Louisiana Law Review

Volume 39 | Number 4
Summer 1979

On Washing Dirty Linen in Public: Privacy and the First Amendment

Rick Revels

The Louisiana Supreme Court in *Henderson* was correct in holding that the deceased declarant of the excited utterance should be susceptible to impeachment and discrediting in the same manner as other witnesses, so far as such a process is feasible. However, impeachment should not be allowed simply because the excited utterance is "testimonial," if it is testimony of an entirely different character from traditional testimony. The true nature of the excited utterance compels its own justification for permitting impeachment. A defendant who has already lost the fundamental right to confront his accuser because of the accuser's death should not be further impositioned by being denied the opportunity to discredit that witness whose testimony is used against him.

Allen M. Posey, Jr.

ON WASHING DIRTY LINEN IN PUBLIC: PRIVACY AND THE FIRST AMENDMENT

The defendant erected a bulletin board in his washateria on which he posted pictures of the plaintiff taking money from a soft drink machine five months earlier with captions detailing the plaintiff's identity and subsequent conviction. About fifteen months later, the plaintiff brought suit alleging that the publicity constituted undue harassment which had caused him great humiliation and embarrassment. The trial court agreed, enjoined the defendant from giving further publicity to the incident in any manner, and awarded damages in the amount

---

a chance to explain his inconsistencies. C. MCCORMICK, *supra* note 3, § 37, at 72. A strict adherence to the foundation requirement in the case of an absent hearsay declarant has been described as being tantamount to a sacrifice of "substance of proof to orderliness of procedure, and the rights of the living party to consideration of the deceased witness." Mattox v. United States, 156 U.S. 237, 260 (1895) (Shiras, J., dissenting). Professor Wigmore has voiced the concern that requiring a strict adherence to the foundation requirement in the case of an absent hearsay declarant would result in a simultaneous deprivation of the impeacher's two most potent modes of defense, those of cross examination and impeachment by prior inconsistent statements. 3A J. WIGMORE, *supra* note 28, § 1033, at 1037-38. He concludes that requiring a strict compliance in the case of an absent hearsay declarant would be pushing the rule too far. 3A J. WIGMORE, *supra* note 28, § 1033, at 1037-38. This appears to be the prevailing view in most jurisdictions today. C. MCCORMICK, *supra* note 3, § 37, at 74.

of $500. In affirming the trial court, the Third Circuit Court of Appeal *held* that the defendant's conduct constituted an actionable invasion of the plaintiff's right to privacy and was not within the protection of the rights of free speech and press. *Norris v. King*, 355 So. 2d 21 (La. App. 3d Cir. 1978).[1]

The right to privacy has been invoked in widely divergent contexts,[2] making general definitions difficult to apprehend. It most simply designates the right to be let alone.[3] The court in *Hamilton v. Lumbermen's Mutual Casualty Co.*[4] stated that privacy encompasses the right to live one's life in seclusion without being subjected to unwarranted and undesired publicity, and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned.[5] The notion of privacy is capsuled in the following definition: "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."[6]

Because the definitions of the right to privacy are so vague, cover so many different interests, and arise in such varied contexts, attempts have been made to subdivide the different kinds of invasion included. Due principally to the influence of William L. Prosser,[7] a complex of four distinct torts has been recognized: appropriation, intrusion, public disclosure of private facts, and false light.[8] Because of the common features of

1. *Cert. denied*, 357 So. 2d 1165 (La. 1978), *cert. denied*, 99 S. Ct. 596 (1978).

2. Rehnquist, *Is an Expanded Right to Privacy Consistent With Fair and Effective Law Enforcement?*, 23 KAN. L. REV. 1, 21 (1974).

3. "The right to one's person may be said to be a right of complete immunity: to be let alone." T. COOLEY, LAW OF TORTS 29 (1879). This is the apparent source of the phrase.

4. 82 So. 2d 61 (La. App. 1st Cir. 1955).

5. *Id.* at 63.

6. A. WESTIN, PRIVACY AND FREEDOM 7 (1967).

7. *See generally* W. PROSSER, THE LAW OF TORTS 802 (4th ed. 1971); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

8. The following definitions were officially adopted by the American Law Institute's Restatement (Second) of Torts in 1977:

> § 652B. Intrusion upon Seclusion
>
> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

the four torts, the defendant's actions may give the plaintiff several grounds for recovery.[9] For example, if A breaks and enters B's home, steals a photograph of B, and publishes it to advertise his whiskey, together with false statements about B that would be highly objectionable to a reasonable man, B has grounds to recover under each of the four tort classifications.[10]

Louisiana has had a long and full tradition of judicial concern for these privacy interests.[11] A cursory glance at several cases reveals the breadth of protected privacy interests in Louisiana and illustrates that each of the four torts gives rise

---

§ 652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

§ 652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

§ 652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS §§ 652B, 652E (1977).

9. W. PROSSER, *supra* note 7, at 814.

10. RESTATEMENT (SECOND) OF TORTS § 652A, comment d, Illus. 1 (1977).

11. In *Denis v. Leclerc*, 1 Mart. (O.S.) 297 (La. 1811), the court enjoined the defendant from publishing with indecent commentary, a letter the plaintiff had sent to a third party. This was almost eighty years before Samuel Warren and Louis Brandeis published their famous article calling for recognition of the right to privacy as a separate entity. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Express recognition of the right to privacy soon followed in Louisiana. *See* Schulman v. Whitaker, 115 La. 628, 39 So. 737 (1905); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905). The court in both cases found that the right to be let alone protected a person not yet convicted from having his picture placed in a rogues' gallery. *See generally* F. STONE, TORT DOCTRINE § 191 in 12 LOUISIANA CIVIL LAW TREATISE 247 (1977); Comment, *The Right of Privacy in Louisiana*, 28 LA. L. REV. 469 (1968). Express recognition of the right to privacy is also found in article 1, section 5, of the Louisiana Constitution of 1974 which provides in part: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."

to a cause of action. Thus for example, when plaintiff's fellow employees entered his dwelling without permission, the court found an actionable intrusion upon his privacy.[12] Likewise, appropriation of a person's picture to advertise the benefits of a health club triggered liability although the plaintiff had given consent ten years earlier.[13] Disclosure of color photographs of an employee's wounds at a company safety meeting without his permission has also been proscribed.[14] Finally, a lawyer complaining that radio advertisements indicated that he was currently selling used cars, recovered because this publicity placed him in a false light.[15]

A person's right to privacy is not absolute, however. The United States Supreme Court noted in *Time, Inc. v. Hill*[16] that "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community."[17] Louisiana courts have applied a test of reasonableness to determine actionable invasions of privacy.[18] Under such a test, a person may lawfully invade the privacy of another, but he may not seriously and unreasonably interfere with this right without the imposition of liability.[19]

When the gravamen of the claimed injury is the publication of information, as in disclosure and false light cases, the claims of privacy directly confront the constitutional freedoms of speech and press.[20] Thus, a compromise developed between the two at common law, principally in the defamation area, resulting in a limited privilege to speak about matters concerning public figures or of public interest.[21] Beginning especially

12. Love v. Southern Bell Tel. and Tel. Co., 263 So. 2d 460 (La. App. 1st Cir. 1972).

13. McAndrews v. Roy, 131 So. 2d 256 (La. App. 1st Cir. 1961).

14. Lambert v. Dow Chemical Co., Inc., 215 So. 2d 673 (La. App. 1st Cir. 1968).

15. Tooley v. Canal Motors, Inc., 296 So. 2d 453 (La. App. 4th Cir. 1974).

16. 385 U.S. 374 (1967).

17. *Id.* at 388.

18. Comment, *supra* note 11, at 477. *See, e.g.*, Cunningham v. Securities Inv. Co. of St. Louis, 278 F.2d 600, 602 (5th Cir. 1960); Pack v. Wise, 155 So. 2d 909, 913 (La. App. 3d Cir. 1963). *Accord,* Norris v. Moskin Stores, Inc., 272 Ala. 174, 132 So. 2d 321 (1961).

19. Comment, *supra* note 11, at 471.

20. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489 (1975).

21. Prosser, *Privacy, supra* note 7, at 410. This privilege has been termed that

with *New York Times Co. v. Sullivan,*[22] this limited privilege[23] has been broadened in scope and given constitutional status.[24] This development in defamation was carried over into privacy actions by *Time, Inc. v. Hill,* which applied to false light cases the *New York Times* standard of "knowledge of falsity or reckless disregard as to whether the statement was false or not."[25] In *Time, Inc.*, a magazine story about the opening of a play misleadingly indicated that the play accurately portrayed an incident in which the plaintiffs had been involved. The Court reversed the lower court's judgment for the plaintiffs and remanded for application of this rigorous new standard. Some protection of false speech has been deemed necessary to give the vital "breathing space" in which beneficial dialogue may flourish.[26]

Truthful speech is involved in wrongful disclosure and has likewise received increasing protection.[27] The United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*[28] indicated that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[29] The defendant's reporter

---

of fair comment.

22. 376 U.S. 254 (1964).

23. The Court held that a public official having his public conduct defamed was constitutionally required to show knowledge that the statement was false or reckless disregard as to the falsity on the part of the defendant in order to recover. The concern was that the fear of large damage awards would chill the legitimate dissemination of useful information. 376 U.S. at 278.

24. W. PROSSER, *supra* note 7, at 819. He called this broadening unquestionably the greatest victory won by defendants in the modern history of the law of torts. *Id.*

25. 385 U.S. 374 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held in part that the *New York Times* standard need not be applied to a private plaintiff in a defamation action. No case has yet indicated whether this lesser standard is available to a private plaintiff in a false light action; in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Court declined to resolve this issue.

26. New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964); NAACP v. Button, 371 U.S. 415, 433 (1963).

27. Indeed, the drafters of the Restatement (Second) of Torts felt compelled to note that liability for giving publicity to true statements may not be consistent with the free-speech and free-press provisions of the first amendment. RESTATEMENT (SECOND) OF TORTS § 652D, Special Note (1977).

28. 420 U.S. 469 (1975).

29. *Id.* at 495.

had obtained the name of a deceased rape victim from official court records, and the information was subsequently broadcast despite a Georgia statute prohibiting such publicity.[30] The Court considered the key interest to be the press's role in informing the public of the operations of government.[31] *Cox Broadcasting* was reaffirmed in *Oklahoma Publishing Co. v. District Court*[32] in which the Court unanimously and summarily set aside a state court pretrial order enjoining members of the media from publishing the name or picture of a juvenile involved in a pending delinquency proceeding. The reporters had obtained the person's name at an earlier detention hearing which could have been closed under state law but had not been so closed.

In *Cox* the Court left open the question of whether a state may ever define and protect an area of privacy free from truthful, but unwanted publicity in the press.[33] Justice Powell in his concurring opinion in *Cox* stated that he believed *Gertz v. Robert Welch, Inc.*[34] required that truth be recognized as a complete defense in a defamation action for harm to one's reputation, but that causes of action grounded in a state's desire to protect privacy generally implicated different interests and allowed a different constitutional balance to be struck.[35]

In *Norris v. King* the Third Circuit Court of Appeal faced this task of balancing the plaintiff's interest in privacy against the defendant's interest in free speech. The plaintiff had stolen between $25 and $50 from the defendant's soft drink machine. The defendant made various attempts to recover this money, including several telephone conversations with the plaintiff's

30. GA. CODE ANN. § 26-9901 (1972).

31. This sentiment is shared by Alexander Meiklejohn, who stated that "the self-education of a self-governing public" is the core value protected by the first amendment. Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L.J. 234, 263 (1966). Justice Brandeis articulated additional interests promoted by free speech: it is necessary for the success of a democratic society because it provides a safety valve to relieve unrest and allows peaceful change; it is an end in itself, promotive of the self-fulfillment of the individual. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

32. 430 U.S. 308 (1977).

33. 420 U.S. at 491.

34. 418 U.S. 323 (1974).

35. 420 U.S. at 500 (Powell, J., concurring).

mother and his attorney. Roughly five months after the plaintiff had pleaded guilty to theft, the defendant erected a bulletin board on which he posted pictures of the plaintiff taken by a hidden security camera. Captions under the pictures informed the viewer of the plaintiff's name and address, with a somewhat insulting commentary designed to warn potential offenders that detection was certain and conviction likely.[36] Viewing these facts from the perspective of the debtor-creditor relationship, the majority held that the defendant's conduct constituted undue harassment and coercion directed at restitution.[37] The court emphasized the manner and duration of the exposure.[38] Furthermore, it considered the defendant's rights of free speech and press to be less weighty than those of members of the media who have constitutional responsibilities to keep the public informed.[39]

Since a debtor-creditor relationship resulted from the plaintiff's theft, the court's decision relied heavily on the strong line of creditor-coercion cases within the larger body of privacy cases in Louisiana juriprudence.[40] Under the jurisprudence, a creditor may take reasonable steps to collect debts legally due,[41] but any high-pressure tactics, coercion, or outrageous

---

36. Norris v. King, 355 So. 2d 21, 22 (La. App. 3d Cir. 1978). The commentary read in part:

> HMMMM . . . HERE WE HAVE MICHAEL NORRIS OF RT. 1 BOX 556, PINEVILLE, LOUISIANA. MICHAEL IS CAREFUL—HE WANTS TO BE SURE NO ONE IS WATCHING!
>
> WOW . . . MICHAEL IS SWIFT—IF HE RUNS FAST ENOUGH WHILE HOLDING THE MONEY BOX WITH BOTH HANDS—MAYBE HE WON'T GET CAUGHT.
>
> TOO BAD . . . MICHAEL ISN'T FASTER THAN OUR CAMERAS! AND MICHAEL ISN'T FASTER THAN THE POLICE! MICHAEL PAYS THE COURT $105.00 MICHAEL GETS 91 DAYS IN JAIL (suspended) MICHAEL MUST REPORT TO A PROBATION OFFICER FOR 1 YEAR MICHAEL *NOW* HAS A POLICE RECORD.

Id. at 22.

37. *Id.* at 25.

38. *Id.* at 24.

39. *Id.* at 24-25.

40. *See, e.g.*, Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919); Booty v. American Fin. Corp. of Shreveport, 224 So. 2d 512 (La. App. 2d Cir. 1969); Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. App. 1st Cir. 1968); Pack v. Wise, 155 So. 2d 909 (La. App. 3d Cir. 1963).

41. Comment, *supra* note 11, at 472.

conduct on his part will render his activities actionable.[42] The grounds for recovery in these cases are in part based on the torts of intrusion and intentional infliction of emotional distress,[43] which overlap to provide the debtor with a potent counter-weapon against abusive collection methods.[44] In order to recover for intentional infliction of emotional distress, one must generally show extreme outrage and serious harm. However, as Prosser notes, "once 'privacy' gets into the picture, and the fact of the intrusion is added," such proof "apparently [is] no longer required."[45]

In *Norris* the defendant had requested the trial judge to order restitution at the time the plaintiff was sentenced for the theft conviction, but the judge declined, explaining that restitution was a civil matter.[46] When asked why he did not pursue a civil remedy, the defendant explained that the small amount did not justify civil proceedings.[47] The defendant also declined to accept a compromise offer to settle for $25. The majority viewed the defendant's subsequent actions as a resort to self-help which improperly ignored the remedy provided by law.[48]

---

42. W. PROSSER, *supra* note 7, at 57. Comment, *Collection Capers: Liability for Debt Collection Practices*, 24 U. CHI. L. REV. 572, 584 (1957). *See, e.g.*, Norris v. Moskin Stores, Inc., 272 Ala. 174, 177, 132 So. 2d 321, 323 (1961); Guthridge v. Pen-Mod, Inc., 239 A.2d 709, 713 (Del. Super. Ct. 1967); Booty v. American Fin. Corp. of Shreveport, 224 So. 2d 512, 516 (La. App. 2d Cir. 1969); Pack v. Wise, 155 So. 2d 909, 913 (La. App. 3d Cir. 1963).

43. THE RESTATEMENT (SECOND) OF TORTS § 46 (1965) defines the tort of intentional infliction of emotional distress in part as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

An early Louisiana case illustrating this type conduct is *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920)(often referred to as the "pot of gold" case). *See also* Gadbury v. Bleitz, 133 Wash. 134, 233 P. 299 (1925). The defendant was a mortician who refused to cremate the body of the deceased son of the plantiff until a prior disputed debt was paid in full.

44. W. PROSSER, *supra* note 7, at 57.

45. Prosser, *Privacy*, *supra* note 7, at 422.

46. Norris v. King, 355 So. 2d 21, 29 (La. App. 3d Cir. 1978).

47. *Id.*

48. Strong sentiment against such practices can be inferred from the numerous cases in which the debtor successfully recovered from the creditor; the large amounts of the awards, especially at the trial level; and the recent legislative action in this area on both the state and federal level. *See, e.g.*, Tuyes v. Chambers, 144 La. 723, 81 So.

Several telephone calls were made by the defendant to the plaintiff's mother and his attorney. The plaintiff's mother testified that the defendant had threatened to erect the bulletin board if restitution were not made, conduct which clearly would be coercive under the jurisprudence.[49] The dissenting judge, however, forcefully argued that coercion was not supported by the record and that the creditor-debtor rationale of the majority was misapplied.[50]

---

265 (1919)($32.75 debt owed, $500 awarded); Booty v. American Fin. Corp. of Shreveport, 224 So. 2d 512 (La. App. 2d Cir. 1969)($991 debt owed, jury awarded over $20,000 which was reduced by the trial judge to $7,500); Boudreaux v. Allstate Fin. Corp., 217 So. 2d 439 (La. App. 1st Cir. 1968)($185 debt owed by husband and wife, $1800 awarded to each, reduced to $500 apiece on appeal); Pack v. Wise, 155 So. 2d 909 (La. App. 3d Cir. 1963)(failure to settle a disputed debt cost plantiff his job, $5000 awarded); Quina v. Robert's, 16 So. 2d 558 (La. App. Orl. Cir. 1944)($1.45 debt owed, $100 awarded). *Cf.* Love v. Southern Bell Tel. and Tel. Co., 263 So. 2d 460 (La. App. 1st Cir. 1972)(plantiff lost his job with the defendant due in part to the intrusion of defendant's employees, awarded $15,000); Hamilton v. Lumbermen's Mut. Cas. Co., 82 So. 2d 61 (La. App. 1st Cir. 1955)(not a creditor-coercion case, but the jury awarded $12,500 for the unauthorized use of plantiff's name by his insurer, reduced on appeal to $3,000).

See also LA. R.S. 9:3562 (Supp. 1972)(Louisiana Consumer Credit Law)(lists unauthorized collection practices but the section is not to limit a debtor's right to bring an action for damages provided by article 2315); Fair Debt Collection Practice Act § 806, 15 U.S.C. § 1692(d) (1977) which provides:

> A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.
>
> (2) The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.
>
> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 1681(a)(f) or 1681(b)(3) of this title.
>
> (4) The advertisement for sale of any debt to coerce payment of the debt.
>
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (6) Except as provided in section 1692(b) of this title, the placement of telephone calls without meaningful disclosure of the caller's identity.

49. For example, in *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919), similar threats to humiliate the debtor through public exposure were made to recover the $32.75 debt—resulting in a $500 damage award.

50. 355 So. 2d at 28-30 (Hood, J., dissenting). Judge Hood pointed out that the

Even if the majority's factual findings are accepted, it is likely that the defendant's conduct apart from the erection of the bulletin board was insufficient to support recovery by the plaintiff. The majority pointed to this conduct, however, to support its finding that the defendant was motivated in this actionable publicity by a desire to coerce and harass the plaintiff. The bulletin board was seen as an unreasonable debt collection device and served as one more manifestation of the defendant's improper motivation.[51]

The line of debt collection cases gives the debtor some protection from a creditor's attempts to force payment by making the indebtedness known to the public. The traditional view is that a creditor's giving publicity to a debt is actionable, even though the debt is undisputed.[52] The notion underlying these cases is that a private debt is not a legitimate concern of the public and that the law provides a remedy to the creditor which he is expected to exercise in lieu of self-help. The debtor may continue to be protected from publicity concerning the debt, even if it is reduced to judgment and thus a matter of public record.[53]

Applicability of these debt collection cases to the instant

---

bulletin board cost more than the debt owed and that pictures of two individuals who were not indebted to the defendant were just as prominently displayed. Also, no demand for payment was made at any time after the bulletin board was erected. *Id.*

51. "It appears obvious, from the record, that one of defendant's motives in displaying plaintiff's picture in defendant's washateria was to coerce payment of that which defendant claims that plaintiff took from him." 355 So. 2d at 25.

52. *See, e.g.*, Trammell v. Citizens News Co., Inc., 285 Ky. 529, 148 S.W.2d 708 (1941)(debt published in newspaper); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927)(creditor posted sign in his shop window); Tuyes v. Chambers, 144 La. 723, 81 So. 265 (1919)(posted on blacklist and published in newspaper advertising sale of accounts receivable); Tollefson v. Price, 247 Or. 398, 430 P.2d 990 (1967)(debt posted in store).

53. Merely by being made an involuntary participant in a legal proceeding on a matter of purely private concern, the debtor should not be stripped of his right to privacy. By analogy to the defamation area, the Court stated in *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) that the details of many, if not most, courtroom battles would add almost nothing toward advancing the uninhibited debate on public issues.

In a few instances, however, the debt *can be* of public interest, however, depending on its nature and the parties involved. *E.g.*, Bell v. Courier-Journal and Louisville Times Co., (Ky.) 402 S.W.2d 84 (1966)(no liability for publishing that a public official was delinquent on his taxes—not a private debt).

case should be limited by important differences in the nature of the disclosure. Defendant did not post the private debt but rather an account of the theft and subsequent conviction, with captions, pictures, and the plaintiff's name and current address.[54] The public has a legitimate interest in the administration of its criminal justice system, and the information displayed was, for the most part, a matter of public record. In *Cox Broadcasting* the Court stated that information in the public records is presumed to be of public interest.[55] Under general tort theory, liability should not arise from the public disclosure of a fact on the public records because such a fact has lost its private nature.[56] It follows then that had a newspaper published an account of the incident shortly after its occurrence, liability could not be imposed consistently with either general tort theory or first amendment requirements.

In *Norris* the majority skirted the defendant's constitutional challenge by finding inapplicable those cases in which the publicity was given by the *news media.* While valid distinctions can perhaps be drawn between media and non-media defendants, the majority overstated its position. It is at best unsettled whether the media have any greater rights than the ordinary citizen. Chief Justice Burger in his concurring opinion in *First National Bank of Boston v. Bellotti*[57] stated that "[t]he Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others."[58] The Chief Justice indicated that no special status was meant to be conferred on a limited group, and the press clause merited special mention only because the press was more often the object of official restraints. Free speech protects expression itself while free press protects the scope of dissemination of that expres-

54. 355 So. 2d at 22.

55. Cox Broadcasting, Inc. v. Cohn, 420 U.S. 469, 495 (1975).

56. For example, the name of the rape victim in *Cox Broadcasting* was found to have been placed in the public domain. Oklahoma Pub. Co. v. District Court, 430 U.S. 308, 311 (1977).

57. 435 U.S. 765 (1978).

58. *Id.* at 798.

sion.[59] It seems well settled that the press has no greater right of *access* to information than does the general public.[60] To the extent that the same interests in free speech are implicated, the distinction between media and non-media defendants appears unsound.[61] The defendant's constitutional argument was squarely posed and should have been squarely addressed.

If one assumes that an individual's free speech rights are equal to those of the media, the question remains whether Mr. King abused his right. There is some validity to the position which the trial court and the majority took—that fifteen months of continued publicity effectively exhausted any public interest the disclosure may have initially furthered.[62] By analogy to the defamation area,[63] excessive publicity might be seen as an abuse of whatever privilege the defendant originally had. Even the dissenting judge agreed that the defendant should not be permitted to leave the bulletin board up indefinitely, but felt that it had not been displayed for an unreasonable length of time.[64]

The position of the majority on the unreasonable duration of the exposure was weakened by its reliance on *Briscoe v.*

---

59. *Id.* at 799-800. *But see* Bezanson, *The New Free Press Guarantee,* 63 VA. L. REV. 731 (1977); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?,* 26 HAST. L.J. 639 (1975); Stewart, *"Or of the Press,"* 26 HAST. L.J. 631 (1975).

60. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Nixon v. Warner Communications, Inc. 435 U.S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Branzburg v. Hayes, 408 U.S. 665, 684 (1972)(dictum)(no right of special access to information not available to the public generally); Estes v. Texas, 381 U.S. 532, 589 (1965)(Harlan, J., concurring).

61. It is doubtful that *Cox Broadcasting* is relevant only to instances in which the media is involved. In the related defamation area, the cases have not indicated that any different treatment of non-media defendants is appropriate. *See, e.g.,* St. Amant v. Thompson, 390 U.S. 727 (1968)(same standard applied to non-media defendant); Garrison v. Louisiana, 379 U.S. 64 (1964)(no media litigants involved though same standard applied); New York Times Co. v. Sullivan, 376 U.S. 254 (1964)(four clergymen joined as co-defendants).

62. 355 So. 2d at 24. Abuse often arises when the use or purpose exceeds the permission given. *E.g.,* Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969).

63. *See* RESTATEMENT (SECOND) OF TORTS § 604 (1977).

64. 355 So. 2d at 32-33 (Hood, J., dissenting).

Reader's Digest Association, Inc..[65] In that case, the defendant's article included a reference to the plaintiff's conviction for truck hijacking without specifying that the crime occurred eleven years earlier. In the long lapse of time since the crime, the plaintiff had established a new and productive life which was adversely affected by this new exposure. The California Supreme Court held that the plaintiff had stated a cause of action for the invasion of his right to privacy and remanded the case with a specific test for the trial court to apply.[66] *Briscoe* is distinguishable from the instant case in that the plaintiff in *Briscoe* was placed in a false light; he was not a *recent* felon, but a rehabilitated member of society. Further, no ill motives prompted the publicity by the defendant in *Briscoe*; the issue there was an excessive lapse of time, not an excessive duration of the publicity. Even had the facts more closely resembled those in *Norris, Briscoe* represented the minority position at the time it was decided and may be out of line with the later case of *Cox Broadcasting*.[67]

The majority's position may be supportable even under *Cox* because the manner of disclosure, in addition to its excessive duration, may have been objectionable. The information on the bulletin board was not confined to a "bald recitation"[68] of the facts on the public record. The privilege to give publicity to an incident is circumscribed by what a member of the public could view for himself in the records. The wording of the captions inserted in the display held the plaintiff up to public

65. 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

66. *Id.* at 538, 483 P.2d at 40, 93 Cal. Rptr. at 872.

67. *See, e.g.*, Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) *(held* a charge of criminal conduct, no matter how remote in time and place, can never be irrelevant to an official's or candidate's fitness for office); Sidis v. F-R Publishing Corp., 113 F.2d 806 (2d Cir. 1940) (brief biographical sketch of former child prodigy published many years after his public acclaim had faded); Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 828 (D.C.D.C. 1955) ("Persons formerly public, however, cannot be protected against disclosure and re-disclosure of known facts through the reading of old newspaper accounts and other publications . . . ."); Barbieri v. News-Journal Co., 56 Del. 67, 71, 189 A.2d 773, 775 (1963) ("But we do not agree that the lapse of time, in itself, recreates, or reinstates, a plaintiff's right of privacy . . . ."); Rawlins v. Hutchinson Pub. Co., 218 Kan. 295, 304, 543 P.2d 988, 995 (1975)(the court read *Cox Broadcasting* as dictating a different result from *Briscoe*).

68. Aquino v. Bulletin Co., 190 Pa. Super. Ct. 528, 541, 154 A.2d 422, 430 (1959).

ridicule.[69] Intentionally inflicted distress is qualitatively distinct from harm incidental to a mere disclosure, and to the degree present, may have properly led to a finding of abuse of the privilege to speak.

On the other hand, the *Norris* defendant made a forceful argument, accepted by the dissenting judge, that his purpose in displaying the information was solely to deter crime.[70] At least thirty-six thefts had been committed in the defendant's washateria in the four years prior to the incident involving the plaintiff.[71] A hidden security camera had been installed, but had failed to significantly reduce thefts. After the display was erected, no more thefts were reported.[72] Not only was the defendant's property safeguarded, but the safety of his patrons was increased. Assuming, however, that the defendant was truly interested only in deterrence of crime in his washateria, it is arguable that a display which did not reveal the plaintiff's identity would have been just as effective. Changing real actors' names and shading photographs have inclined various courts to view a defendant's actions as more reasonable.[73] The majority interpreted the defendant's failure to use less intrusive methods as evidence of his motive to coerce.[74]

Norris could not complain that his reputation in the community was damaged by the defendant's disclosures, for indeed, the gist of the information was accurate and a matter of public record. However, the Constitution does not give the defendant a bludgeon of truth with which to inflict incessant distress upon an admitted thief. Neither the trial judge, major-

69. 355 So. 2d at 25. *See* W. PROSSER, *supra* note 7, at 832 (any comments or headlines added are not privileged unless they fairly reflect the gist of the text). *Cf.* Taggart v. Wadleigh-Maurice, Ltd., 489 F.2d 434 (3d Cir. 1973)(plaintiff photographed at a newsworthy event, but the film was edited to achieve a comic effect at the plaintiff's expense—servicing portable latrine at Woodstock festival).

70. 355 So. 2d at 30.

71. *Id.* at 26.

72. *Id.* at 29.

73. *See, e.g.*, Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966) (documentary film of prisoners in which identities not revealed and faces shaded); Bernstein v. National Broadcasting Co., 129 F. Supp. 817 (D.C.D.C. 1955) (plaintiff's real name not revealed).

74. 355 So. 2d at 23.

ity, nor dissenting judge objected to an injunction being imposed.[75] The plaintiff in the instant case was only eighteen years old, had served his probationary sentence, and recently had married. He had obtained a job, and his employer had requested that the defendant remove the display.[76] The plaintiff's ability to become a productive member of society and society's interest in the rehabilitative process were impeded by this continued exposure.[77]

This case demonstrates the difficulty of regulating the extent to which a person may speak the truth when such speech causes another great distress. The strong competing interests of privacy and free speech defy easy accomodation. The majority eased its task of balancing these interests by improperly stressing the distinction between an individual's and the media's right to disseminate information. However, given the majority's finding that the defendant was motivated by a desire to harass the plaintiff, this writer believes the defendant's actions were sanctioned consistently with the Constitution.

Rick Revels

Bellotti—CORPORATIONS' FREEDOM OF SPEECH

First National Bank of Boston,[1] seeking a declaratory judgment, challenged the constitutionality of a Massachusetts statute[2] prohibiting corporations from making political contribu-

75. *Id.* at 24, 26, 33. The court did not mention that an injunction is generally an inappropriate remedy to restrain torts such as defamation or harassment against the person, nor attempt to justify its action by the finding of special circumstances and irreparable injury. *See* Greenberg v. Burglass, 254 La. 1019, 1027, 229 So. 2d 83, 86 (1969). *See also* LA. CODE CIV. P. art. 3601.

76. 355 So. 2d at 29.

77. *See, e.g.*, Bernstein v. National Broadcasting Co., 129 F. Supp. 817, 828 (D.C.D.C. 1955); Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 538, 483 P.2d 34, 40, 93 Cal. Rptr. 866, 872 (1971); Melvin v. Reid, 112 Cal. App. 285, 287, 297 P. 91, 93 (1931).

1. The other plaintiffs joining First National Bank of Boston in suing were: New England Merchants National Bank, the Gillette Co., Digital Equipment Corp., and Wyman-Gordon Co.

2. MASS. GEN. LAWS ANN. ch. 55, § 8 (West 1977), provides, *inter alia:*