sup> and are applicable in cases with particularly intangible damages.<sup>173</sup> In essence, when the plaintiff suffers injuries that are hard to quantify, the court instructs the jury that it may presume damages and allow recovery even without proof of harm.<sup>174</sup> This suggestion is not a novel one for constitutional tort claims. The Supreme Court's holding in *Memphis Community School District v. Stachura* left open the possibility that presumed damages would be available in limited situations of non-monetary harm.<sup>175</sup>

The analytic framework for implementing a presumed damages scheme in forced disclosure cases already exists. Typically, presumed damages are available in tort claims aimed at protecting the personal dignity of the plaintiff, such as assault, battery, malicious prosecution, and *invasion of privacy*.<sup>176</sup> The ever-growing overlap between tort and constitutional law suggests importing this standard of presumed damages into § 1983 claims with intangible damages.<sup>177</sup> The only way to

<sup>171</sup> See *supra* Part II.A (the "color of law" problem); Part II.C.1 (the emotional distress problem); Part II.D (the proximate cause problem); Part II.E (the immunity problem). It is important to remember that *Sterling* came about as an appeal from a denial of summary judgment. See *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000). The merits of the § 1983 action were not entirely discussed.

<sup>172</sup> Traditionally, at common law, courts used presumed damages for privacy and defamation torts, without reference to actual pecuniary harm. 3 RESTATEMENT OF TORTS § 621 cmt. a (1938) ("It is not necessary for the plaintiff to prove any specific harm to his reputation or any other loss caused thereby"); 4 *id.*, § 867 cmt. d (1939) (noting that damages are available for privacy torts "in the same way in which general damages are given for defamation" without proof of "pecuniary loss [or] physical harm").

<sup>173</sup> See Wells, *supra* note 55, at 217.

<sup>174</sup> *Id.*

<sup>175</sup> The *Stachura* court would not allow damages to be presumed unless there was a nonmonetary harm that could not be quantified. See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 311 (1986). This is true of forced disclosure cases where the injury would not likely be monetary in nature.

<sup>176</sup> See DAN B. DOBBS, LAW OF REMEDIES § 7.3(1), at 302-03 (2d ed. 1993).

<sup>177</sup> See Wells, *supra* note 55, at 217.

assure that parties will be made whole through § 1983 litigation for deprivation of informational privacy is to infuse a system of presumed damages into constitutional tort analysis.

Second, for the reasons laid out above, a more liberal understanding of proximate causation is necessary if future litigants in forced disclosure cases are to have any chance of recovery for the threat of public outing or forced disclosure of sexual orientation. Under the permissive standard set forth in *Warner v. Orange County Department of Probation*,<sup>178</sup> a plaintiff can meet the causation requirement even where there is some reasonably foreseeable intervening force, including the acts of third parties.<sup>179</sup> For instance, even if Marcus Wayman had a preexisting clinical depression stemming from his homosexuality,<sup>180</sup> Wilinsky would still be liable for Wayman's injuries because it was foreseeable that his statements would result in some sort of harm to the vulnerable teen. This standard ensures that courts will not bar aggrieved parties from recovery simply because the emotional stress of sexual disclosure was not the harm envisioned when the Due Process Clause was written.<sup>181</sup>

Third, courts should permit punitive awards more liberally in claims of forced disclosure. One goal of § 1983 is to deter future wrongdoing by government officials.<sup>182</sup> Plaintiffs should not be left to collect only nominal damages if they fail to establish actual, compensatory damages. When a plaintiff receives only nominal damages for egregious wrongdoing, there is nothing preventing state actors from committing similarly homophobic acts in the future. Instead, a court employing a liberal punitive scheme could more adequately deter future wrongdoing by government officials.<sup>183</sup> This analytic structure, if

<sup>178</sup> 115 F.3d 1068 (2d Cir. 1997).

<sup>179</sup> *Id.* at 1071 (citing *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989)).

<sup>180</sup> There was some evidence supporting the assertion that Marcus was suffering from depression. See Elliot Grossman, *Defense Can't Present "Alternative" Scenario: Minersville Teen's Suicide is Basis of Lawsuit Brought by His Mother*, MORNING CALL (Allentown, Pa.), Nov. 7, 2001, at B1. The defendants attempted to introduce evidence of Wayman's depression through the testimony of a psychologist who had analyzed Wayman's mental health and school records. *Id.* The Magistrate judge blocked this testimony, claiming the testimony was irrelevant because Wayman's mental health problems occurred long before the incident. *Id.* Indeed, the percentage of gay teens that suffer from clinical depression is staggeringly high. See Robert Garafolo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 *PEDIATRICS* 895, 895 (1998). A court would still be required to assess whether Wayman's injuries were the foreseeable consequence of the defendants' actions.

<sup>181</sup> See *supra* notes 128–29 and accompanying text.

<sup>182</sup> See Beyer, *supra* note 55, at 155.

<sup>183</sup> See generally Wells, *supra* note 55, at 221 (arguing that a liberal use of punitive damages would remedy the shortcomings of the common law compensatory damages structure).

followed by a federal court, would afford future plaintiffs a legitimate opportunity at a sizable monetary recovery under § 1983.

## B. Policy Suggestions and Litigation Strategies

Some scholars suggest that aggrieved plaintiffs should utilize the common law tort system as the exclusive source for their monetary recovery.<sup>184</sup> There are three significant problems with this suggestion. First, there may be no direct common law analogue to a § 1983 claim for threats of or actual disclosure of sexual orientation. If there is actual disclosure, a plaintiff may bring suit for invasion of privacy.<sup>185</sup> If the plaintiff has a specific and cognizable emotional injury, he may allege an intentional infliction of emotional distress.<sup>186</sup> Most claims, however, fall plainly outside these discrete categories. Moreover, a plaintiff could not bring a defamation claim unless the official's disclosure of his homosexuality was factually untrue.<sup>187</sup> Therefore, plaintiffs may be left without a cause of action unless the facts neatly fit into one of these tort claims.

Second, from a systemic standpoint, the rationales behind § 1983 actions and common law tort claims differ. A § 1983 action contemplates not only that the defendant acted wrongfully, but that he did so in violation of a constitutional right. Conversely, a common law tort claim is typically rooted solely in plaintiff's desire for monetary redress. While a common law tort claim might provide the litigant with financial compensation, the court would not declare the defendant's behavior unconstitutional. Although a declaration that the defendant's acts were unconstitutional may not provide the plaintiff with much solace, it serves a symbolic dignitary function.

Lastly, forcing plaintiffs to sue solely through the common law tort system—thus focusing to a large extent on the harm suffered—suggests that the plaintiffs are shamed or embarrassed by their sexual orientation. When plaintiffs sue because officials disclose truthful information about their orientation, the suit implies that the plaintiffs are embarrassed by the information disclosed.<sup>188</sup> Allowing plaintiffs to maintain a constitutional tort claim helps focus the courts' analysis

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<sup>184</sup> Some argue that there is an inherent tension between constitutional tort actions and common law tort actions brought in state courts. Both claims may permit recovery for the exact same injury and allowing both may be redundant. This is doubly confounding when one considers that the standard is functionally the same for most constitutional tort and common law tort actions. See, e.g., James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 406 (2003).

<sup>185</sup> See RESTATEMENT (SECOND) OF TORTS § 652A (1965).

<sup>186</sup> See *id.* § 46.

<sup>187</sup> See Ingrid Schüpbach Martin, *The Right to Stay in the Closet: Information Disclosures by Government Officials*, 32 SETON HALL L. REV. 407, 441 (2002).

<sup>188</sup> See *id.* at 444.

on the constitutionality of the defendant's acts, minimizing the shame-factor highlighted by the tort process. Although a complainant would still be required to demonstrate harm, bringing suit under § 1983 for a violation of a basic constitutional guarantee seems to reduce the notion that their orientation is shameful or embarrassing.

Therefore, unless the plaintiff is seeking solely financial redress, future litigants should utilize § 1983 as a more sweeping remedy to threats of disclosure and actual disclosure of sexual orientation.

#### CONCLUSION

Despite the problems inherent in any § 1983 action, *Sterling* should not be disregarded as an irrelevant federal decision that has little, if any, value for future litigants. Instead, the tenets the Third Circuit declared should be heralded as ushering in a new age in which individuals have an unfettered right to privacy in their own sexual orientation. The full significance of the holding remains to be seen. The court did not have the opportunity to test the merits of the complete § 1983 claim, and it is unclear how other courts will handle similar claims in the future. Though Americans are becoming increasingly comfortable with their own sexual orientation, cases involving forced disclosure are still likely, as evidenced by the most recent outing of GOP officials supporting the Federal Marriage Amendment.<sup>189</sup> In fact, these are not isolated and unrelated incidents. Instead, these incidents bring to light a difficult and problematic situation facing a large number of closeted gay men and women across the country.

Given the importance of the right, it is necessary that the court fashion an appropriate and workable remedy. Of course, the best solution is for public officials to carry out their work in tolerant and accepting ways, avoiding future forced disclosure suits altogether. Short of this idealistic solution, however, the courts should make a remedy available to aggrieved parties under § 1983. The purpose of § 1983 is not only to right constitutional wrongs, but also to deter public officials from committing similar acts in the future. In order to serve these dual purposes, § 1983 actions for disclosure and threatened disclosure of sexual orientation must survive despite the

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<sup>189</sup> The most recent example of public outing occurred in the wake of the proposed Federal Marriage Amendment, which would effectively prohibit homosexual marriages. In the heated environment that the proposed amendment engendered, many gay activists and GOP opponents sought to "out" GOP staffers to undermine the party's amendment momentum. The outing of various Capitol Hill staffers is yet another example of public outing and reinforces the need to reconsider the statutory remedy for those victims. See Stefen Styrsky, *Outing on Capitol Hill Stirs Debate*, GAY CITY NEWS, July 1-7, 2004, available at [http://gaycitynews.com/gcn\\_327/outingoncapitolhill.html](http://gaycitynews.com/gcn_327/outingoncapitolhill.html) (last visited Jan. 26, 2005). Indeed, at least one harassment complaint has been filed in the matter. *Id.*

many barriers that exist. To that end, the federal district courts hearing § 1983 actions should take a liberal approach to disclosure suits, as "it is difficult to imagine a more private matter than one's sexuality."<sup>190</sup>

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<sup>190</sup> *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).