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The Right of Privacy Is Recognized in Texas.

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TORTS—Right Of Privacy—The Right Of Privacy Is Recognized In Texas

Billings v. Atkinson, 489 S.W.2d 858 (Tex. Sup. 1973).

Plaintiff brought action against the Southwestern Bell Telephone Company and their employee, Mr. Atkinson, for an invasion of privacy caused by Atkinson having attached an FM wire tap device to the plaintiff's private telephone line. The jury returned a verdict in favor of the plaintiff and awarded him $10,000 compensatory and $15,000 exemplary damages. The trial court granted Atkinson's motion for judgment *non obstante veredicto.* The court of civil appeals, in affirming the lower court's decision, held that since Texas had adopted the common law as it existed in 1840, and since no right of privacy existed at common law nor had been added by statute, there could be no recovery on such a theory.[1] The Texas Supreme Court granted the plaintiff's application for writ of error. Held—*Reversed.* An unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted.[2]

Most authorities trace the conceptual development of the right of privacy to an article written by Warren and Brandeis in 1890.[3] This essay has been effective as a catalyst in further advancing an earlier acknowledged tenet, the "right to be let alone."[4] The growth of the right of privacy as a personal right rather than one of property[5] or contract[6] can be attributed to these two authors. It was the belief of these eminent writers that societal transformation and the increasing complexity of life attendant thereto necessitated protection of man's natural right to solitude and privacy.[7]

The right of privacy is generally held to include four separate and distinct actionable "torts";[8] a right to be free from:

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1. Billings v. Atkinson, 471 S.W.2d 908, 912 (Tex. Civ. App.—Houston [1st Dist.] 1971); TEX. REV. CIV. STAT. ANN. art. 1 (1969).

2. Billings v. Atkinson, 489 S.W.2d 858, 860 (Tex. Sup. 1973). Judgment was rendered for the plaintiff in the amounts previously assessed by the jury. *Id.* at 861.

3. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 802 (4th ed. 1971).

4. 1 T. COOLEY, THE LAW OF TORTS 29 (2d ed. 1888).

5. Prince Albert v. Strange, 41 Eng. Rep. 1171, *aff'd*, 64 Eng. Rep. 293 (Ch. 1849).

6. Yovatt v. Winyard, 37 Eng. Rep. 425 (Ch. 1820).

7. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). The right of privacy may be generally defined as "the right of an individual to be let alone, to live a life of seclusion, and to be free from unwarranted publicity." 77 C.J.S. *Right of Privacy* § 1 (1952).

8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971). Prosser states that the right of privacy is not one tort but a complex of four. Each type of invasion may be termed a tort involving a violation of the right of privacy which ties the not so similar interests together. *Id.* at 804. Additionally, in the RESTATE-

1) Intrusion onto one's property, be it real or personal.
2) Wrongful appropriation of one's signature or likeness by another for commercial exploitation.
3) Public disclosure of private facts when the public has no legitimate interest.
4) Being put in a false light in the public eye.[9]

Since initially endorsed as constituting a cause of action by the Georgia Supreme Court in 1905,[10] acceptance of the right of privacy has increased significantly.[11] In the 1930's, the tide seemed to turn in favor of reception of the right of privacy with the stimulating effect created by the benediction of the Restatement of Torts.[12] Despite this trend of approval, there were some legal writers who felt that the problems involved in sanctioning a right of privacy outweighed its benefits.[13] Through the years the repeated objections of the lack of precedent, the purely mental character of the injury,

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MENT OF TORTS § 867 (1939) it is said that the right of privacy is not regarded as an absolute, but the invasion must be unreasonable and this reasonableness will be determined by customs of time and place as the standard is relative.

In general, the defenses to a right of privacy action are consent of the plaintiff either express or implied, privileges encountered in the law of libel and slander, however, malice is not essential, nor is truth a defense.

See also Comment, *Thoughts Concerning the Status of the Law of Privacy in Texas,* 23 BAYLOR L. REV. 117 (1971).

9. There was some hesitation at first regarding acknowledgment of this right but it has diminished in force. *See* O'Brien, *The Right of Privacy,* 2 COLUM. L. REV. 437 (1902); Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROB. 326 (1966). The present doctrine of the right of privacy is best described as one slow in developing at first because courts protected privacy with some other long recognized interest and thereby created a type of parasitic damages. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 9.5, at 678 (1956).

10. Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905). This decision rejected the reasoning relied on by the New York Court of Appeals in refusing to recognize a right of privacy in Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902) dealing with the use of the plaintiff's picture without her consent. A storm of disapproval ensued following this New York case leading to a statutory enactment in 1903 regarding the use of a person's name without consent.

11. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971); RESTATEMENT OF TORTS § 867 (1939). There are three jurisdictions which presently refrain from fully recognizing a right of privacy. Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955); Henry v. Cherry & Webb, 73 A. 97 (R.I. 1909); Yoeckel v. Samonig, 75 N.W.2d 925 (Wis. 1956). *See* Annot., 11 A.L.R.3d 1296 (1967) (concerned with eavesdropping as a violation of the right of privacy); Annot., 14 A.L.R. 2d 750 (1950); Annot., 168 A.L.R. 446 (1947); Annot., 138 A.L.R. 22 (1942).

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 804 (4th ed. 1971); RESTATEMENT OF TORTS § 867 (1939). As stated in 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 9.6, at 683-84 (1956):

> Because it was a new concept, with the fluidity which frequently accompanies a formative period [the right of privacy], was almost immediately adapted to a great variety of situations . . . . It became, in a sense, a catchall for a great number of cases in which mental suffering or other emotional distress was the primary injury sustained and for which no other substantive theory for relief was available.

13. *See generally* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 LAW & CONTEMP. PROB. 326 (1966).

the fear of a flood of litigation, the difficulty of damage computation, and possible undue restrictions on liberty of speech and free press, have served as a rationale for rejecting the right of privacy. Due to these apprehensions, the right of privacy has suffered a piecemeal evolution. Courts have relied on the persuasive authority offered by foreign jurisdictions concerning the privacy question more often than in many other tort areas. In addition to the extreme factual variations encountered, this reliance may be due primarily to the high degree of uncertainty involved in a tort field where the injury alleged is often entirely mental in nature.

Another tort category often concerned with similar questions is that of defamation. The law of defamation, which includes both libel and slander, has experienced a convoluted history and is sometimes termed the result of an "historical accident."[14] As the evolution of these twin torts evidenced no particular aim or plan,[15] legal scholars have not been kind in their treatment of this area of law.[16] The result of this haphazard development is basically that a defamatory communication is one which tends to hold the plaintiff up to hatred, contempt, or ridicule, or causes him to be shunned or avoided.[17] Further, it is typically held that "[d]efamatory language may be actionable per se, that is, in itself, or it may be actionable per quod, that is, only on an allegation and proof of special damages."[18] Despite distinct differences in origin and growth pattern, the right of privacy and defamation are in many ways strikingly similar.[19] It is these similarities which may indelibly influence the Texas law of defamation in a manner not yet revealed with certainty.

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14. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971). The difference between the torts of invasion of privacy and defamation was aptly stated in Themo v. New England News Pub. Co., 27 N.E.2d 753, 755 (Mass. 1940) where the court concluded:

> The fundamental difference between a right to privacy and a right to freedom from defamation is that the former directly concerns one's own peace of mind, while the latter concerns primarily one's reputation . . . .
>
> There is also general agreement that the plaintiff need not plead or prove special damages in privacy cases and in this respect it is similar to per se libel or slander. *See* 62 AM. JUR. 2d *Privacy* § 44 (1972).

15. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971). *See* Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Green, *Slander and Libel*, 6 AM. L. REV. 592 (1872).

16. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737 (4th ed. 1971). *See* Courtney, *Absurdities of the Law of Defamation*, 36 AM. L. REV. 552 (1902); Veeder, *History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

17. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 739 (4th ed. 1971).

18. Fields v. Worsham, 476 S.W.2d 421, 426 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); 36 TEX. JUR. 2d *Libel and Slander* § 2 (1962).

19. *See* Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1111 (1962) wherein it is said that the standard for an invasion of privacy is phrased in terms of the effect of the plaintiff himself and indicates that it must be offensive to him. But, the standard is still not subjective; the courts speak of the requirement that it be offensive to a person of ordinary sensibilities. Despite the different way of stating this test from that of defamation, in the case of a false statement they are likely to reach the same result. "Certainly it would appear that a statement which holds him

Until *Billings v. Atkinson*,[20] the Texas courts did not view the right of privacy in a favorable light.[21] The right was dealt with under guise of more traditional tort concepts such as trespass, defamation, or quasi-property interests.[22] The intent may have been to further justice without drastically departing from the staid position of non-recognition of the right of privacy. That same static position is clearly seen in *Milner v. Red River Valley Publishing Co.*[23] where the court of civil appeals defined the right of privacy but refused to apply it. The court reaffirmed the position that Texas courts are limited to the enforcement of rights as they existed on January 20, 1840, unless changed or added to by statute and that since the right of privacy met neither of these pre-requisites, it would not be recognized.[24] The court's position which even at that time was contrary to the decisions of many other jurisdictions, was based upon the reasoning that protection could be afforded for these types of invasions under more conventional actions such as libel, slander, wire-tapping and nuisance.[25]

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up to hatred, ridicule, or contempt would offend the sensibilities of an ordinary, reasonable person." *Id.* at 1111. *See also* TEX. REV. CIV. STAT. ANN. art. 5430-32 (1958); TEX. PENAL CODE ANN. art. 1269-94 (1953).

20. 489 S.W.2d 858 (Tex. Sup. 1973).

21. *See* McCullagh v. Houston Chronicle Pub. Co., 211 F.2d 4 (5th Cir.), *cert. denied*, 348 U.S. 827 (1954); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App.—Dallas 1952, no writ).

22. U.S. Life Ins. Co. v. Hamilton, 238 S.W.2d 289 (Tex. Civ. App.—Waco 1951, writ ref'd n.r.e.). Herein the court stated that Texas courts should and would, under appropriate circumstances, allow recovery for an invasion of privacy but that they were not to decide that question. *Id.* at 292.

23. 249 S.W.2d 227 (Tex. Civ. App.—Dallas 1952, no writ). The appellants were relatives of the deceased. The defendant newspaper carried a notice of Milner's death and told of his previous indictment in a grain theft case. His relatives sued for an invasion of privacy. The court stated that such rights were protected by libel and slander, search and seizure, and other traditional actions. The facts also revealed libel questions which were dismissed on grounds of truth and that there was no blackening of the deceased's memory.

It is important to note that the right of privacy was defined as a *personal* right to be let alone. *Id.* at 229. Therefore, even in states which allowed right of privacy actions to be maintained, it was typical to refuse redress to relatives if they are not personally affected (unless altered by statute).

24. Milner v. Red River Valley Pub. Co., 249 S.W.2d 227, 229 (Tex. Civ. App.—Dallas 1952, no writ). This rationale may be faulty. Regardless of the fact that courts should raise their own offspring, Texas courts have typically dealt with the common law as a system for growth and change. Witness the adoption of rules regarding escaped animals, protection of infant trespassers, recovery for physical harm resulting from shock, manufacturer's liability, last clear chance or doctrine of discovered peril, and third party beneficiaries, none of which could satisfy the requisites set forth in *Milner* and in the court of civil appeals holding in *Billings*. *See* Seavey, *Can Texas Courts Protect Newly Discovered Interests*, 31 TEXAS L. REV. 309, 310 (1953). *See also* Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W.2d 246 (1942); Guisti v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874 (1912).

25. A jurisdiction advancing a rationale similar to this, as now rejected in Texas, is Nebraska. *See* Brunson v. Ranks Army Store, 73 N.W.2d 803 (Neb. 1955); Perlman, *The Right of Privacy in Nebraska: A Re-examination*, 45 NEB. L. REV. 728

The late cognizance of the right of privacy by Texas courts can conceivably be viewed as propitious. Texas may now rely on the events and developments which have transpired in other jurisdictions and thereby avoid many of the same pitfalls and evidentiary problems encountered by other court systems.[26] As mentioned previously, these foreign authorities have treated the right of privacy as constituting four distinct types of invasions with each type having varied components.[27] Confusion has sometimes resulted in jurisdictions which failed to heed the existence of the distinctly individual natures of these invasion of privacy classifications.[28] Taking these protectable interests in order—intrusion, disclosure, false light, and appropriation—Dean Prosser stated:

> [T]he first and second require the invasion of something secret, secluded or private pertaining to the plaintiff; the third and fourth do not. The second and third depend upon publicity, while the first does not, nor does the fourth, although it usually involves it. The third requires falsity or fiction; the other three do not. The fourth involves a use for the defendant's advantage, which is not true of the rest.[29]

This analysis reveals that by recognition of the right of privacy in general and presumably the specific classes of false light in the pubic eye, and public disclosure of private facts,[30] a possible confusion, overlap, or merger

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(1966). *See also* Nizer, *The Right of Privacy: A Half-Century's Developments*, 39 MICH. L. REV. 526 (1941).

For further discussion involving this rationale which Texas now rejects, *see* Harned v. E-Z Finance Co., 151 Tex. 641, 254 S.W.2d 81 (1953) though this particular decision remains unaffected at present.

In O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941), *cert. denied,* 315 U.S. 823 (1942) a football player's right of privacy was held not to have been violated by the use of his picture on a beer advertisement without his consent even assuming an action for an invasion of privacy would lie in Texas. *Id.* at 170. Later, in McCullagh v. Houston Chronicle Pub. Co., 211 F.2d 4 (5th Cir.), *cert. denied,* 348 U.S. 827 (1954) the *Milner* reasoning was relied upon in denying the existence of a right of privacy in Texas. *Id.* at 5.

26. For example: the initial formulation of what constitutes an invasion of privacy, what the applicable defenses are, and answers regarding damage computation. Therefore it may not always be said that a weak rationale must inevitably lead to unfortunate results.

27. *But see* Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. REV. 962 (1964); Green, *The Right of Privacy,* 27 ILL. L. REV. 237 (1932).

28. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 814 (4th ed. 1971). In Ettore v. Philco T.V. Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied,* 351 U.S. 926 (1956) the present state of the right of privacy was described to be "still that of a haystack in a hurricane . . . ."

29. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 814 (4th ed. 1971).

30. This is presumed since in Billings v. Atkinson, 489 S.W.2d 858 (Tex. Sup. 1973) the Texas Supreme Court made reference to a "judicially approved definition" of the right of privacy which encompasses these areas:

> [I]t is the right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in

effect may be created. Since Texas has now followed the majority in approving the right, a review of the experiences prevalent in other jurisdictions may be helpful in attempting to predict possible interaction between the tort areas of privacy and defamation.[31]

The Georgia Supreme Court was the initial court of last resort to sustain the existence of a right of privacy and therefore Georgia is appropriately suited to a comparative analysis. In *Pavesich v. New England Life Insurance Co.*,[32] the plaintiff's picture appeared beside an ill-dressed and sickly looking man. Beneath the plaintiff's likeness, which was used without his consent, were words that the plaintiff had purchased insurance from the defendant company while the other person portrayed had not. In addition to firmly establishing the existence of the right of privacy in Georgia, the court *also* stated that a libel action was perhaps applicable to these facts and that the plaintiff was entitled to have this question submitted to the jury.[33] Thus, the potentiality of a confusion, overlap, or merger effect was evident even from the outset. A number of subsequent decisions in Georgia discussed both privacy and defamation, and although dealing with only one fact situation, often maintained that a cause of action might be had under either theory. For instance, in *McKown v. Great Atlantic & Pacific Tea Co.*,[34] the plaintiff brought an action on one count for slander and a separate count for an action based on an invasion of privacy. The court stated: "[S]ince all slander cases necessarily involve the right of privacy against slander the right of privacy is involved but the gist of the action is still slander in such cases and not an invasion of privacy."[35] This attempt to distinguish the two fields of tort was to be of little consequence. A few years later in *Ford Motor Co. v. Williams*,[36] the plaintiff brought an action based on trespass and an invasion of

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such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Id. at 859. *See* 62 AM. JUR. 2d *Privacy* § 1 (1972).

31. In the main, use will be made of Georgia and Kentucky since the former was the first state to give full recognition to the right of privacy and the latter dealt with the question prior to the 1890 Warren and Brandeis article, though not fully accepting the right until 1927. These jurisdictions' acceptance patterns create a useful time span for analysis purposes. Ohio is to be used as a footnote supplement to fill in the time survey (1905 - 1927 - 1956 - 1973) of initial recognition, while all three states frequently rely on one another for precedent. All are representative and non-statutory in their form of recognition.

32. 50 S.E. 68 (Ga. 1905). This case contains an excellent discussion of the right of privacy and it is often cited as the leading case in the area. Cases generally treating privacy and defamation are Haggard v. Shaw, 112 S.E.2d 286 (Ga. Ct. App. 1959); Davis v. General Fin. & Thrift Corp., 57 S.E.2d 225 (Ga. Ct. App. 1950).

33. Pavesich v. New England Life Ins. Co., 50 S.E. 68, 81 (Ga. 1905).

34. 107 S.E.2d 883 (Ga. Ct. App. 1959). The plaintiff borrowed a pen from the defendant store in order to sign a check. One of the defendant's employees, thinking the plaintiff had kept the pen, accosted the plaintiff in a dentist's office and, in the presence of others, accused the plaintiff of taking the pen.

35. *Id.* at 886-87.

36. 132 S.E.2d 206 (Ga. Ct. App.), *rev'd on other grounds,* 134 S.E.2d 32 (Ga.

privacy. The defendant contended that an action for an invasion of privacy was available only when some other remedy was not and consequently trespass alone was available to the plaintiff. The court of appeals demonstrated that the evolution of the right of privacy had led to allowing a separate and distinct action to be based on privacy alone and therefore both actions could be brought simultaneously.[37] The *McKown* case obviously conflicts with this finding but the court in *Ford* relied on *Pavesich* in holding that both counts were actionable and that the Georgia Supreme Court would have rejected the *McKown* reasoning.[38] Finally, in the *Ford* decision, the court acknowledged the possible presence of an element of defamation. This would have been true had the defendant acted within view of the plaintiff's neighbors when he entered the plaintiff's house and confiscated his personal belongings. Since the police were present, this might have suggested that the plaintiff was a felon. Regarding this the court said: "The fact that this element may be present here does not exclude the presence also of a trespass and an invasion of privacy flowing from the same conduct."[39] This multiplicity of actions question again arose in *Freeman v. Busch Jewelry Co.*[40] where the Northern District Court of Georgia held that a tort was committed when the plaintiff's wife read a postcard mistakenly sent to the plaintiff by the defendant from which she inferred that her husband was having a clandestine love affair with another woman. The court stated:

> It is not necessary for this court to label plaintiff's action as one arising from violation of a right of privacy as plaintiff contends, or as arising, if at all, for alienation of affections as defendant contends, or, as seems more likely to this court, as arising from a publication of a libel.[41]

Thus, it seems that from the earliest decision in Georgia which authorized the right of privacy, until many years later, in certain situations, the areas of

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1963). The plaintiff was not home when employees of the defendant accompanied by three police cars and a paddy wagon, forcibly entered the plaintiff's house and confiscated personal property belong to the plaintiff which they believed he had stolen.

37. *Id.* at 210; see Welsh v. Pritchard, 241 P.2d 816 (Mont. 1952); Bennet v. Norban, 151 A.2d 476 (Pa. 1959) where the court stated: "Often no other remedy exists, but if one is concurrent it does not obliterate the right of privacy." *Id.* at 479.

38. Ford Motor Co. v. Williams, 132 S.E.2d 206, 210 (Ga. Ct. App.), *rev'd on other grounds*, 134 S.E.2d 32 (Ga. 1963). In Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905), a petition was brought in two counts, one for libel and the other for invasion of privacy, and the court held *both* to be good. Here, in *Ford* the court believed that the reasoning used in McKown v. Great Atl. & Pac. Tea Co., 107 S.E.2d 883 (Ga. Ct. App. 1959), was probably argued in the *Pavesich* case, but that the Georgia Supreme Court had rejected those arguments, as have other jurisdictions; *see* Annot., 138 A.L.R. 22 (1942).

39. Ford Motor Co. v. Williams, 132 S.E.2d 206, 211 (Ga. Ct. App. 1963); *see* Cabaniss v. Hipsley, 151 S.E.2d 496 (Ga. Ct. App. 1966) for a discussion of the development of the right of privacy in Georgia by means of a case-by-case approach. *See* McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E.2d 810 (Ga. Ct. App. 1939) (regarding constitutional issues).

40. 98 F. Supp. 963 (N.D. Ga. 1951).

41. *Id.* at 966.

defamation and the right of privacy are no more distinguishable today than then. In retrospect, Georgia courts have had 68 years in which to clarify and distinguish privacy from defamation; however, the direction has been towards integration rather than separation.

An analysis of Kentucky's experiences with the right of privacy may prove helpful in that this judiciary had dealt with the right in cases arising prior to the composition of the 1890 Warren and Brandeis article.[42] One of the initial decisions was *Foster-Milburn Co. v. Chinn*,[43] where the court of appeals allowed recovery for the use of the plaintiff's name and likeness in an advertisement. Though the ruling could have been based squarely on the right of privacy, the court avoided such a pronouncement and decided the case on grounds of fraud and defamation. The court realized the possibility of a libel action arising after certain evidentiary issues were settled and mentioned that the defendant's acts constituted a general invasion of the plaintiff's privacy.[44] In 1927, in the case of *Brents v. Morgan*,[45] the court finally gave full recognition to the right of privacy and incorporated the Warren and Brandeis article almost in its entirety into the decision, although making it known that they were cautious and hesitant.[46] A decision relevant to this privacy-defamation question is *Gregory v. Bryan-Hunt Co.*[47] where the defendant, while at the plaintiff's place of business, asserted that the plaintiff had stolen cigarettes from the defendant, and because of this the police seized the plaintiff's cigarettes within view of many customers. The court of appeals said that while it may have been true that an action for an invasion of privacy may incidentally include some of the other elements of actions such as libel, slander, or assault, there was a fine line of distinction which needed to be remembered. The differentiation advanced was that the right of privacy was not intended to be a substitute or alternative remedy for other known and established remedies. The court stated that the plaintiff had no cause of action based on an invasion of privacy as the publication was

42. Thus, *even before* the 1890 Warren and Brandeis article, the common law recognized privacy as a right, but violation thereof was accompanied by a doing-justice technique of finding some legal peg upon which to predicate liability. Bunch, *Kentucky's Invasion of Privacy Tort—A Reappraisal,* 56 KY. L.J. 259, 270 (1967). As early as 1867 in Grigsby v. Breckenridge, 65 Ky. (2 Bush) 480 (1867) the court intimated that if the plaintiff were damaged by the defendant publicizing letters the plaintiff had written to his deceased wife, recovery would be allowed.

43. 120 S.W. 364 (Ky. 1909); *cf.* Douglas v. Stokes, 149 S.W. 849 (Ky. 1912). The *Douglas* case involved the reproduction of photographs of the plaintiff's dead Siamese twin sons where the court allowed recovery on a breach of express or implied contract theory but generally held plaintiff's privacy to have been invaded. *Id.* at 850.

44. Foster-Milburn Co. v. Chinn, 120 S.W. 364, 366 (Ky. 1909).

45. 299 S.W. 967 (Ky. 1927). The defendant placed a placard in the window of his shop which stated that the plaintiff owed the defendant money and had not yet paid the debt. The sign, while being large and conspicuous, was true. The court reviewed prior holdings and held that the plaintiff's privacy had been invaded. *Id.* at 971.

46. *Id.* at 970-71.

47. 174 S.W.2d 510 (Ky. 1943).

oral and thus slander was the appropriate remedy.[48] Again, in *Pangallo v. Murphy*[49] it was held that there could be no redress for an invasion of privacy by oral publication.[50]

Notwithstanding these rules and the strictness of some holdings, the areas of defamation and privacy are still closely linked, even in Kentucky. In *Elkins v. Roberts*[51] the statement was made that the plaintiff told a lie and "I will have him indicted for it." Typically in Kentucky, recovery has not been allowed for an invasion of privacy by oral statements but, if this oral allegation were published and resulted in special damages, suit could be brought under either the defamation or invasion of privacy theories.[52] Though the gradual evolution of the right of privacy in Kentucky may be seen as a contrast to the whirlwind development that occurred in Georgia, the possibility of confusion, overlap or merger is still present in the privacy-defamation area regardless of Kentucky's stricter rulings and treatment of the law of privacy.[53]

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48. *Id.* at 512-13. The court held that the facts of this case did not reveal an invasion of privacy because if such were the rule, when a charge was made that a person had committed theft, if done in the presence of others, the aggrieved party could maintain an action for violation of his privacy rather than for slander. *Id.* at 513. Kentucky is one of few jurisdictions not allowing a privacy action to be brought for an *oral* statement. *See* 62 AM. JUR. 2d *Privacy* § 27 (1972) for a list of other jurisdictions following this rule. In Jones v. Herald Post Co., 18 S.W.2d 972 (Ky. 1929) the court also denied recovery for similar reasons. Thus, Kentucky's privacy holdings may be classified as strict. This is true even though Warren and Brandeis were not in favor of recovery being allowed for oral publications without special damage. *See* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 217 (1890).

49. 243 S.W.2d 496 (Ky. 1951).

50. *Id.* at 497.

51. 242 S.W.2d 994 (Ky. 1951). The court refused redress stating that these words were neither actionable per se nor per quod. *Id.* at 996. *See* Lucas v. Moskins Stores, Inc., 262 S.W.2d 679 (Ky. 1953); Voneye v. Turner, 240 S.W.2d 588 (Ky. 1951); Rhodes v. Graham, 37 S.W.2d 46 (Ky. 1931).

52. Bunch, *Kentucky's Invasion of Privacy Tort—A Reappraisal*, 56 KY. L.J. 259, 280 (1967).

53. Troublesome questions in areas other than defamation may accompany reception of the right of privacy as an actionable tort in Texas. The experiences of Ohio reveal the likelihood of conflict between privacy and mental distress actions. The Ohio Supreme Court first considered the existence of a right of privacy in Housh v. Peth, 133 N.E.2d 340 (Ohio 1956) where the facts showed a creditor's campaign to harass the debtor plaintiff. The facts represented a typical case of intentional infliction of mental distress for which recovery was afforded under the invasion of privacy theory. Generally, the Ohio experience is not unlike that undergone in Kentucky and Georgia; again rules and guidelines have been set but clarification of these measures has not yet been attained. For discussions concerning the possibility of all privacy law becoming a part of the larger tort of the intentional infliction of mental suffering, *see* Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Harper & McNeely, *A Reexamination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426; Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63 (1950).

In *Billings* the Texas Supreme Court was careful in avoiding a direct confrontation

Even in those jurisdictions where the right of privacy has been acknowledged for several years, the resultant effect of its affirmation on the law of defamation may not yet be assessed with certainty. The possible effects of the *Billings v. Atkinson*[54] decision on defamation need at least be considered, especially since the Texas Supreme Court legitimatized the existence of the right of privacy but refrained from defining the nature and requirements of the cause of action in any but the most general terms, leaving the completion of that task to future decisions.[55]

Of the four types of invasion of privacy, the two which are most clearly analogous to the reputation right guarded by defamation are public disclosure of private facts and placing the plaintiff in a false light in the public eye.[56] Dean Prosser realized the overlap or merger effect the right of privacy has on the law of defamation and while stating that the developments in privacy were not wrong, it was time to consider if a halt should be called.[57] His reasoning was that the safeguards and defenses of defamation were being jettisoned and ignored while the law of defamation could possibly be "swallowed up" by the right of privacy decisions.[58] Dean Wade also took cognizance of this supplanting effect and similarly felt it could lead to defamation being engulfed by the invasion of privacy actions. Wade felt this opportunity for legal reform should be welcomed by the courts as a chance to remove the apology and lament rationale which often accompanies decisions in the libel and slander categories.[59]

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with this mental distress question. For general privacy cases in Ohio, *see* Young v. That Was The Week That Was, 312 F. Supp. 1337 (N.D. Ohio 1969); Dayton Newspapers Inc. v. City of Dayton, 259 N.E.2d 522 (Ohio Ct. C.P. 1970); La Crone v. Ohio-Bell Tel. Co., 182 N.E.2d 15 (Ohio Ct. App. 1961).

54. 489 S.W.2d 858 (Tex. Sup. 1973).

55. In a similar manner, the Kentucky court initially phrased its acceptance of the right of privacy in broad generalities without stating explicit justifications. Therefore they have had to apply generalities to widely varied fact situations. Further, the court failed earlier to evolve a detailed, complete, and practical working rule to determine if a violation had occurred. Problems often arise when courts proceed on an ad hoc basis of this nature. Thus it has been said that this type of broad decision lessens the trial court's ability to decide the applicable law and render valid instructions when questions are presented to the jury. This makes the Kentucky Court of Appeals an arbiter of facts in many cases presented to it. Bunch, *Kentucky's Invasion of Privacy Tort—A Reappraisal*, 56 KY. L.J. 259, 271 (1967). This point is raised in reference to the generality of the Texas *Billings* decision and reveals that problems of a varied nature may present themselves.

56. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1120 (1962).

57. Prosser, *Privacy*, 48 CAL. L. REV. 383, 423 (1960).

58. *Id.* at 422-23. Prosser realized that the defenses of truth, special damages, innuendo, retraction statutes and the filing of a bond for costs as required in defamation were circumvented in privacy actions. However, he recognized the usefulness of privacy actions in extending to afford remedies where none existed previously. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 117, at 813 (4th ed. 1971).

59. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1122 (1962). *See also* Hart v. E.P. Dutton & Co., 93 N.Y.S.2d 871, 876 (Sup. Ct. 1949), *appeal denied*, 99 N.Y.S.2d 1014 (1950), *quoting* Street, FOUNDATIONS OF LEGAL

It is only logical that if a true statement is actionable in privacy, a false statement should be also. If the communication is offensive to a person of ordinary sensibilities, truth or falsity should not be an issue. Given this, if a non-defamatory declaration invades the plaintiff's right of privacy and is therefore actionable, a defamatory statement should be actionable for the same reason.[60] Granted, this construction produces an overlap with the law of defamation whereby many restrictions and limitations of libel and slander may be avoided, but the outcome could be salutary if proper tutoring is commenced through sensible judicial decisions. The problems of duplication of damages or full freedom of speech and press, as well as the others, may be nullified by proper judicial reaction and possible statutory enactments.

The end result in Texas will probably be a deviation from actions based on libel and slander towards proceedings grounded in right of privacy terminology. This shift would seem sensible and therefore inevitable in view of the less stringent requirements and limitations existing in the privacy field. There are two sides to this issue[61] but any practical and conceptual difficulties evident in this new trend may be eradicated by proceeding judiciously.

Texas, by gleaning knowledge from the experiences of other jurisdictions and purging any inconsistencies therein, stands in an advantageous position to formulate a unified body of rules delineating the parameters of the right of privacy concept. Proper use of the judicial sickle of discretion will certainly lead to a more coherent formulation of rules regarding the right of privacy. This right is definitely a product of its time,[62] and although the *Billings* decision is somewhat belated, there is at least an awareness of this pernicious proliferation of intrusions upon one's privacy and it is submitted that should the watchword become clarity, Texas law will benefit.

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LIABILITY, Vol. 1, p. 319, where it is said regarding the right of privacy that if such a right were to be born that it would come from the law of libel:

> Those who contend for a right of personal security broad enough to include a general right "to be let alone" would not perhaps admit this, but unquestionably the law of libel furnishes a nearer approach to the indicated goal than any other branch of tort.

60. Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093, 1120-21 (1962). *See* Note, 50 CAL. L. REV. 363 n.57 (1962) where it is stated:

> Although the interest ostensibly protected in privacy cases is the plaintiff's hurt feelings, his reputation is also injured in the false light cases. To deny a recovery in privacy in these cases, while allowing recovery when defamation is not involved, would seem to put an unjustified premium on hurt feelings.

Aside from this, it is also true that a majority of defamation actions may now be brought for an invasion of the right of privacy.

61. For arguments in opposition to this privacy-defamation merger, *see* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

62. Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526 (1941).