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Invasion of Privacy in Texas: Public Disclosure of Embarrassing Private Facts

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INVASION OF PRIVACY IN TEXAS: PUBLIC DISCLOSURE OF EMBARRASSING PRIVATE FACTS

INTRODUCTION

Although invasion of privacy tort law has existed for more than a century in the United States,[1] in Texas, this area of the law is in its infancy, tracing back only a quarter century.[2] The purpose of this comment is three-fold: (1) to illustrate the origins of the four modern torts constituting invasion of privacy; (2) to examine public disclosure of embarrassing private facts ("private-facts tort"); and (3) to argue for revising the Texas private-facts tort in order to resolve its current conflict with the rights to free speech and free press. This discussion centers on recent mass media cases that conflict with the First Amendment.[3] Although the mass media does not have legal rights superior to any person, partnership, or corporation, this comment assumes protecting mass media interests serves to safeguard all First Amendment interests.

Part I of this comment traces the origins of invasion of privacy in the United States and explores available defenses. Part II traces invasion of privacy in Texas with specific emphasis on the private-facts tort. Part III offers suggestions to Texas courts regarding invasion of privacy as it continues to evolve in Texas.

I. ORIGINS OF INVASION OF PRIVACY

Today's invasion of privacy law arises principally from a line of law review articles, beginning with the influential 1890 study by law partners Louis Brandeis and Samuel Warren.[4] Brandeis and Warren wrote:

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1. *See generally* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 158 (1993) (discussing inception of problems in the media); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. Billings v. Atkinson, 489 S.W.2d 858, 861 (Tex. 1973) (holding invasion of privacy is a legal injury).

3. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

4. *See* Warren & Brandeis, *supra* note 1, at 196. Today, there are four separate, distinct torts: (1) commercial appropriation of name or likeness; (2) public disclosure of embarrassing private facts; (3) placing an individual in a false-light; and (4) intrusion upon physical seclusion. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). *See also* RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977).

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> The press is overstepping in every direction the obvious bounds of propriety and of decency. . . . The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.[5]

It should be noted the United States did not inherit a common law privacy tort from England.[6] Furthermore, the U.S. Constitution does not specifically recognize the right of individual privacy, and early legislatures did not provide one.[7] But by the early 1900's, times were radically changing.[8] "Perhaps most important was the advent of commercial mass media that were highly competitive and pervasive. Extremely private matters could be made quite public overnight. And the media seemed increasingly inclined to do just that."[9]

Today, there are four invasion of privacy torts recognized either by statute or common law: commercial appropriation, false light, intrusion, and public disclosure of embarrassing private facts.[10] In some instances, however, courts have rejected one or more of Professor Prosser's four categories.[11] Although some scholars collectively treat the four types of invasion of privacy torts as a single legal right to be left alone,[12] it is nevertheless constructive to consider the four categories as separate, distinct torts.[13]

A. Commercial Appropriation

Commercial appropriation is the oldest and perhaps most settled of the four modern torts, beginning with the case of *Roberson v. Rochester Folding-Box Co.*[14] In 1902, Franklin Mills Flour commercially appropriated Abigail Roberson's image for its advertising posters. Twenty-five thousand lithographic prints of her image appeared in saloons, stores, and other public places both locally and nationally. Roberson sued for invasion of privacy commercial exploitation and

5. Warren & Brandeis, *supra* note 1, at 196.
6. *See* ZELEZNY, *supra* note 1, at 158.
7. *Id.*
8. *Id.*
9. *Id.*
10. *See* Prosser, *supra* note 4.
11. *See* Cain v. Hearst Corp., 878 S.W.2d 577, 579 (Tex. 1994) (rejecting recognition of false-light invasion of privacy); Renwick v. News & Observer Publishing Co., 312 S.E.2d 405, 410 (N.C. 1984), *cert. denied*, 469 U.S. 858 (1984) (rejecting false-light invasion of privacy).
12. *See, e.g.*, THOMAS M. COOLEY, LAW OF TORTS 29 (1993).
13. *See* Prosser, *supra* note 4.
14. 64 N.E. 442 (N.Y. 1902).

ultimately lost.[15] The *Roberson* court, unpersuaded that such a legal right existed, was concerned with the recognition of such a tort and its possible impact on freedom of speech and freedom of press.[16] Consequently, the New York Court of Appeals reversed the intermediate court, denying Roberson's recovery because "the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence."[17]

The *Roberson* decision created tremendous public controversy. As a result, New York passed its first privacy law in 1903, prohibiting the use of an individual's name or likeness for trade or advertising purposes without the person's consent.[18] Shortly thereafter, following New York's lead, Georgia courts took action recognizing a common law right of privacy in 1905. In *Pavesich v. New England Life Insurance Co.*,[19] the Georgia Supreme Court considered the unauthorized use of an individual's photograph in a life insurance advertisement. Persuaded by Samuel Warren and Louis Brandeis' law review article[20] and Justice Gray's dissent in *Roberson*,[21] the *Pavesich* court enthusiastically recognized a legal right to privacy:

> So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . . .[22]

Since *Pavesich*, other courts have awarded damages to private citizens for shame, humiliation, and mental distress resulting from the unauthorized commercial exploitation of their identities.[23] Consequently, celebrities and public figures have recovered for commercial appropriation of their likenesses.[24] The rationale behind celebrity recovery is that a celebrity's right to publicity is essentially a property right.[25] In these circumstances, the plaintiff's primary concern is not

15. *Id.*
16. *Id.* at 444, 447.
17. *Id.* at 447.
18. *See* DON R. PEMBER, MASS MEDIA LAW 213 (6th ed. 1993).
19. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (holding likeness to be a property right).
20. Warren & Brandeis, *supra* note 1.
21. *Roberson*, 64 N.E. at 448.
22. *Pavesich*, 50 S.E. at 80-81.
23. *See, e.g.*, Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 500 (Mo. Ct. App. 1990).
24. *See, e.g.*, Maples v. National Enquirer, 763 F. Supp. 1137 (N.D. Ga. 1990); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
25. KENT R. MIDDLETON & BILL F. CHAMBERLIN, THE LAW OF PUBLIC COMMUNICATION 216 (2d ed. 1991). Middleton and Chamberlin note celebrities who make their living from public performances are accustomed to public exposure and thus suffer commercial loss. *Id.* at 216.

his appearance in the advertisement, but rather the lack of monetary compensation for the use of his image or likeness. Nevertheless, damages are often awarded for the consequential embarrassment or shame suffered from the unauthorized publicity. It is this element of *mental distress* which relates commercial appropriation to the other three torts and to the general invasion of privacy abhorred by Samuel Warren and Louis Brandeis.[26]

B. False-Light

False-light is the public dissemination of highly offensive information about a person with knowledge or reckless disregard of the truth.[27] False-light cases typically are mass media invasions and fall into three categories: distortion, embellishment, and fictionalization.

Distortion results either from the false impression created when information or photography is used out of context or when relevant information is omitted. In *Gill v. Curtis Publishing Co.*,[28] a court considered whether the photographic distortion of a married couple constituted commission of the false-light tort when the husband was pictured with his arm around his wife, touching his cheek to her face. In *Gill*, the picture was taken without the couple's knowledge or consent. Later, *Ladies Home Journal* published the photograph to illustrate a story regarding love. The caption read, "Publicized as glamorous, desirable, 'love at first sight' is a bad risk."[29] The companion story stated love at first sight is the wrong kind of love because it is based on "100% sex [sic] attraction" instead of affection and respect.[30] Consequently, the California Supreme Court held, "It is not unreasonable to believe such would be seriously humiliating and disturbing to plaintiffs' sensibilities . . . especially when we consider it deals with the intimate and private relationship between the opposite sexes and marriage."[31]

Embellishment results from false information being added to a journalistic account. In *Cantrell v. Forest City Publishing Co.*,[32] an Ohio newspaper reporter wrote a follow-up news story concerning the plight of the widow and family of Melvin Cantrell, who died in an accident.[33] In *Cantrell*, a reporter visited the family's home and noted the abject poverty of the family. In his follow-up story, the reporter described how "Margaret Cantrell will talk neither about what happened nor about how they are doing. She wears the same mask of

26. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652C; Warren & Brandeis, *supra* note 1, at 196.
27. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652E.
28. 239 P.2d 630 (Cal. 1952).
29. *Id.* at 632.
30. *Id.*
31. *Id.* at 635.
32. 419 U.S. 245 (1974).
33. *Id.* at 247.

non-expression she wore at the funeral."[34] Margaret Cantrell, however, was not at home when the reporter visited, nor had she ever even met him.[35] Thus, the United States Supreme Court, in upholding the jury award for the plaintiff, held knowingly or recklessly publishing falsehoods is sufficient to support a jury finding against a reporter.[36]

Fictionalization occurs when fictional elements are attributed to real persons or events. In *Strickler v. NBC*,[37] for instance, a plaintiff claimed he was harmed by the defendant's portrayal of him in a television docudrama.[38] The plaintiff, a commander on active duty with the U.S. Navy, was a passenger on a commercial flight forced to make an emergency landing.[39] The defendant portrayed the plaintiff as smoking cigarettes, being out of uniform, and engaging in the "highly personal and private act of praying" while on active duty.[40] According to the plaintiff, these were fictional elements attributed to him which caused him "humiliation, embarrassment and great mental pain and suffering."[41] At trial, the defendant asserted the offensiveness of such depictions is a question of law for the court to determine.[42] The federal district court disagreed, however, and held the offensiveness of any such depictions is a question of fact, thus overruling the defendant's motion to dismiss.[43]

C. *Intrusion*

The modern *intrusion* tort is defined as the intentional invasion into a person's physical seclusion or private affairs in a manner highly offensive to a reasonable person.[44] Intrusion can be traced back to eavesdropping, which was considered a nuisance under common law.[45] Today, most intrusion cases focus on subterfuge or outrageous behavior by journalists or media persons. Moreover, when intrusion involves the mass media, it is distinctively different from the other three invasion of privacy torts because it occurs in the actual newsgathering process, and not in a subsequent publication or broadcast of the offensive information. Consequently, intrusion requires no publicity for a valid cause of action.

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34. *Id.* at 248.
35. *Id.*
36. *Id.* at 252-53.
37. 167 F. Supp. 68 (S.D. Cal. 1958).
38. *Id.* at 69.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 71.
43. *Id.*
44. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652B.
45. Berger v. New York, 388 U.S. 41, 45 (1967) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 1570 (Rees Welsh & Co. 1902)).

For example, in *Dietemann v. Time, Inc.*,[46] a magazine reporter pretended to be the plaintiff's patient in order to gain access to the plaintiff's home.[47] After deceitfully obtaining entry, the journalist secretly tape recorded and photographed the plaintiff. The Ninth Circuit Court of Appeals held the journalist's behavior constituted invasion of privacy.[48] Although the plaintiff invited the reporter into his house, the court reasoned that a plaintiff "should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording. . . ."[49] Rejecting the defendant's claim that concealed electronic mechanisms are essential to investigative reporting, the court strongly disagreed that such tools are indispensable for newsgathering: "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."[50]

D. Public Disclosure of Embarrassing Private Facts

The *private-facts* tort involves a publication that "(a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public."[51] In *Sidis v. F-R Publishing Co.*,[52] the Second Circuit Court of Appeals defined the private-facts tort as publication of information so intimate and so unwarranted as to shock or outrage a community's notions of decency.[53] However, the *Sidis* court failed to define *legitimate public concern*, noting that public figures are "subjects of considerable interest and discussion to the rest of the population."[54]

In *Sidis*, the plaintiff was a child prodigy. Regardless of the passage of thirty years since the plaintiff's childhood, the court found he was a figure of legitimate public interest and publishing information about him did not offend a community's notions of decency.[55] As the court observed, "he was a person about whom the newspapers might display

46. 449 F.2d 245 (9th Cir. 1971).
47. *Id.* at 246.
48. *Id.* at 247.
49. *Id.* at 249.
50. *Id. See also* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973). An overzealous photographer trailed Jacqueline Kennedy Onassis for days, bumping into Onassis and her daughter, following her vehicle too closely while driving, and endangering her children. Although most of defendant's activity occurred in a public place, the court held the degree and nature of his fact collecting process constituted not only invasion of privacy, but also assault, battery, harassment, and intentional infliction of emotional distress. *Id.* at 994.
51. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, § 652D.
52. 113 F.2d 806 (2d Cir. 1940).
53. *Id.* at 809.
54. *Id.*
55. *Id.*

a legitimate intellectual interest, in the sense meant by Warren and Brandeis, as distinguished from a trivial and unseemly curiosity."[56]

In another private-facts case, *Barber v. Time, Inc.*,[57] a plaintiff recovered damages for a picture taken against her will while she was in the hospital.[58] In *Barber*, a picture was published alongside a story revealing that the plaintiff suffered from a rare disease causing her to lose weight even though she ate in excess. The article referred to the plaintiff as a "starving glutton."[59] The Missouri Supreme Court found the publication was an invasion of medical privacy which violates the legally protected confidentiality of the physician-patient relationship.[60] The *Barber* court held an individual has a right to privacy regarding medical treatment and a right to be free from personal publicity.[61] Moreover, the court noted the legitimate public concern element of the private-facts tort only permits identification of the plaintiff if the press needs to warn the public that the plaintiff carries a contagious disease.[62] Therefore, identification of the *Barber* plaintiff was unnecessary because a story concerning a legitimate public concern would have focused on the rare disease rather than the patient.

Private-facts torts often conflict with freedom of expression under the First Amendment. Consequently, courts must balance competing rights. When First Amendment claims are weak or nonexistent, the law must be applied narrowly to protect personal secrets or private moments that are neither newsworthy nor of legitimate public concern. Professor Zelezny posits that "the perceived threat of mortifying exposure by the mass media is probably as great today as it was in 1890 when Warren and Brandeis published their influential law review article."[63] Nevertheless, "only a few courts have ruled against the media and other corporations in private-facts cases."[64] Thus, Professor Middleton asserts, "Plaintiffs in private-facts suits are most likely to be successful when the information made public about them involves illness, hospitalization, retardation or exposure of intimate parts of the body. Because offensiveness is a jury question, what constitutes a highly offensive revelation may vary with communities and regions."[65]

56. *Id.*
57. 159 S.W.2d 291 (Mo. 1942).
58. *Id.* at 292, 296.
59. *Id.* at 295.
60. *Id.*
61. *Id.*
62. *Id.*
63. ZELEZNY, *supra* note 1, at 168.
64. MIDDLETON & CHAMBERLIN, *supra* note 25, at 182.
65. *Id.*

E. Defenses to Invasion of Privacy

1. Intrusion, Commercial Appropriation, and False-Light Defenses

There are several defenses to invasion of privacy torts as a matter of law. *Consent* and *occurrence of an event in a public place* are both defenses to intrusion lawsuits.[66] *Consent* is also the most often asserted defense in commercial appropriation cases.[67] Additionally, *newsworthiness* may be asserted as a defense to commercial appropriation if names or pictures are published by the news media.[68] Furthermore, courts have held *profit motivation* or *advertising support* does not diminish newsworthiness.[69]

Defendants in false-light lawsuits use *newsworthiness* to defeat the *highly offensive* element required in false-light causes of action. Defendants also use *truth* or *ignorance of the falsity* to defeat the *reckless disregard* or *knowledge of the falsity* element. This knowledge requirement stems from the United States Supreme Court's extension of constitutional privilege to false-light lawsuits in *Time, Inc. v. Hill.*[70]

In *Hill*, the Supreme Court compared the standard for false-light torts to the standard for libel set forth in *New York Times v. Sullivan.*[71] Under *Sullivan,* a libel plaintiff must prove a defendant had knowledge of the falsity or displayed reckless disregard for the truth.[72] Noting that the same First Amendment principles relevant in *Sullivan* apply to false-light cases, the *Hill* Court held false-light plaintiffs are subject to the same burden of proof as libel plaintiffs.[73] Thus, in false-light cases involving matters of legitimate public concern, if a plaintiff is a public figure, he must prove the defendant had knowledge of the falsity or displayed a reckless disregard for the truth.[74]

2. Private-Facts Defenses

There are three defenses to private-facts torts recognized by law: (1) consent; (2) matters of legitimate public concern (often referred to as *newsworthiness*); and (3) constitutional privilege (public records or occurrences). *Consent* will not be discussed because it is primarily a fact issue.[75] The *legitimate public concern* defense is often the focus in cases involving publication of matters not accessible to the general

66. *See, e.g.,* People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269 (Nev. 1995).
67. *Id.*
68. *Id.*
69. Stephano v. News Group Publications, Inc., 474 N.E.2d 580, 584-85 (N.Y. 1984).
70. 385 U.S. 374 (1967).
71. 376 U.S. 254 (1964).
72. *Id.* at 283.
73. *Hill*, 385 U.S. at 390-91.
74. *Id.*
75. *See generally* W. PAGE PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 18, at 112 (5th ed. 1984).

public. The mass media generally relies on the legitimacy of public concern defense when consent and constitutional privilege are not available.[76]

The *constitutional privilege*[77] defense extends from the principle that information cannot be private in nature when legally obtained from public records. In *Cox Broadcasting Corp. v. Cohn*,[78] a father sued an Atlanta television station for reporting his daughter's name in violation of a Georgia statute prohibiting publication or broadcast of a rape victim's identity.[79] The United States Supreme Court, however, held the First Amendment does not permit a privacy suit against the media for disseminating private information contained in public records that are part of an open-court proceeding.[80] Justice White wrote:

> By placing the information in the public domain on official court records, the state must be presumed to have concluded that the public interest was thereby being served. . . . We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law.[81]

In 1989, the Supreme Court further expanded its public-records protection in *Florida Star v. B.J.F.*[82] In *Florida Star,* a newspaper named a rape victim in a one-paragraph news story.[83] The newspaper acquired the information from a police news release, despite signs in the police department press relations center which warned that a rape victim's name is not part of the public record.[84] Moreover, a Florida statute made it unlawful to publish a rape victim's name.[85] Additionally, the newspaper had its own policy prohibiting such publication.[86]

The United States Supreme Court, however, held for the newspaper, reasoning that if a newspaper lawfully obtains truthful information about a matter of public significance, "punishment may lawfully

76. *See* Barber v. Time, Inc., 159 S.W.2d 291 (Mo. 1942) (illustrating the subjectivity in determining newsworthiness in cases not within a narrow range); MIDDLETON & CHAMBERLIN, *supra* note 25, at 182. Middleton and Chamberlin note a jury determination of newsworthiness or matter of legitimate public concern may vary greatly from one community or region of the country to another. *Id.*

77. The constitutional privilege defense is also referred to as *the public records defense.*

78. 420 U.S. 469 (1975).

79. *Id.* at 495.

80. *Id.*

81. *Id.* at 495-96.

82. 491 U.S. 524 (1989).

83. *Id.* at 527.

84. *Id.* at 528.

85. *Id.* at 526.

86. *Id.* at 528.

be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[87] Justice Marshall expressed his belief that the government erroneously disclosed the plaintiff's name by including it in police records.[88] He further stated the government violated its own policy by disseminating a government news release, and this "can hardly be said to be a narrowly tailored means of safeguarding anonymity."[89]

The *Cox* and *Florida Star* cases appear to limit the private-facts tort to non-newsworthy disclosures. Notably, in neither decision does the Supreme Court prohibit the government from sealing court documents or prohibit courts from protecting identities by using fictitious names. Both *Cox* and *Florida Star* contain narrow holdings to protect the use of lawfully obtained public records. Thus, these rules assume public records are of concern to the community or are newsworthy by nature.[90]

II. Invasion of Privacy in Texas

A. General

Texas did not recognize invasion of privacy until 1973 in *Billings v. Atkinson*.[91] *Billings* was an intrusion case involving wiretapping.[92] In June 1967, Mrs. Lloyd Billings was speaking with a neighbor on the telephone when she noticed a loud popping noise on the phone line.[93] She terminated the call and walked outside, where she noticed Atkinson, a telephone repairman, working on the terminal box behind her house. When a second telephone repairman returned the next day to investigate the source of the popping noise, he discovered a wire tap device attached to the petitioner's phone line which would transmit conversations over a standard FM radio when connected to the telephone line. The Billings sued, claiming mental anguish as a result of the wire tap.[94]

The trial court granted judgment notwithstanding the verdict for the defendant. The court of appeals affirmed, relying on *Milner v. Red River Publishing Co.*,[95] holding no right of privacy exists at common

87. *Id.* at 541.
88. *Id.* at 538.
89. *Id.*
90. Middleton & Chamberlin, *supra* note 25, at 189.
91. 489 S.W.2d 858 (Tex. 1973).
92. *Id.*
93. *Id.* at 859.
94. *Id.*
95. 249 S.W.2d 227 (Tex. Civ. App.—Dallas 1952, no writ). In *Milner*, a widow of a World War II veteran sued for invasion of privacy after the *Sherman Daily Democrat* published an obituary which mentioned Milner's involvement in several thefts. *Id.* at 227. The court held for the defendant, noting the plaintiff's complaint failed to state a cause of action because Texas did not recognize the right to privacy. *Id.* at 229.

law, nor does any right to privacy exist by statute.[96] The Texas Supreme Court reversed, however, noting *Milner* recognized that some privacy interests are afforded protection under other theories of law.[97] Persuaded by the Restatement (First) of Torts, the *Billings* court was first to recognize that an unwarranted invasion of an individual's right of privacy is a tort.[98]

In 1975, the first Texas case involving commercial appropriation was litigated. In *Kimbrough v. Coca-Cola/USA*,[99] a former college football player sued for use of his name and likeness in advertisements in college football game programs. The defendant contacted Kimbrough, inviting him to appear in a series of institutional advertisements for various universities in the Southwest Conference.[100] Kimbrough accepted the invitation and subsequently learned the defendant used his likeness in a commercial endorsement for a major soft drink. Kimbrough testified that he "did not contemplate the use of his name and picture in an advertisement which had the commercial aspects of the one published and had not consented to such use."[101] The trial court granted summary judgment for the defendant, but the court of appeals reversed, holding a genuine issue of material fact existed as to the extent of Kimbrough's consent.[102] The Texas Supreme Court refused writ and has yet to hear a commercial appropriation lawsuit.

In 1976, the Texas Supreme Court recognized a private-facts tort in *Industrial Foundation of the South v. Texas Industrial Accident Board*.[103] In *Industrial,* the plaintiff was a nonprofit corporation collecting information relating to worker's compensation claims for distribution to its member employers. The plaintiff sued the defendant seeking disclosure under the Texas Open Records Act. The defendant claimed an exception, arguing compliance with the Texas Open Records Act invades individual privacy by publicly disclosing embarrassing private facts. The Texas Supreme Court, however, remanded the case for determination on a person-by-person basis as to whether the information in the worker's compensation claims files could be released under the Texas Open Records Act.[104] The court held:

96. Billings v. Atkinson, 471 S.W.2d 908, 912-13 (Tex. Civ. App.—Houston [1st Dist.] 1971) *rev'd,* 489 S.W.2d 858 (Tex. 1973).

97. *Billings,* 489 S.W.2d at 860 ("[T]he right of privacy interests have been afforded protection under such traditional theories as libel and slander, wrongful search and seizure, eavesdropping and wiretapping . . . .").

98. *Id.*

99. 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.); *cf.* Benavidez v. Anheuser-Busch, Inc., 873 F.2d 102 (5th Cir. 1989) (applying Texas law).

100. *Kimbrough,* 521 S.W.2d at 720.

101. *Id.*

102. *Id.* at 720, 724.

103. 540 S.W.2d 668, 682 (Tex. 1976), *cert. denied,* 430 U.S. 931 (1977).

104. *Id.* at 686.

> [I]nformation contained in workmen's compensation claim files is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. If the information meets the first test, it will be presumed that the information is not of legitimate public concern unless the requestor can show that, under the particular circumstances of the case, the public has a legitimate interest in the information notwithstanding its private nature.[105]

In 1994, in *Cain v. Hearst Corp.*,[106] the Texas Supreme Court refused to recognize false-light. In *Cain*, the plaintiff was a prison inmate serving a life sentence for murder. He sued for false-light invasion because a newspaper published false information claiming he was a member of the "Dixie Mafia" and he had killed as many as eight people.[107] The *Cain* majority rejected false-light because "1) it largely duplicates other rights of recovery, particularly defamation; and 2) it lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law."[108]

In his dissent, Justice Hightower, joined by three other justices, argued defamation and false-light are not co-extensive.[109] Justice Hightower maintained the scope of actionable conduct varies between the torts and each tort is calculated to protect distinctively different interests.[110] This close decision and Justice Hightower's strong dissent suggest Texas might recognize false-light in the future.

In summary, Texas presently recognizes a cause of action for intrusion and for public disclosure of embarrassing private facts. Texas courts have implicitly acknowledged commercial appropriation, but have rejected false-light.

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105. *Id.* at 685.

106. 878 S.W.2d 577 (Tex. 1994).

107. *Id.* at 577. The newspaper article also stated:

> Cain killed one of his lawyers in 1973 and married the lawyer's widow a few months later; Cain killed a 67 year old [sic] man in 1977; in 1983 he "bought" a prostitute from a friend to help finance his activities; Cain persuaded the prostitute to marry a trailer park owner named Anderson, so that Cain could kill Anderson and share in the prostitute's inheritance from Anderson; when the prostitute balked, Cain threatened to kill her 5 year old [sic] daughter and "deliver her daughter's head in a wastepaper basket;" the prostitute married Anderson 3 days later; and on January 5, 1985 Cain killed Anderson.

Id. Not surprisingly, Cain did not mention these allegations in his false-light claim. *Id.*

108. *Id.* at 579-80.

109. *Id.* at 586 (Hightower, J., dissenting).

110. *Id.* (Hightower, J., dissenting).

B. Embarrassing Private-Facts Tort in Texas

Because Texas courts have only recently recognized the private-facts tort, there are few Texas cases regarding private-facts disclosure by the mass media. In *McNamara v. Freedom Newspapers, Inc.*,[111] the *Brownsville Herald* published a photograph of McNamara, a student, playing in a high school soccer match. The photograph accompanied a story regarding the contest. The photograph showed the plaintiff running after a soccer ball with his genitals exposed.[112]

As a defense, the newspaper contended the First Amendment of the United States Constitution and the free speech provision of the Texas Constitution[113] barred recovery because the photograph was newsworthy and was taken in a public place. The Corpus Christi Court of Appeals held the newspaper was immune to liability for publication of the photograph, noting "the First Amendment sometimes protects what would otherwise be an actionable invasion of privacy when a publication by the media is involved."[114]

Moreover, asserting First Amendment protection encompasses "a vast spectrum of tastes, views, and expressions, all of which fall within a broad definition of newsworthy,"[115] the *McNamara* court stated "[a]rguably the rights of free speech and press guaranteed by our Texas Constitution are more extensive than those guaranteed by the United States Constitution."[116] The court found it significant that McNamara was voluntarily participating in a spectator sport in a public place, and no one involved in the publishing process noticed the embarrassing exposure in the photograph.[117]

In another related case involving the mass media, *Star-Telegram, Inc. v. Walker*,[118] a trial judge issued a protective order prohibiting the newspaper from publishing information already disclosed in open court and in the public record.[119] The Texas Supreme Court, however, held the protective order violated Article I, Section 8 of the Texas Constitution because it unreasonably restricted expression by preventing the dissemination of public information.[120]

In *Star Telegram,* the protective order was intended to protect the identity of a victim of a brutal rape. The victim reported the crime to

111. 802 S.W.2d 901 (Tex. App.—Corpus Christi 1991, writ denied).
112. *Id.* at 903.
113. TEX. CONST. art. I, § 8.
114. *McNamara*, 802 S.W.2d at 904 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).
115. *Id.*
116. *Id.*
117. *Id.* at 905. *Cf.* Daily Times Democrat v. Graham, 162 So.2d 474 (Ala. 1964) (holding a published photograph was an invasion of privacy where a woman's dress blew over her head and exposed her panties and legs at a county fair exhibit).
118. Star-Telegram, Inc. v. Walker, 834 S.W.2d 54 (Tex. 1992).
119. *Id.* at 55.
120. *Id.*

the police who prepared an offense report containing the victim's identity.[121] Based on the police report, the newspaper published two news stories, but did not use the victim's name. However, a week after the first story appeared, the victim filed a request to compel use of the pseudonym "Jane Doe" in all public files and records concerning the offense.[122] Despite her request for anonymity, Jane Doe's real name was used in an indictment filed in October 1989.[123]

In June 1990, Jane Doe sued the newspaper for private-facts invasion of privacy, claiming the newspaper used sufficient detail in the news stories to identify her. During discovery in the civil suit, the defendant asked Jane Doe for information relating to her identity. She responded by filing for a protective order in December 1990.[124] The order was orally granted during a telephone hearing, prohibiting the *Star-Telegram* from publishing facts relating to the victim's identity.[125]

Approximately two months later, the prosecuting attorney in the criminal case advised Jane Doe that using her real name during the criminal trial would increase the probability of the rapist's conviction. Jane Doe agreed, provided the court record would be sealed following the criminal trial. The assailant was convicted and Jane Doe's real name was used on numerous occasions during the criminal trial.[126]

In June 1991, the state sealed the files and expunged Jane Doe's real name from the records of the criminal trial.[127] Meanwhile, the *Star-Telegram* moved for reconsideration of the oral protective order granted in December 1990.[128] On reconsideration, the trial judge reduced the order to writing after Jane Doe submitted proof of the state's promise of confidentiality through evidence of the criminal court order expunging her identity.[129] On appeal, the Texas Supreme Court held the trial court's protective order constituted an invalid prior restraint on the *Star-Telegram*'s Article I, Section 8 right to disseminate public information, noting:

> Trial proceedings are public information. . . . The order entered by the criminal court closing the files and expunging Jane Doe's true identity from the criminal records (more than three months following the criminal trial) could not retroactively abrogate the press' [sic] right to publish public information properly obtained from open records. The law cannot recall information once it is in the public domain.[130]

121. *Id.*
122. *Id.* (citing TEX. CODE CRIM. PROC. art. 57.02(f) (West 1992)).
123. *Id.*
124. *Id.* at 55-56.
125. *Id.*
126. *Id.* at 56.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 57 (footnote omitted).

Moreover, in another related case, *Doe v. Star-Telegram, Inc.*,[131] a rape victim contended the *Fort Worth Star-Telegram* indirectly identified her by disclosing information from police reports including her age, occupation, business address, and make and model of her automobile.[132] The defendant asserted several defenses, including newsworthiness and the constitutional privilege of lawfully obtained public records. The trial court granted summary judgment for the defendant.[133] The court of appeals reversed and remanded,[134] and the defendant appealed.[135]

The Fort Worth Court of Appeals held two of the defendant's four defenses were groundless.[136] First, pleading truth as a defense was inapplicable in a private-facts tort action.[137] Second, the plaintiff had withdrawn her negligence claim, so the newspaper's defense to that cause of action was moot.[138] As to its other defenses, the newspaper asserted (1) the information was truthful and lawfully obtained, and (2) the matter was of legitimate public concern.

The Fort Worth Court of Appeals held the defendant's public records defense under *Florida Star* was negated by an allegation contained in a police sergeant's affidavit.[139] The police sergeant maintained the reporter violated police department policy and procedure. The appellate court held the second defense would fail if the information was unlawfully obtained. Ultimately, the appellate court found a factual dispute existed over whether the information was lawfully obtained and thus reversed the defendant's summary judgment.[140]

The Texas Supreme Court, moreover, rejected the newspaper's procedural argument, which claimed the summary judgment should be reinstated because the respondent failed to assign error to each basis on which the newspaper moved for summary judgment.[141] The *Doe* court reasoned, "In challenging a summary judgment, it is sufficient that an appellant broadly assert the trial court erred in granting summary judgment."[142]

Notwithstanding this finding, the Texas Supreme Court, however, unanimously reversed the court of appeals. Under the specific facts of the case, the court held the information disclosed by the newspaper

131. 864 S.W.2d 790 (Tex. App.—Fort Worth 1993), *rev'd*, No. D-4578, 1995 WL 341575 (Tex. June 8, 1995).
132. *Id.* at 791.
133. *Id.* at 792.
134. *Id.* at 793.
135. Star-Telegram, Inc. v. Doe, No. D-4578, 1995 WL 341575 (Tex. June 8, 1995) (unpublished opinion).
136. *Doe*, 864 S.W.2d at 792.
137. *Id.*
138. *Id.*
139. *Id.* at 792-93.
140. *Id.* at 793.
141. *Doe*, 1995 WL 341575 at *2.
142. *Id.* (citing Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970)).

concerned matters of legitimate public concern.[143] Moreover, the *Doe* court concluded this defense was sufficient to disprove an essential element of the plaintiff's case, and thus affirmed the summary judgment.[144]

The *Doe* court reasoned that facts which do not *directly* identify an innocent party, but which may *indirectly* identify the party to persons who are already aware of uniquely identifying personal information may or may not be a legitimate public concern.[145] Although the court cautioned the news media to avoid unwarranted public disclosure and embarrassment of individuals involved in otherwise newsworthy events of legitimate public interest, the court noted it is impossible for the news media to anticipate every such circumstance and avoid it "without an unacceptable chilling effect on the media. . . ."[146] The Texas Supreme Court stated:

> To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public.[147]

As a result, the court did not consider the petitioner's constitutional claims or the constitutional issues addressed by the court of appeals regarding whether the truthful information was lawfully obtained.[148]

III. The Future of Privacy Torts in Texas

The Texas Supreme Court should adopt a broad interpretation of the defenses available in private-facts lawsuits to avoid the potential chilling effects on both mass media and other forms of public expression. As the *McNamara* court noted, the rights of free speech and free press guaranteed under the Texas Constitution are more extensive than those guaranteed by the United States Constitution.[149] *McNamara* correctly acknowledged a broad interpretation of *newsworthy* was necessary when balancing First Amendment interests against an individual's privacy interests in protecting against disclosure of embarrassing facts.[150]

Professor Francois contends, "'[L]egitimate public interest' is crucial in the disposition of many libel and privacy lawsuits because a

143. *Id.* at *1.
144. *Id.* at *4.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904 (Tex. App.—Corpus Christi 1991, writ denied).
150. *Id.*

publication that is in the public interest implicates the First Amendment."[151] He further notes that "Wisconsin's right to privacy law, enacted in 1977, 'stipulates that *any relief* depends on whether there is a legitimate public interest in the matter involved.'"[152]

The Texas Supreme Court's holding in *Star-Telegram* provides a buffer against the potential chilling effects on news media that might emanate from covering rape cases. However, *Star-Telegram* failed to address the relevant constitutional issues.[153] Ultimately, the issue is not identification of a plaintiff, but whether the information is lawfully obtained and of legitimate public concern. The *Star-Telegram* court held the information contained in police reports was of legitimate public concern, but the court did not foreclose future challenges over how information is obtained. The Texas Legislature should provide disclosure exemptions for certain individuals, such as informants and rape victims, thus their names would not be a matter of public record. Logically, if the names are not in the public record, any argument regarding suppression of First Amendment rights is mooted.

The Texas Supreme Court should reexamine the test from *Industrial* regarding all private-facts cases. In *Industrial*, the court held information that satisfies the requirement of containing highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, also satisfies a presumption that such information is not of legitimate public concern unless a defendant demonstrates such legitimacy.[154] However, this places the burden of proof upon those asserting First Amendment interests, and is contradictory to the holding in *McNamara*.[155]

Since the *Industrial* court recognized the private-facts tort, it is conceivable the court intended its test to be narrowly applied only to cases involving access to worker's compensation files. Because of this ambiguity, the *Industrial* test should either be clarified or rejected. A broader definition of what constitutes a matter of legitimate public concern should be adopted, without placing an explicit or implicit burden of proof on defendants in private-facts lawsuits. Texas need not

151. WILLIAM E. FRANCOIS, MASS MEDIA LAW AND REGULATION 236 (6th ed. 1994).

152. *Id.* (emphasis added).

153. Star-Telegram, Inc. v. Doe, No. D-4578, 1995 WL 341575, at *3 (Tex. June 8, 1995).

154. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976).

155. McNamara v. Freedom Newspapers, Inc., 802 S.W.2d 901, 904-05 (Tex. App.—Corpus Christi 1991, writ denied). *See also* FRANCOIS, *supra* note 151.

follow the lead of other states in completely rejecting a private-facts tort,[156] but it should make modifications to its existing laws.

Michael Sewell

156. *See, e.g.,* Hall v. Post, 372 S.E.2d 711 (N.C. 1988) (holding claims for invasion of privacy for publication of true but private facts are not cognizable at law).