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The Privacy Action in Texas: Its Characterization, and a Determination of Applicable Statutes of Limitations

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Invasion of privacy was not recognized as a cognizable cause of action in Texas until Billings v. Atkinson. With this step, Texas joined the mainstream of American judicial thought on the subject. The privacy action will become an important one in Texas as hopeful plaintiffs gain encouragement from the fact that two of the four forms of the privacy action, intrusion and appropriation, have now been recognized, thereby leaving open the question of whether the other two forms of privacy action, false light and public disclosure of embarrassing private facts, will be recognized in the future.

As the privacy action is still in its infancy in Texas, a myriad of unanswered questions remains. For example, what statute of limitation will apply to the privacy tort? There is no specific statute of limitation with respect to privacy actions in Texas and as yet there has not been a judicial resolution of this issue. The question is dependent on an interpretation of the various existing statutes of limitations and the characterization of the privacy tort as recognized in Texas. Further, the question of whether it is even appropriate for the newly recognized privacy tort to fit under one of the present limitation statutes, which were designed to accommodate forms of action recognized at common law, must be considered and answered. It is the purpose of this Comment to explore the nature of the privacy tort as it has been judicially defined; to analyze the nature of the tort as recognized in Texas; and to determine the applicable statute of limitation to the privacy action in Texas by a consideration of both the characterization of the tort and the general purposes, policies, and construction of the statutes of limitations in Texas. After determining the applicability of present Texas statutes of limitations to the several types of privacy actions expressly or implicitly recognized by Texas courts so far, this Comment submits a proposal for a new statute of limitation to accommodate the very recently recognized privacy right in Texas.

I. The Privacy Tort
   A. Characterization of the Privacy Action

It was not until the publication of a famous law review article by Warren and Brandeis in 1890 that invasion of privacy was introduced and defined.

1. 489 S.W.2d 858 (Tex. 1973).
as an independent legal cause of action.⁴ Although courts had long recognized and given effect to rights that were essentially the same as the right of privacy under the guise of property rights, or breach of confidence or an implied contract,⁵ this article had a dramatic impact on the legal fraternity and led to the recognition in many states of a new cause of action.⁶ Conceived by Warren and Brandeis as part of the broad right of an individual to "an inviolate personality,"⁷ the right of privacy has become a composite of diverse interests and has been held to apply to many different kinds of situations.⁸ Characterization of the privacy cause of action thus becomes most complex. As suggested by Prosser,⁹ and as indicated by case law,¹⁰ invasion of privacy is not one tort, but a complex of four torts tied together by a common name, but otherwise having almost nothing in common. These four torts have been categorized as follows: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness." These four types of invasion may be subject, in some respects at least, to different rules, and confusion may result from mixing the different types.¹²

The first variation of the privacy action, intrusion upon the plaintiff's solitude or seclusion, "is an intentional tort analogous to trespass and battery

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4. The significance of the recognition of the right of privacy as an independent cause of action was noted by the court in Annerino v. Dell Publishing Co., 17 Ill. App. 2d 205, 149 N.E.2d 761 (1958), as follows: "Basically, recognition of the right of privacy means that the law will take cognizance of an injury, even though no right of property or contract may be involved and even though the damages resulting are exclusively those of mental anguish." Id. at 206, 149 N.E.2d at 762, quoting Eick v. Perk Dog Food Co., 347 Ill. App. 293, 299, 106 N.E.2d 742, 745 (1952).

5. The interests protected by the privacy concept are varied, and in addition to the personal interest of the individual "to be let alone," there have been at least three other separate interests, somewhat analogous to property rights, protected: interest in one's history, interest in one's likeness, and interest in one's name. See Feinberg, Recent Developments in the Law of Privacy, 48 COLUM. L. REV. 713, 717 (1948).

6. The right of privacy has been judicially defined as: "The right of an individual to be let alone, or to live a life of seclusion, or to be free from unwarranted publicity, or to live without interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities." Earp v. City of Detroit, 16 Mich. App. 271, 167 N.W.2d 841, 845 (1969). In addition, the right of privacy has been recognized and stated by the American Law Institute as follows: "The right of privacy is invaded when there is (a) intrusion upon the seclusion of another . . . or (b) appropriation of the other's name or likeness . . . or (c) publicity given to the other's private life . . . or (d) publicity which places the other in a false light before the public . . . ." RESTATEMENT (SECOND) OF TORTS § 652A(2) (Tent. Draft No. 21, 1975).


8. See, e.g., notes 13-30 infra and accompanying text.


10. Prosser's conclusions come from his synthesis of over three hundred cases on privacy from all over the nation. Prosser, supra note 9, at 388-89.

11. Id. at 389.

12. Id.
in protection of personal integrity."\textsuperscript{13} It includes not only physical invasion,\textsuperscript{14} but also eavesdropping upon private conversations by wiretapping or microphones\textsuperscript{15} and spying into windows of a home.\textsuperscript{16} To constitute a valid cause of action, defendant's conduct must outrage one of ordinary sensibilities; the hypersensitive person may not recover for actions which are merely rude or inconsiderate.\textsuperscript{17} The interest protected is primarily a mental one rather than economic or pecuniary.\textsuperscript{18} The "public figure" defense is not relevant in this type of invasion of privacy, since no publication is involved;\textsuperscript{19} however, it is necessary that the thing intruded upon or pried into is, and must be entitled to be, private.\textsuperscript{20}

The second variation of the privacy tort, public disclosure of private facts, is altogether distinct from intrusion. The public disclosure tort involves publication of matter which would be offensive and objectionable to a reasonable man of ordinary sensibilities.\textsuperscript{21} Authorities have disagreed on what interest is protected by this tort. According to Prosser, the interest protected by the public disclosure action is that of reputation, with the same


\textsuperscript{16} Pritchett v. Board of Comm'r's, 42 Ind. App. 3, 85 N.E. 32 (1908) (owner of a residence near adjoining jail may have relief from the nuisance of invasion of his privacy by the jail windows being left open so that the prisoners may look into the house); Souder v. Pendleton Detectives, 88 So. 2d 716 (La. App. 1956) (cause of action that insurer and detective agency violated the "Peeping Tom" statute by trespassing on claimant's property and peeping into windows); Moore v. New York El. R.R., 130 N.Y. 523, 29 N.E. 997 (1892) (loss of privacy occasioned by the ability of the defendant's passengers and employees to look into plaintiff's upper-story windows from the platform and stairs of defendant railroad station may be considered in action to recover damages to easements).

\textsuperscript{17} Shorter v. Retail Credit Co., 251 F. Supp. 329, 332 (D.S.C. 1966). In Shorter the court said that when a plaintiff bases an action for invasion of privacy on intrusion alone, bringing forth no evidence of publication on the part of the defendant, it is incumbent upon him to show a blatant and shocking disregard of his rights by the defendant, and serious mental or physical injury or humiliation to himself resulting therefrom.

\textsuperscript{18} Id.

\textsuperscript{19} See, e.g., Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514, 517 (Sup. Ct. 1968). Applying District of Columbia law, the New York Supreme Court held here that the plaintiff, a well-known public figure, had a constitutional right to maintain an action for invasion of privacy based on the defendant's unprivileged wiretapping, making of harassing telephone calls, trailing by private detectives, and other conduct.


\textsuperscript{21} Prosser, supra note 9, at 396. The decision which has become the leading case is Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931), which involved a motion picture that revealed the present identity of a reformed prostitute who had been the defendant in a murder trial seven years before and who had since become a respectable member of society living in obscurity. Most states are very skeptical of the public disclosure tort. See, e.g., Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940), where recovery was denied to a young man who years before had been an infant prodigy well-known to the public. An article published by a magazine had depicted intimate details of the man's secluded and theretofore obscure personal adult life.
overtones of mental distress that are present in libel and slander. Moreover, he characterizes this tort as essentially an extension of defamation into the field of publications that do not fall within the narrow limits of the old torts, with the elimination of the defense of truth. On the other hand, Warren and Brandeis, who seemed especially concerned with this form of the privacy tort, said that the injury inflicted by the invasion of privacy bears only a superficial resemblance to the wrongs dealt with by defamation, owing to the nature of the instruments by which the invasion occurs. They explained that whereas the legal remedy for privacy involves the treatment of wounded feelings, the defamation principle, dealing only with damage to reputation with the injury done to the individual in his external relations to the community, covers a radically different interest.

The third variation of the privacy action, publicity which places plaintiff in a false light in the public eye, requires some element of untruth, and thus differs from the tort of public disclosure which functions irrespective of the truth. According to Prosser, the interest protected by the "false light" tort is clearly that of reputation, with overtones of mental distress. Other authorities have characterized the injury primarily as one of injury to the person through mental anguish, embarrassment, or humiliation.

Although the portrayal need not necessarily be defamatory, there has been a good deal of overlapping of defamation and false light cases, and it seems clear that either action, or both, will very often lie.

22. Prosser, supra note 9, at 398.
23. Id.
25. Id.
26. Examples of the false light type of privacy action are cases falsely attributing to the plaintiff some opinion or utterance, the unauthorized use of plaintiff's name to advertise for witnesses of an accident, the use of plaintiff's picture to illustrate a book or article with which he has no reasonable connection, and the inclusion of the plaintiff's name, photograph, and fingerprints in a public "rogues' gallery" of convicted criminals, when he has not in fact been convicted of any crime. See, e.g., Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (article concerning the negligence of children); Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948) (face of an innocent person used in conjunction with an article depicting taxicab drivers as ill-mannered and dishonest); Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952) (magazine article on love between the opposite sexes and its relation to divorce); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905) (placing of plaintiff's picture in rogues' gallery); Hamilton v. Lumbermen's Mut. Cas. Co., 82 So. 2d 61 (La. Ct. App. 1955) (unauthorized use of insured's name in advertisement); Thompson v. Close-Up Inc., 277 App. Div. 848, 98 N.Y.S.2d 300 (1950) (article concerning the peddling of narcotics); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941) (plaintiff's name signed to a telegram to the governor urging political action which would have been illegal for him, as a state employee, to advocate).

27. Prosser, supra note 9, at 400.
28. Other authorities, however, have disagreed with Prosser's analysis. See, e.g., Bloustein, Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U.L. Rev. 962, 981 (1964); Nimmer, The Right To Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935, 958 (1968); note 104 infra and accompanying text.

29. W. Prosser, supra note 9, at 813; Linehan v. Linehan, 134 Cal. App. 2d 250, 285 P.2d 326 (1955) (defendant's statements that plaintiff was living with her husband sinfully and illegally held sufficient to sustain the finding that the defendant was guilty of slander and invasion of privacy); Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (complaint alleging that a purchaser of a photograph from a client for whom a model had originally posed had altered the photograph and added suggestive captions injuring the model's reputation as an individual and in the trade, held
The fourth variation of the privacy action, appropriation of plaintiff's likeness or name, concerns the exploitation of attributes of the plaintiff's identity to the advantage of the defendant. Examples of this action are where the plaintiff's name or picture has been used without his consent to advertise the defendant's product, to accompany an article sold, or for other business purposes. This form of the privacy tort is clearly distinct from the other three. The interest protected by the appropriation theory is not so much a mental as a proprietary one: plaintiff's interest is his name and likeness as an aspect of his identity. A decision of the Second Circuit has recognized the proprietary nature of the action, concluding that an exclusive license has a "right of publicity" which entitles the owner to enjoin the use of his name or likeness by a third person. In jurisdictions where the privacy tort has not been recognized, similar results in appropriation cases have been possible under a breach of trust or quasi-contract theory.

B. Break with Precedent: Recognition of the Privacy Right in Texas

Prior to the 1973 case of Billings v. Atkinson, Texas courts consistently sufficient to state a cause of action for libel and invasion of privacy); Martin v. Johnson Publishing Co., 157 N.Y.S.2d 409 (Sup. Ct. 1956) (defendant's publishing of plaintiff's photograph without consent in conjunction with a lurid story, held libelous and invasion of plaintiff's right to privacy); Bennett v. Norban, 396 Pa. 94, 151 A.2d 476 (1959) (irate assistant manager's acts of blocking a departed customer's path and searching her pockets and purse, held slanderous and an invasion of the customer's privacy). In Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577, 581 (1942), the court recognized that the letter complained of might very well have formed the basis of a libel charge. See also Hazlitt v. Fawcett Publications, 116 F. Supp. 538 (D. Conn. 1953) (the applicable statute of limitation for defamation was bypassed by amending the action as one for the invasion of privacy).

30. Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (defendant advertised erroneously and without the plaintiff's consent that the plaintiff was a satisfied user of the defendant's machine); McCreery v. Miller's Grocery, 99 Colo. 499, 64 P.2d 803 (1936) (plaintiff, who had employed a photographer to take and finish four pictures, later discovered the photographer had exposed a copy to public view in his showcase); Fitzsimmons v. Olinger Mortuary Ass'n, 91 Colo. 544, 17 P.2d 535 (1932) (an undertaker caused pictures of a dead body being moved from an airplane to be inserted in newspapers for advertising purposes); Korn v. Rennison, 21 Conn. Supp. 400, 156 A.2d 476 (Conn. Super. Ct. 1959) (defendant allegedly used the plaintiff's photograph, without the plaintiff's consent, for advertising purposes); Fisher v. Murray M. Rosenberg, Inc., 175 Misc. 370, 23 N.Y.S.2d 677 (Sup. Ct. 1940) (a photograph of a member of a professional dancing team was used without his consent in advertising shoes).

31. Prosser, supra note 9, at 406.

32. Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir.), cert. denied, 346 U.S. 816 (1953), rev'd sub nom. Bowman Gum, Inc. v. Topps Chewing Gum, Inc., 103 F. Supp. 944 (E.D.N.Y. 1952). The court thus explained the right of publicity, or the right to grant the exclusive privilege of publishing one's picture: "For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances . . . ." 202 F.2d at 868.

33. Not all courts, however, have agreed. See, e.g., Strickler v. National Broadcasting Co., 167 F. Supp. 68 (S.D. Cal. 1958). In this action for invasion of privacy by way of a network telecast of a dramatized version of the plaintiff's experiences in connection with an emergency landing of a commercial airliner, the court refused to recognize the right of publicity as a new property right in California. Id. at 70. See generally Nimmer, The Right of Publicity, 19 LAW & CONTEMP. PROB. 203 (1954); Note, The Right of Publicity: A Doctrinal Innovation, 62 YALE L.J. 1123 (1953).


35. 489 S.W.2d 858 (Tex. 1973).
refused to consider invasion of privacy as an actionable legal claim. *O'Brien v. Pabst Sales Co.*

concerned a famous former football player who brought an action for invasion of his right of privacy and for damages by way of injury to him in using his name and picture in advertising beer. The plaintiff failed in his attempt because the Fifth Circuit ruled that he was not a private person and because he was constantly seeking publicity. It was recognized by Circuit Judge Holmes in his dissenting opinion, however, that under the Texas common law, the plaintiff would be entitled to recover the reasonable value of the use in trade and commerce of his picture for advertisement purposes, to the extent that such use was appropriated by defendant. The right to use one's name or picture for purposes of commercial advertisement, he said, "is a property right that belongs to every one; it may have much or little, or only a nominal, value; but it is a personal right, which may not be violated with impunity." 

In *U.S. Life Insurance Co. v. Hamilton,* where the plaintiff sought to recover for the unauthorized use of his signature and name in the promotion of the defendant's business, recovery of nominal damages was allowed. However, the court did not find it necessary to decide whether the right of privacy should be recognized as a cause of action in Texas, for it held that damages in such a case are not based upon or restricted to an invasion of the plaintiff's privacy as that legal concept has been developed by judicial decisions in other jurisdictions. Instead, the court held that the use of an individual's signature for business purposes unquestionably constitutes the exercise of a valuable right of property in the broadest sense of the term; thus, the court based the plaintiff's complaint and nominal recovery upon an infringement of property rights in and to the exclusive use of his signature, irrespective of the question of privacy as an independent ground of recovery.

As recently as 1952 the Texas court of civil appeals, in *Milner v. Red River Valley Publishing Co.*, refused to recognize the right of privacy, relying on the proposition that Texas common law, as a fixed body of law, can only be changed by legislative enactment. The court reasoned that, as "Texas courts are limited to the enforcement of rights under the common law as it existed on January 20, 1840," unless changed, modified, added to, or repealed by statute, and as the right of privacy was not recognized under the common law at that time, no recovery could be had in Texas for invasion of privacy as such. Prior to *Billings*, other Texas courts and federal courts applying Texas law had followed the *Milner* decision and had continued to deny that invasion of privacy was a cognizable claim in that state.
Billings v. Atkinson\(^{46}\) concerned an action against the telephone company and its employee for damages arising out of the installation of a wiretap device on the plaintiff's telephone. The Texas Supreme Court reasoned that although the law of Texas had not recognized a cause of action for a breach of the privacy right, as such, the court in Milner did recognize that some of the right of privacy interests have been protected under such traditional theories as libel and slander, wrongful search and seizure, eavesdropping, and wiretapping.\(^{47}\) Moreover, "eavesdropping was an indictable offense at common law."\(^{48}\) Measured by these considerations, the court recognized invasion of the right of privacy as a legal cause of action, portraying illegal wiretapping as a classic example of the tort of intrusion upon the plaintiff's seclusion or solitude, and awarded to plaintiff actual damages of $10,000 plus $15,000 exemplary damages. Speaking through Justice Denton, the court stated that the right of privacy 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 such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."\(^{49}\) Although the court seemed to recognize all four forms of the tort in this definition, because of Justice Denton's careful analogizing of the Billings wiretapping to eavesdropping, a common law offense, it is likely that only the tort of intrusion was actually recognized.

A plaintiff was not again successful in a privacy action in Texas until 1975 in the case of Kimbrough v. Coca-Cola/USA.\(^{50}\) Kimbrough concerned a former college football player who filed suit to recover damages for the unauthorized exploitation of his name and likeness for commercial purposes. The Texas court of civil appeals held that the plaintiff had a denied, 348 U.S. 827 (1954) (prior Texas court decisions had foreclosed any cause of action based on the invasion of privacy); Hansson v. Harris, 252 S.W.2d 600 (Tex. Civ. App.—Austin 1952, writ ref'd n.r.e.) (where the plaintiff had been arrested for a misdemeanor, photographed, and fingerprinted, and the arresting officers had acted in good faith but no complaint had been filed against the plaintiff, the plaintiff was not entitled to an injunction on the ground that the police chief had invaded the plaintiff's right of privacy by transmitting the plaintiff's photograph and fingerprints to other law enforcement officials and exhibiting them in the rogues' gallery not open to the general public). In a post-Milner decision, Payne v. Laughlin, 486 S.W.2d 192 (Tex. Civ. App.—Dallas 1972, no writ), relief for invasion of privacy was also denied in the absence of the pleading of trespass, wiretapping, or property damage in an action based on the defendant's allegedly keeping the plaintiff under surveillance.


\(^{47}\) 489 S.W.2d at 860.

\(^{48}\) Id.

\(^{49}\) Id. at 859.

\(^{50}\) 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.). For cases where the general right of privacy in Texas was recognized but where the plaintiff's claim was rejected, see Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329 (5th Cir. 1973) (action of the police department in making a limited release of arrest information could not be characterized as an invasion of the union organizers' right to privacy); Cullum v. Government Employees Fin. Corp., 517 S.W.2d 317 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.) (a creditor's writing of one letter to a debtor's employer seeking assistance in collecting a debt did not give the debtor a cause of action for invasion of the right to privacy).
cognizable cause of action for violation of his right of privacy, and that the evidence raised the issue as to whether the plaintiff, who had agreed to allow his picture and name to be used in connection with a project honoring outstanding college football players in the area and institutional advertisements promoting college football, consented to the use of his name and likeness in a beverage advertisement, thereby precluding summary judgment. The defendants in this case argued that the plaintiff, being a "public person," had no cause of action for violation of any proprietary right or right of privacy and cited O'Brien v. Pabst Sales Co., in support of their position. The court in Kimbrough, however, distinguished O'Brien from the case at bar. In O'Brien, the plaintiff, a highly publicized figure, failed to recover on his claim that his name and picture had been used with a beer advertisement. The court in Kimbrough observed that whereas the claim in O'Brien was not for the value of the plaintiff's name in advertising a product but for damages by way of injury to plaintiff by using his name in advertising beer, in Kimbrough the claim was to recover damages for the unauthorized appropriation and use of plaintiff's name and likeness in an advertising program.52

In summary, only two types of privacy have thus far been explicitly recognized in Texas, intrusion and appropriation. While the courts have indicated their willingness to reverse precedent and recognize the right, only the tip of the iceberg has been explored, and whether or not Texas courts will recognize the more controversial privacy torts of public disclosure and false light are questions that remain to be answered. Should the right be extended in Texas to cover these additional two privacy actions, the additional question arises concerning the applicable statutes of limitations.

C. Characterization and Analysis of the Privacy Tort in Texas

Rather than distinguishing Kimbrough from O'Brien in terms of the type of damages sought by the plaintiffs, the Texas court of civil appeals in Kimbrough could have gotten around the so-called "public figure" defense by simply holding that such a defense, although applicable to defamation cases, does not apply to the appropriation type of invasion of privacy. The Alabama Supreme Court has said, for example, that even the most famous have a right to be protected against the unauthorized commerical appropriation of their names and photographs, and that although a public figure may be the proper subject of news, the privilege does not extend to commercialization of his personality in a manner altogether distinct from the dissemination of news or information.53

51. 124 F.2d 167 (5th Cir. 1941), cert. denied, 315 U.S. 823 (1942).
52. 521 S.W.2d at 721.
53. Bell v. Birmingham Broadcasting Co., 266 Ala. 266, 96 So. 2d 263, 265-66 (1957). See also Rosemont Enterprises, Inc. v. Urban Systems, Inc., 72 Misc. 2d 788, 340 N.Y.S.2d 144, 146 (Sup. Ct. 1973) ("There is no question but that a celebrity has a legitimate proprietary interest in his public personality. He must be considered as having invested years of practice and competition in a public personality which eventually may reach marketable status. That identity is a fruit of his labors and a type of property.")
Because of the court's careful distinction in Kimbrough between the type of damages sought in O'Brien and in Kimbrough, and the court's recognition of the proper element of damages in an appropriation case of the value of the plaintiff's name in advertising a product instead of injury to him in the way of mental anguish, the appropriation type of privacy action in Texas appears identical to the quasi-contract action. This does not seem to be the case in many jurisdictions other than Texas which recognize as the major element of damages in an appropriation action personal damages such as mental anguish, embarrassment, and humiliation.\textsuperscript{54}

A quasi-contractual obligation has been recognized by the Texas courts to be one that is created by the law for reasons of justice, without any expression of assent, and sometimes even against a clear expression of dissent.\textsuperscript{55} Contracts implied in law, or quasi-contracts, rest solely on a legal fiction and are not contract obligations in the true sense, for there is no actual assent as in the case of true contracts.\textsuperscript{56} Such implied-in-law obligations rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Therefore, "when the party to be bound is under a legal obligation to perform the duty from which his promise is inferred, the law may infer a promise even as against his intention."\textsuperscript{57} Generally restitutional in nature, the amount of recovery would be the unjust enrichment of the defendant by his appropriation of the plaintiff's property. It is submitted that this quasi-contractual cause of action for such pecuniary damages is in essence what is being recognized by the Texas courts under the rubric of the appropriation type of privacy action.

In summary, the characterization of the two types of privacy action as recognized in Texas thus far, intrusion and appropriation, are in essence very different. While the interest protected by the tort of intrusion is that of personal feelings such as mental anguish, embarrassment, and humiliation, the interest protected by the appropriation tort is essentially a pecuniary one measured by the value of the defendant's unjust enrichment.

\textsuperscript{54} See, e.g., Fairfield v. American Photocopy Equip. Co., 138 Cal. App. 2d 82, 291 P.2d 194 (1955) (an attorney whose name, personality, and endorsement had been appropriated in an advertisement was compensated only for injury to his peace of mind and to his feelings); Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207, 127 P.2d 577 (1942) (the court spoke only of the traditional compensation for injury to feelings where an actress's name was appropriated in an advertisement which cast doubt on her moral character).


\textsuperscript{56} Miekow v. Faykus, 297 S.W.2d 260, 264 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.).

\textsuperscript{57} Id.
D. Allowing the Plaintiff To Choose the Characterization of the Wrong in an Appropriation Case: Waiver of the Tort

According to common law, a tortiously injured plaintiff is often allowed to waive the tort and sue in quasi-contract.58 If the Texas judiciary should choose in the future to expand the appropriation type of privacy action to encompass injury to the feelings and humiliation damages, as recognized in other jurisdictions, the plaintiff in such a case should theoretically be entitled to sue on the tort or, if he wishes, to waive the tort and sue in quasi-contract for the unjust enrichment of the defendant for unauthorizedly appropriating to his benefit the plaintiff's property. This latter choice should be especially suited to the public figure who, being continuously in the limelight by way of circumstance or his achievements, could not justifiably complain of mental anguish at having been cast in the public gaze; indeed, such public figure may well benefit by added exposure to the public.

Because the privacy action is essentially a hybrid, courts generally have encountered difficulties in characterizing the nature of the wrong inflicted. Certain courts have treated the privacy action as a property right, and others have characterized it as a personal right. Texas has chosen to treat an action for intrusion as protecting a personal right and an action for appropriation as protecting an economic right. Whether or not Texas' characterization of the appropriation tort will be broadened to encompass personal injury remains an unresolved question. Perhaps the doctrine of waiver of the tort would eliminate much of the difficulty of deciding the nature of the action by letting the plaintiff choose his own characterization of the injury inflicted. It must be realized, however, that this would also permit the plaintiff to choose his own statute of limitation.

Courts in some jurisdictions have not permitted the plaintiff to choose his own characterization of the privacy action by waiving the tort action for violation of the right of privacy and bringing suit in assumpsit.59 This

58. For example, if the defendant converts the plaintiff's property to his own use and sells it for a certain amount, the plaintiff may sue in various tort actions; but he may sue also, if he desires to do so, in assumpsit for the proceeds received by the defendant from the sale. The defendant is under an obligation to turn over these proceeds, and this obligation is said to be quasi-contractual in nature. Corbin, supra note 55, at 535-36. It must be realized, however, that in order for the doctrine of waiver of tort to apply, the defendant must have been unjustly enriched, and it is not sufficient merely that the plaintiff has been impoverished by the tort. If the plaintiff's claim is in reality to recover damages for an injury done, his sole remedy is to sue in tort. W. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS 160 (1893).

59. See, e.g., York, Extension of Restitutional Remedies in the Tort Field, 4 U.C.L.A. L. REV. 499 (1957). See also Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243, 254 (1944) (inconsistent for the plaintiff to sue the defendant for $100,000 for publishing a short biographical sketch, as constituting an invasion of the right of privacy, and in the same suit claim $100,000 on the theory that the plaintiff was entitled to a share in the proceeds of the sale of the book); Hart v. E.P. Dutton & Co., 197 Misc. 274, 93 N.Y.S.2d 871, 874-77 (Sup. Ct. 1949), aff'd, 277 App. Div. 935, 98 N.Y.S.2d 773 (1950) (the complaint stated a cause of action for libel which was barred by the one-year statute of limitations and the plaintiff could not waive the tort and sue in assumpsit so as to make the longer limitation period relating to contracts applicable). Contra, Young v. That Was the Week That Was, 312 F. Supp. 1337 (N.D. Ohio 1969) (recovery upon a theory of unjust enrichment is normally permitted only where there has been some deliberate association of the plaintiff's name or likeness with a defendant's product in connection with an advertising or promotional scheme).
refusal, however, generally has not been based upon very convincing rationales. Two reasons for this reluctance in extending the restitutional remedy to the privacy action are that rights in the personality have not typically been the subject of bargain transactions in the past and that torts which most typically result in enrichment of the wrongdoer have to do with infringement of property interests rather than interests in the personality. These two arguments, however, have become increasingly insignificant with the growth of new forms of technology and the concomitant expansion of the broadcasting media and the advertising industry. The use of the names of well-known individuals in the advertisement of products for sale to the public has come to pervade newspaper, magazine, and television advertising. Commenting on appropriation, the Restatement (Second) of Torts states that although protection of the plaintiff's feelings against mental distress is an important factor leading to recognition of the appropriation tort, "the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle such a licensee to maintain an action to protect it." Thus, according to the interpretation given by the Restatement to the action for unauthorized appropriation of the name or likeness of another to the defendant's benefit, the rule is limited in application to those instances where one can give an exclusive license to another, thereby permitting by way of definition an action for unjust enrichment.

Although the appropriation action in Texas is presently characterized as a quasi-contractual action, the question remains open whether the Texas courts will eventually extend this type of action to encompass personal injuries such as mental anguish. The extension of the scope of appropriation to include such personal damages would seem to serve better the needs of the average citizen, whose name or likeness might have only a small pecuniary value, but whose mental anguish at such unwarranted public exposure might be extremely great. If the Texas courts decide to broaden the appropriation action, it is submitted that rather than trying to characterize the nature of appropriation and the interest protected, the doctrine of waiver of the tort could be utilized to allow the plaintiff to choose his own characterization of the interest invaded by the defendant's conduct. In this way, both the average citizen and the famous figure would be amply protected by allowing

61. Indeed, even as early as 1907 it was recognized by the New Jersey court of chancery that "[i]f a man's name be his own property, as no less an authority than the United States Supreme Court says it is, . . . it is difficult to understand why the peculiar cast of one's features is not also one's property, and why its pecuniary value, if it has one, does not belong to its owner, rather than to the person seeking to make an unauthorized use of it." Edison v. Edison Polyform Mfg. Co., 73 N.J. Eq. 136, 67 A. 392, 394 (Ch. 1907). In Edison the court held that an injunction would lie to restrain the unauthorized use of one's name by another as a part of its corporate title, or in connection with its business or advertisements.
63. Id. (emphasis added).
either type of action to be brought. The characterization chosen of the type
of injury inflicted would then determine the statute of limitation to be
applied.

II. APPLICABILITY OF EXISTING STATUTES OF LIMITATIONS
TO PRIVACY

A. Purpose, Policy, and Construction of Statutes of Limitations

The primary purpose of statutes of limitations is to compel the assertion of
claims within a reasonable period after their origin, so that the opposing
party has a fair opportunity to defend while witnesses are available and the
evidence is still fresh in their minds. Statutes of limitations are now
regarded with favor as based upon considerations of sound public policy and
are eminently conducive to social order. They are in the nature of
statutes of repose, requiring diligence in enforcing rights and putting an end
to litigation. The Texas Supreme Court, as early as 1847, recognized that
statutes of limitations proceed upon the presumption that claims are extin-
guished, or ought to be held so, whenever they are not litigated in the proper
forum within the prescribed period. The concept behind statutes of limita-
tions is that of laches or the negligence of the party in bringing an action
late; therefore, statutes of limitations take away all solid ground of complaint
and serve to quicken diligence by making it in some measure equivalent to
right.

The particular period selected as the limitation for bringing suit in ordinary
private civil litigation often varies with the degree of permanence of the
evidence required to prove either liability or extent of damage. For
example, statutes of limitations for contract actions are typically longer than
those for ordinary tort claims. In addition, sometimes the period enacted by
the legislature as the statute of limitations for a particular action indicates the
relative favor or disfavor with which the legislature looks upon certain types
of claims or certain classes of plaintiffs or defendants. Public policy often
favors a quick settlement of a particular type of suit, both in order to dispose
of frivolous claims and because of the special type of injury to be compensat-
ed, such as humiliation damages difficult of ascertainment or reputation
damages which by their very nature are transitory and subject to the respect
an individual holds in society at a particular, limited time. For example, in
Texas, actions of libel and slander, breach of promise to marry, and
seduction are subject to the short limitation period of one year.

Price v. Estate of Anderson, 522 S.W.2d 690 (Tex. 1975); Gaddis v. Smith, 417 S.W.2d
577 (Tex. 1967).
66. Davis v. Howe, 213 S.W. 609, 611 (Tex. Comm'n App. 1919, jdgmt adopted);
Callan v. Bartlett Elec. Coop., 423 S.W.2d 149, 156 (Tex. Civ. App.—Austin 1968, writ
ref'd n.r.e.).
67. Hackworth v. Ralston Purina Co., 214 Tenn. 506, 381 S.W.2d 292, 293-94
68. Gautier v. Franklin, 1 Tex. 732, 739 (1847).
69. Id.
70. See Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1178,
1185-86 (1950).
In an early Texas case the state supreme court stated that where no provision of the statutes of limitations is directly applicable to a cause of action sought to be litigated, the limitation in analogous cases will be applied; and that if the matters in controversy be not analogous to any embraced in the statute, then the longest period would be the rule. However, more recent cases have held that statutes of limitations must be strictly construed, that such statutes are to be construed as other statutes, and that their application is not to be evaded by implied exceptions. Texas courts recognize the general principle for the construction of statutes of limitations today to be that unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction. Furthermore, the courts cannot arbitrarily subtract from or add to the statute of limitation and cannot create an exception where none exists, even when the exception would be an equitable one. The statute of limitation is considered as intending to embrace all causes of action not specifically excepted from its operation, and should not be so construed as to defeat that object.

The original statute of limitation, enacted in England in 1623, was fitted to the formal requirements of common law pleading and applied the limitation upon the form in which the action was brought. Except for slight variations in time periods, this statute was generally adopted in its entirety by the early state legislatures. With the abolition in most states of the forms of action, it was generally held that the object and actual nature of the action, rather than the mere name or form, should control in determining the limitation period. For example, it is generally held that where a statute limits the time in which an action for "injuries to the person" may be brought, the statute is applicable to all actions the real purpose of which is to recover for an injury to the person, whether based upon contract or tort, in preference to a general statute limiting the time for bringing actions ex contractu. Moreover, a statute of limitation, as all statutes, must be read in the light of reason and common sense. In its application to a given set of circumstances, it must not be made to produce a result which the legislature, as a reasonably minded body, could never have intended.

72. Tinnen v. Mebane, 10 Tex. 246 (1853).
77. 21 Jac. I, c. 16 (1623).
78. Developments in the Law, supra note 70, at 1192.
79. Id.
B. Privacy and the Texas Statutes of Limitations

To date there has been no litigation concerning the applicable statutes of limitations to privacy cases in Texas. Three existing Texas statutes of limitations conceivably apply to the privacy cause of action, according to how the limitation statutes are construed and how the privacy actions are analyzed and characterized.

A one-year limitation period enacted in 1897, article 5524,\(^{83}\) applies to actions for malicious prosecution, for injuries done to the character or reputation of another by libel or slander, for damages for seduction, and for breach of promise of marriage. Although this statute does not specifically list invasion of privacy in its enumeration of the various torts covered, it must be realized that invasion of the right of privacy was not a cognizable action under the common law and was not recognized in Texas as an actionable claim until 1973.\(^{84}\) The type of humiliation and reputation damages generally recognized under this limitation period seem to be somewhat analogous to the type of damages recoverable under some forms of the privacy action, especially "false light" and public disclosure, which although not expressly recognized in Texas, may well be in the future.

Texas' two-year statute, article 5526,\(^{85}\) covers two areas of possible application to the privacy action. Section 4 covers actions for debt where the indebtedness is not evidenced by a contract in writing; section 6 pertains to actions for injury done to the person of another. The relevant considerations are the applicability of section 4 to appropriation actions and of section 6 to intrusion. If the false light and public disclosure actions are recognized by Texas, section 6 might apply. In considering the proper application of section 6, it must be determined whether the term "injury done to the person of another" is appropriate to such intangible, hard-to-measure damages as humiliation, embarrassment, and mental anguish unaccompanied by physical injury.

The final limitation period, a four-year statute, article 5529,\(^{86}\) applies to every action other than for the recovery of real estate, for which no limitation is otherwise prescribed. This limitation period need be considered only in the event that the other two articles under consideration are inapplicable.

Before determining which limitation period or periods should apply to the privacy action in its four distinct forms, this Comment will examine and analyze the issue as has been determined by the various other jurisdictions in which the question has been litigated.

C. Determinations by Other Jurisdictions of the Applicable Statutes of Limitations in Privacy Actions

Questions concerning the proper statute of limitation to be applied in a

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\(^{84}\) Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).


\(^{86}\) Id. art. 5529.
privacy action have arisen in jurisdictions other than Texas. The answer has turned upon the precise wording of the statutes of limitations in the various jurisdictions, as well as the characterization by the jurisdictions of the real object and essence of the privacy action.

_Hazlitt v. Fawcett Publications, Inc._ held that a privacy action brought in Connecticut is governed by Connecticut's general tort statute of limitation, allowing three years to bring suit, and not by the statute allowing two years to bring an action for libel and slander. _Hazlitt_ concerned an action brought against a publisher to recover damages on the dyadic grounds that a magazine article was libelous and that it was an invasion of the right of privacy. Holding the libel count, but not the privacy count, to be barred by the statutes of limitations, the court said that the operative facts on which the claimed torts of libel and privacy depend are not identical, although they may be based upon the same publication and have much in common.

Distinguishing the two torts, the court stated that the injury in defamation cases is to plaintiff's reputation, which may be conceived of as having a situs wherever the plaintiff is known. The essence of a privacy claim, however, is mental distress caused to the plaintiff which may be considered as located at his domicile. The court rejected defendant's claim that the Connecticut two-year statute applying to defamation cases covered privacy actions as well, stating that this statute, which specifically enumerated only the actions of libel and slander, was too plain to leave room for the claim that it was intended to apply to torts other than libel and slander. Because only the torts of libel and slander were specifically listed in the two-year statute, and because the court's characterization of the privacy action was unlike its description of the defamation action, the court applied the three-year limitation period to the privacy action.

A similar analysis was used in _Association for the Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee_, in which a New York court reasoned that the state's one-year statute of limitation did not mention causes of action for privacy, although it expressly covered libel and slander actions, and, therefore, did not apply. Nor

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88. Id. at 542.
89. Id.
90. CONN. GEN. STAT. REV. § 1394(b) (1951), now CONN. GEN. STAT. REV. § 52-597 (1975). This section reads: "No action for libel or slander shall be brought but within two years from the date of the act complained of."
91. 116 F. Supp. at 542.
92. _Hazlitt_ was cited as support in _Branson v. Fawcett Publications, Inc._, 124 F. Supp. 429, 431 n.2 (E.D. Ill. 1954), which held summarily that Illinois' statute of limitation on defamation would not be applicable to a cause of action for invasion of privacy. Although the court's construction of the statute remains as good law, the outcome of this case would be different today, as an amendment to this statute in 1959 inserted the words, "or for publication of matter violating the right of privacy." ILL. REV. STAT. ch. 83, § 14 (1966).
did New York's three-year statute include a violation of the common law right of privacy existing under the laws of some other jurisdictions, although violations of the right of privacy under the Civil Rights Law of New York were within the scope of the statute. As there was no express statutory limitation in New York for actions based on violations of the common law right of privacy, the court said that the six-year statute, which governed actions not otherwise provided for, probably governed and that, at any rate, the one-year statute was definitely inapplicable.

The courts in Hazlitt and Emergency Civil Liberties Committee utilized similar reasoning in that both courts refused to apply a statute of limitation specifically listing only actions of libel and slander to a privacy case. This conclusion seems to be in line with the general policy of construing statutes of limitations strictly. The New York court in Emergency Civil Liberties Committee went even further than Hazlitt in its strict construction of the New York limitation periods, for it recognized that there are different forms of the privacy action, and that they are subject, under the laws of New York, to different periods of limitations; the limitation period for New York's statutory privacy right is not appropriate to the common law right of privacy in other jurisdictions.

In determining the proper limitation period to be applied in a false light privacy action, a Pennsylvania court in Hull v. Curtis Publishing Co. dwelt more on the characterization of the privacy action than did the aforementioned cases. Reasoning that the gravamen of the privacy action is the injury to the feelings of the plaintiff, including mental anguish and distress caused by the publication, the court distinguished the privacy case from a defamation action. The privacy action concerns injury to a person's feelings, whereas defamation concerns injury to character or reputation, which pertain to the standing of a person in the eyes of others and are attributes in law separate from the "person." The court held the proper

plaintiff claimed to have been victimized inasmuch as he was not supplied with the answers before the show, although everybody thought he had the answers because the practice was so prevalent. Plaintiff sued for damages to his reputation and academic prospects as a result of defendant's inducing him to participate in a rigged television contest. Although this was not the conventional action for defamation, governed by the one-year period of § 51 of the Civil Practice Act, the court of appeals nevertheless applied that period, reasoning that current tort doctrine defines defamation in terms of the injury, damage to reputation, rather than in terms of the wrongful act, the written or spoken word. The court stated that in applying a statute of limitation it looks for the reality and the essence of the action and not its mere name. Id. at 455, 227 N.E.2d at 574, 280 N.Y.S.2d at 643.

96. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1948). New York is one of four states with a statutory right to privacy. Id. § 50. The other states are Oklahoma, Utah, and Virginia. See OKLA. STAT. ANN. tit. 21, §§ 839.1-3 (Supp. 1975); UTAH CODE ANN. §§ 76-4-8, -9 (1953); VA. CODE ANN. § 8-650 (1957). In states with a statutory right of privacy, the tort is delimited by the provision.

97. N.Y. CIV. PRAC. LAW § 49(8) (1920), now N.Y. CIV. PRAC. LAW § 215(3) (McKinney 1972) (presently part of the one-year statute).

98. N.Y. CIV. PRAC. LAW § 48(3) (1920), now N.Y. CIV. PRAC. LAW § 213(1) (McKinney 1972).


100. 182 Pa. Super. 86, 125 A.2d 644 (1956).

101. 125 A.2d at 649.
limitation period to be the state's two-year statute,\textsuperscript{102} which applied to suits brought to recover "damages for injury wrongfully done to the person, in case [sic] where the injury does not result in death . . . ."\textsuperscript{108} In reaching its decision, the court in \textit{Hull} reasoned that because recovery could be had under a privacy action for injured feelings alone, the wrongs redressed must be considered direct rather than indirect injury; and the injury must then be considered as one wholly personal in character, not depending upon any effect the publication may have on the standing of the individual in the community.\textsuperscript{104} Reasoning that an individual's mind, feelings, and mental processes are as much a part of his person as his observable physical parts, the court concluded that an injury affecting the sensibilities is as equally an injury to the person as is an injury to the body.\textsuperscript{105} Therefore, the court held that a cause of action for violation of the right of privacy, causing mental suffering to the plaintiff, is an injury "to the person."\textsuperscript{106}

Because of the court's characterization of the privacy action as one based on emotional or mental duress, and because of the court's interpretation of the phrase "injury to the person" as including such mental distress,\textsuperscript{107} the final decision reached in \textit{Hull} seems logical at first glance. There was, however, a missing element in the court's analysis: the unraised question as to whether the characterization of the privacy tort as protection of mental distress alone would not perhaps be different in a \textit{false light} case, such as

\textsuperscript{103} \textit{Id.}
\textsuperscript{104} 125 A.2d at 649. The court further distinguished between defamation and invasion of privacy, saying that damages in actions of defamation are for an injury to reputation while damages in actions for invasion of the right to privacy are for injury to one's own feelings. In actions to recover damages for defamation truth is a defense, while in actions to recover damages for invasion of privacy it is not. \textit{Id.} at 650 n.5. \textit{But see} note 27 \textit{supra} and accompanying text, where Prosser characterized the \textit{false light} privacy action as protecting reputation.
\textsuperscript{105} 125 A.2d at 649. The court relied upon an article by Roscoe Pound, in which the author stated: "A man's feelings are as much a part of his personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth." Pound, \textit{Interests of Personality}, 28 \textit{Harv. L. Rev.} 343, 363-64 (1915).
\textsuperscript{107} The court's interpretation of the phrase "injury to the person" is in accord with that of the majority of states. \textit{See, e.g.}, Krum v. Sheppard, 255 F. Supp. 994 (W.D. Mich. 1966); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.D.C. 1955); Reed v. Real Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Commerce Oil Ref. Corp. v. Miner, 199 A.2d 606 (R.I. 1964); Whitley v. Whitley, 436 S.W.2d 607 (Tex. Civ. App.—Houston [14th District] 1968, no writ). In \textit{Krum} v. \textit{Sheppard} the court explained: [I]f the legislature had intended that the statute apply only where there was a physical or bodily injury to the person, it would have been a simple matter for it to express that intent clearly and unambiguously. It could have used the words 'physical injury' or 'bodily injury' to limit the application for this subsection. Since most legislators are skilled in the use of language, we may presume that the failure to use such modifying words indicates an intent to give the phrase 'injuries to person' its usual, broader meaning.
The court did not address that issue and did not differentiate the different kinds of privacy actions. Whether its conclusion would have been changed had it reached this issue is unclear.

A contrary decision to Hull was reached in a recent New Jersey case, Canessa v. J.I. Kislak, Inc. Canessa concerned a suite for damages against a real estate company which distributed for its own commercial purposes reprints of a newspaper article along with a picture of the plaintiffs. The court held that the suit, insofar as the claim was based on appropriation of the plaintiffs' likenesses and names for the defendant's commercial benefit, was an action for invasion of a property right and not one for injury to the person, and, therefore, was governed by the state's six-year statute of limitation relating to actions for tortious injury to property rights. The court said that confusion in the area of privacy has been compounded by the fact that plaintiffs in other jurisdictions have based their actions in appropriation cases solely upon "injury to feelings," without recognizing the basic property rights involved, as they were recognized before and after the Warren and Brandeis law review article. The court explained, "the reality of a case such as we have here is . . . simply this: plaintiffs' names and likenesses belong to them. As such they are property. They are things of value. Defendant has made them so, for it has taken them for its own commercial benefit." The court in Canessa distinguished such cases as Hull which have held that an action for invasion of the right of privacy is one for injury to the person. Unlike Hull, Canessa was based on the particular theory of appropriation by the defendant for his commercial benefit, as distinguished from the right of privacy in the general sense.

The court in Canessa also considered whether that aspect of the plaintiffs' claim for mental distress was barred by the state's two-year statute governing actions for "injury to the person." Its answer was in the negative. The court reasoned that the New Jersey Supreme Court in Earl v. Winne held that the words "injury to persons" in the state's two-year statute of limitation are to be specifically construed and that such phrase comprehended only those common law actions which were pursuable by trespass vi et armis. Under common law the clear and basic distinction between an action of trespass vi et armis and an action on the case was recognized by the difference in the periods of limitations in the original statutes in New Jersey. In light of this New Jersey statutory interpretation, the court in

108. Hull is characterized as a false light action because of the facts involved. Three police officers sued for an invasion of privacy by the defendant's republication of a newspaper photograph of the plaintiffs grabbing at a suspect in their custody. This photograph was used in a magazine article which did not explain or have anything to do with the photograph, thereby placing plaintiffs in a false light. 182 Pa. Super. at 86, 125 A.2d at 644.
111. 235 A.2d at 76.
112. Id. at 75-76.
113. Id. at 76.
114. Id. at 74.
117. 235 A.2d at 77-78.
Canessa held that since the action for invasion of privacy involves no force to the person, it would not have been enforceable by trespass *vi et armis* and is thus not comprehended within the phrase “injury to persons.” Therefore, the court held, the privacy tort fell within the language of a “tortious injury to the rights of another not stated in sections 2A:14-2,” and was not barred until six years after the cause of action accrued.¹¹⁸

The analysis used in Canessa concerning interpretation of the phrase “injury to the person” is contrary to that in Hull. The Hull court observed that it would probably be impossible to rely upon the distinction between trespass *vi et armis* and trespass on the case for a determination of the appropriate statute of limitation because these distinctions have faded in the law to the extent that procedural rules have completely abolished them. The analysis in Hull seems clearly preferable to that used in Canessa. The distinction of the old forms of action between trespass *vi et armis* and trespass on the case has no relevance in the majority of jurisdictions as to how the phrase “injury to the person” should be construed. As the old forms of action have been completely abandoned by modern procedural rules, they should have no bearing on interpretation of a statute of limitation or on the statute’s applicability to a relatively new cause of action not even recognized at common law.

Other cases have considered the statute of limitation applicable to a privacy case. Causes of action for invasion of privacy have variously been held to be barred by one-year,¹²⁰ two-year,¹²¹ three-year,¹²² and four-year¹²³ statutes of limitations. The various decisions have turned on the different methods of analysis discussed in the previous cases and on the specific wording of the pertinent statutes.

¹¹⁸. *See N.J. REV. STAT. § 2A:14-1 (1952).* The language of this statute specifically includes every action “for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title . . . .” *Id.*

¹¹⁹. 235 A.2d at 78.

¹²⁰. Belli v. Roberts Bros. Furs, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (1966). The court here held a one-year statute of limitation to apply to a cause of action for invasion of privacy because of an allegedly defamatory article in a newspaper. This one-year statute reads in part as follows: “An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another . . . .” *CAL. CIV. PRO. CODE § 340(3) (West 1954).*

¹²¹. Funk v. Cable, 251 F. Supp. 598 (M.D. Pa. 1966). The court held that under Pennsylvania law, an action which sounds in invasion of the right to privacy and shows a violation of rights redressable under the Federal Civil Rights Act is subject to a two-year period of limitation. *Id.* at 600.

¹²². Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023 (6th Cir. 1968), cert. denied, 394 U.S. 987 (1969). In this privacy case the court held that the state statute of limitation which best effectuates federal policy is the three-year statute. *Id.* at 1028. This three-year statute governs “all other actions for injuries to persons and property.” *MICH. COMP. LAWS § 600.5805(7) (1968).* By its holding, therefore, the court held a one-year limitation period pertaining to libel or slander actions to be inapplicable to a privacy action. *Id.* § 600.5805(6).

¹²³. Houston v. Florida-Georgia Television Co., 192 So. 2d 540 (Fla. App. 1966). In this case the court held applicable a four-year statute of limitation which governs “[a]ny action for relief not specifically provided for in this chapter.” *FLA. STAT. ANN. § 95.11(4) (1960).* Thus, by its holding, the court held inappropriate to the privacy action a two-year statute governing actions for libel, slander, assault, battery, and false imprisonment. *Id.* § 95.11(6).
D. Texas Statutes of Limitations Applicable to Privacy Actions

As more privacy actions are brought by injured plaintiffs encouraged by the recent Billings and Kimbrough decisions, the problem of which limitations period applies will emerge as an important issue. In determining the statutes of limitations appropriate to privacy actions in Texas, the characterization of the action and the interpretation of the statutes under consideration must be taken into account. As previously discussed, the forms of the privacy action recognized in Texas, intrusion and appropriation, have been separately characterized by the Texas courts. The basis of the intrusion action is the protection of personal feelings such as mental anguish, embarrassment, and humiliation. Appropriation, on the other hand, is viewed as protecting pecuniary interests measured by the unjust enrichment of the defendant in his unauthorized use of the plaintiff's name or likeness. With the characterization of the two types of privacy actions resolved, the next issue to consider is the interpretation of the potentially applicable statutes of limitations.

In considering whether section 6 of article 5526, the two-year statute of limitation in Texas, is applicable, the Texas interpretation of the phrase "injury to the person" must be ascertained. Specifically, the question to be decided is whether this term encompasses only direct bodily injury or whether it also includes mental injury unaccompanied by physical damage.

As early as 1894 a Texas court held that a statute of limitation governing actions for injuries to the person of another includes actions for damages for mental anguish caused by failure to deliver a telegram. The Texas court of civil appeals three years later ruled again that mental anguish, disappointment, sorrow, and affliction are in the class of "injuries to the person" in an action for damages for negligence in the delivery of certain telegrams. It explained that such claim is within the statute "[s]o far . . . as the petition seeks damages for injury to the mind or body . . . ." Whiteley v. Whiteley, a 1968 Texas court of civil appeals decision, held that an action for alienation of affections is one for loss of consortium which involves loss occasioning mental pain and anguish of a mental and emotional nature and, therefore, is embraced within the term "injury done to the person of another" under the present two-year statute, article 5526(6). Under Texas interpretation of the phrase "injury to the person of another" it appears that so far as recovery may be had for an invasion of privacy for

124. See text accompanying notes 46-57 supra.
126. An Act of Limitations § 1, [1841] Tex. Laws, 2 H. GAMMEL, LAWS OF TEXAS 627 (1841) (repealed 1897). This Act, now replaced, provided a one-year period for the following classifications: "All actions for injuries done to the person of another, as of assault, battery, wounding, or imprisonment, and all actions for injuries done to the character or reputation of another, as of libel, or slander, shall be commenced and sued within one year next after the cause of such action or suit, and not after . . . ." Id.
129. Id. (emphasis added).
injured feelings alone, then article 5526(6), a two-year statute of limitation, would apply to such an action.\textsuperscript{131}

If the Texas judiciary adheres to its precedent of construing limitation statutes strictly, it will apply to the tort of intrusion section 6 of article 5526, the two-year statute, which governs actions for injury to the person of another. On the other hand, the court will apply to the appropriation action section 4 of the same statute, article 5526, which pertains to debt where the indebtedness is not evidenced by a contract in writing.\textsuperscript{132} Thus, by the foregoing analysis, both intrusion and appropriation are governed by a two-year time period, but by different sections of the statute. Under a strict and literal construction of the limitation periods, neither intrusion nor appropriation could come under the one-year statute; although the type of humiliation damages in intrusion seem analogous to damages in certain actions governed by the one-year statute, the privacy tort is simply not enumerated within the statute and cannot be added by implication. The four-year statute is clearly not applicable, for it is only appropriate in the event no other statute of limitation governs.

\textbf{III. Conclusion}

It is submitted by this author that in light of the purposes and policy considerations behind the limitation statutes different limitation periods should be applied to the torts of intrusion and appropriation than would be applied by a purely strict and literal reading of the existing statutes. Although it may be argued that the court is free to reverse its precedent of strict construction and to apply to the privacy tort the statute which it thinks most appropriate in light of the purposes and policies behind the statutes of limitations in general, it is this author's contention that this would be undesirable and resolution of this issue calls for legislative action. An overriding policy is the requirement of notice, and this policy is perhaps the most important one in the area of limitation statutes because of their penal nature. Even if the courts apply the limitation statutes as they think they should, according to the policies behind the limitation periods and irrespective of the long-standing policy of strict construction, legislative action should, nevertheless, implement such decision. In short, plaintiffs should not have to guess or to be schooled in law to pick the governing time period in

\textsuperscript{131} See Kelly v. Western Union Tel. Co., 17 Tex. Civ. App. 344, 43 S.W. 532 (1897). This was an action for damages for negligence in the delivery of telegrams. The damages alleged consisted of five dollars paid as tolls and of mental anguish, disappointment, sorrow, and affliction as the result of the company's action. Because of the bar of the statute of limitation, the court dismissed the petition insofar as it sought to recover damages to the person, and it regarded such damages of mental anguish as of that category. However, it did allow the claim for the tolls paid, as this pertained to the estate of the plaintiff. Id.

\textsuperscript{132} Tex. Rev. Civ. Stat. Ann. art. 5526(4) (1958). The limitation on an action based on \textit{quantum meruit} is barred within two years. Nystel v. Gully, 257 S.W. 286, 288 (Tex. Civ. App.—Austin 1923, no writ). See also Russell v. Sarkeys, 286 F.2d 736, 740 (5th Cir. 1961), in which the court said that the Texas two-year statute of limitation for actions for debt not evidenced by writing covers all types of nontort claims which give rise to an express or implied obligation to repay and is not confined to technical actions for debt. Further, the limitation applies to equitable as well as legal actions.
which to bring their actions; they should not have to try to fit a newly
recognized tort unknown to Texas common law under the confines of a
statutory scheme seventy-six years old.

The public policy considerations of quick settlement of intangible, hard-to-
measure damages and disposal of spurious and frivolous claims should be
major determinants of the limitation period chosen. Because it is assumed
that injured plaintiffs will bring their actions within a reasonable time, a
short statute of limitation for the privacy action would serve to close the
courts to many baseless and petty claims while still accommodating the more
seriously wronged litigants, thus better serving the social needs of society. In
light of the above considerations, the intrusion action, which protects such
intangible injury as mental anguish, distress, humiliation, and embarrass-
ment, should be governed by a one-year limitation period. However, the
appropriation action, essentially a quasi-contractual action, should remain
governed by the two-year statute applicable to implied-in-law contracts.
Quasi-contract and unjust enrichment are subject to different evidentiary
problems than is intrusion, and are by their nature more easily capable of
measurement in dollars and cents than are mental anguish and humiliation
damages involved in intrusion. It is submitted that the different interests
protected by intrusion and appropriation clearly call for different limitation
periods.

Should the torts of false light and public disclosure be expressly recognized
as actionable claims in Texas, as is likely because of the broad definition of
privacy given in Billings, it would be necessary to formulate a statute of
limitation for these actions, as well as those of intrusion and appropriation. It
is submitted that should these two types of privacy eventually be recognized as
cognizable claims in Texas, a one-year period should apply to them, as well
as to intrusion. It is contended by this author that the torts of public
disclosure and false light are so similar to the defamation action that, if
considered afresh by the legislature, the same considerations should govern
and these three actions should all have the same statute of limitation.

It has been said that the privacy and defamation actions are separate and
distinct torts, even though they share some of the same elements and often
arise out of the same acts. The legal distinction between the two is that a
defamation action is concerned with compensating the injured party for
damage to reputation, while an invasion of privacy action is concerned with
compensating the party for mental suffering. This distinction has been
blurred due to the fact that damages have not been limited to the conceptual
bases of the respective torts. For example, in Texas in defamation
actions the injured party is allowed to recover for emotional distress as well
as injury to reputation. In other jurisdictions where false light and public

135. Id.
136. See, e.g., Renfro Drug Co. v. Lawson, 138 Tex. 434, 440, 160 S.W.2d 246, 250
(1942) (if the publication is defamatory, injury to the reputation of the person defamed
is presumed, and with that injury presumed, the mental anguish of the person defamed
may be taken into consideration in awarding damages); Enterprise Co. v. Ellis,
Disclosure actions have been recognized, damages for injury to reputation have been awarded in addition to damages for mental injury. There is no difference between the two torts as to punitive damages. Moreover, the constraints on recovery for defamation should not be avoided merely by suing on another theory for the same publication of the same matter. In light of the above considerations, it is concluded by this author that false light and public disclosure actions are sufficiently similar to the defamation action to be governed by the same statute of limitation, which would be a one-year period. As defamation is now governed by the present one-year limitation, article 5524, this statute should be enlarged by legislative enactment to include false light and public disclosure.

98 S.W.2d 452, 455 (Tex. Civ. App.—Beaumont 1936, no writ) (well-settled that recovery may be had in libel suits for mental suffering, subjecting one to humiliation and ridicule caused thereby); Hibdon v. Moyer, 197 S.W. 1117, 1118 (Tex. Civ. App.—El Paso 1917, no writ) (damages for mental anguish caused by publication of matter actionable under a libel claim are recoverable regardless of whether there was any other injury or damage); Houston Chronicle Publishing Co. v. McDavid, 157 S.W. 224, 225 (Tex. Civ. App.—Austin 1913, no writ); Young v. Sheppard, 40 S.W. 62 (Tex. Civ. App. 1897, no writ).

138. Id.
140. Tex. Rev. Civ. Stat. Ann. art. 5524 (1958). [Editor's Note: The Texas Supreme Court recently held that the one-year statute of limitation for defamation action does not begin to run until the plaintiff actually knows of the defamatory publication. However, the court noted that the discovery rule was inapplicable when the defamation is made a matter of public knowledge by the media. Kelley v. Rinkle, 19 Tex. Sup. Ct. J. 141 (Jan. 24, 1976).]