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THE RIGHT OF PRIVACY IN ARKANSAS: A PROGRESSIVE STATE

*J. Lyn Entrikin**

“Arkansas has a rich and compelling tradition of protecting individual privacy. . . . [A] fundamental right to privacy is implicit in the Arkansas Constitution.”¹

I. INTRODUCTION

Summarizing Arkansas privacy law just two decades ago, Professor John Watkins observed that caller ID services, electronic eavesdropping devices, and CD-ROM files of computerized personal information all posed significant risks to Arkansans’ privacy interests.² Twenty years later, a proliferation of technological advances enables invasions of privacy by various means, including data mining, social media, internet search engines, spyware, and online identity theft.³ The stakes have never been higher for state laws protecting the civil right of privacy.

Today, privacy law in the United States amounts to an increasingly complex patchwork of state and federal provisions.⁴ With respect to informational privacy, United States law is an example of the sectoral approach to regulation, which layers discrete state and federal constitutional and statutory privacy protections over a backdrop of state common law rules largely drawn from the Restatement (Second) of Torts.⁵ A sectoral approach to in-

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1. *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 349–50 (2001), *quoted with approval* in *Ark. Dept. Human Servs. v. Cole*, 2011 Ark. 145, at 10, 380 S.W.3d 429, 435.

2. John J. Watkins, *The Privacy Tort: An Arkansas Guide*, 1993 ARK. L. NOTES 91, 91 (1993).

3. *See, e.g.*, Rodolfo Ramirez, *Online Impersonation: A New Forum for Crime on the Internet*, 27 CRIM. JUST. 6 (Summer 2012).

4. Paul M. Schwartz, *Preemption and Privacy*, 118 YALE L.J. 902, 904 (2009).

5. RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977); *see* Schwartz, *supra* note 4, at 932 (“The classic example of an ALI process for improving state law is the Restatement (Second) of Torts, which sets out Prosser’s privacy torts and heavily influences state law.”); *see also id.* at 922 (“Overall, the approach in the United States to information privacy law in the private sector has been through sector-specific laws containing FIP’s [fair information practices], which have been enacted by federal and state lawmakers.”).

formational privacy rights regulates a narrow range of privacy interests, as opposed to an “omnibus” law, which offers general standards that govern when no sectoral law unambiguously applies.⁶ On the other hand, autonomous privacy, the right to make decisions free from governmental interference regarding one’s intimate and family relationships, is protected to a greater or lesser extent by federal and state constitutions as interpreted by the courts.

Constitutional privacy jurisprudence reflects the substantial change in social norms relating to privacy interests over the last twenty years.⁷ To a limited extent, federal constitutional law acknowledges a substantive right of autonomous privacy, not only with respect to parenting⁸ and reproductive decisions,⁹ but also conduct within non-marital, consensual sexual relationships.¹⁰ Numerous federal and state statutes recognize sectoral privacy rights,¹¹ including the extensive privacy protection of personal health information guaranteed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).¹² At the same time, state and federal Freedom of Information Acts allow broad public access to government information.¹³ Yet

6. Schwartz, *supra* note 4, at 905.

7. *E.g.*, *Jegley v. Picado*, 349 Ark. 600, 641, 80 S.W.3d 332, 356 (2002) (Brown, J., concurring) (“Societal mores change. . . . The unmistakable trend, both nationally and in Arkansas, is to curb government intrusions at the threshold of one’s door and most definitely at the threshold of one’s bedroom.”).

8. *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

9. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

10. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (invalidating, as a violation of the Due Process Clause, a Texas statute criminalizing certain intimate sexual conduct between two persons of the same sex), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986).

The case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578.

11. An example of a federal sectoral privacy statute is the Children’s Online Privacy Protection Act of 1998, which governs the use of personal information about children on the internet. Schwartz, *supra* note 4, at 924.

12. Pub. L. No. 104-191, 110 Stat. 1936 (1996). For a summary of its key provisions, see OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE (May 2003), available at <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf>. “A major purpose of the Privacy Rule is to define and limit the circumstances in which an individual’s protected health information may be used or disclosed by covered entities.” *Id.* at 4.

13. *See, e.g.*, 5 U.S.C. § 552 (2006); ARK. CODE ANN. §§ 25-19-101 to -109 (Repl. 2002 & Supp. 2011).

even those statutes offer important exceptions that recognize the need to balance the right of public access against the privacy rights of government officials and Arkansas residents whose personal information may be at risk of disclosure in public records.¹⁴

Both state and federal courts have recognized a right of privacy with respect to private consensual adult relationships.¹⁵ But these implied privacy rights clash with statutory and state constitutional provisions that restrict who may marry. For example, Congress enacted the Defense of Marriage Act in 1996.¹⁶ One section of the Act, generally known as DOMA, defines “marriage” for purposes of federal law to mean only “a legal union between one man and one woman as husband and wife.”¹⁷ Further, DOMA expressly authorizes states to disregard same-sex relationships legally recognized as marriages by other states, as well as any rights or claims arising from those same-sex relationships.¹⁸ The United States Supreme Court recently held that by defining “marriage” for purposes of federal law to exclude same-sex marriages presently recognized under the laws of eleven states and the District of Columbia, section 3 of DOMA violates the Due Process Clause of the Fifth Amendment.¹⁹ While the Court deferred to the States to decide in the first instance whether same-sex marriages are valid, the Court’s decision will no doubt lead the Arkansas Supreme Court to revisit the dimensions of the state constitutional right of privacy.

In 2002, the Arkansas Supreme Court joined a small group of other state supreme courts that have interpreted their respective state constitutions to provide a civil right of privacy against government intrusion,²⁰ independ-

14. See, e.g., 5 U.S.C. § 552(b)(6) (excepting “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy”); ARK. CODE ANN. § 25-19-105(b)(12) (Supp. 2011) (excepting “[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy”); see also *McCambridge v. City of Little Rock*, 298 Ark. 219, 230, 766 S.W.2d 909, 914 (1989) (balancing plaintiff’s constitutional privacy interests against public’s interest in open access to criminal investigation records).

15. See, e.g., *Lawrence*, 539 U.S. at 578; *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002).

16. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)), *invalidated in part by* *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

17. 1 U.S.C. § 7, *invalidated by Windsor*, 133 S. Ct. at 2695; see also Ark. Const. amend. 83, § 1 (“Marriage consists only of the union of one man and one woman.”).

18. 28 U.S.C. § 1738C (2006).

19. *Windsor*, 133 S. Ct. at 2695–96. In a related case, the Court dismissed for lack of standing an appeal from a declaratory judgment that California Proposition 8, which refuses recognition of same-sex marriages, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660, 2668 (2013).

20. See generally Jeffrey A. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L. J. 971, 1002–07 (2006) (citing cases). In 1987, for example, the Texas Supreme Court recognized an implied state constitutional right to privacy in striking down a

ent of any interstitial right of privacy implied in the United States Constitution.²¹ Relying on the state's fundamental right of privacy, the court held that the Arkansas constitutional right "protects all private, consensual, non-commercial acts of sexual intimacy between adults."²² In 2011, the Arkansas Supreme Court cited the state constitutional right of familial privacy²³ in

state agency policy requiring employees to take polygraph tests. *Tex. Employees Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 204 (Tex. 1987). Also in 1987, the Arizona Supreme Court interpreted its state constitutional provision barring intrusions into "private affairs" to preclude interference with the individual right of autonomy to terminate life support. *Rasmussen v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987). In 1992, the Tennessee Supreme Court held that its state constitution implicitly granted a fundamental right to privacy independent of any rights guaranteed by the United States Constitution. *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (holding that right to privacy encompasses procreational autonomy, thus protecting former husband's right to object to former wife's proposed donation of frozen embryos to childless couple). These developments in interpreting state constitutions occurred at a time when the United States Supreme Court was becoming increasingly conservative and notably less inclined to expansively interpret the federal Constitution.

21. *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) ("[A] fundamental right to privacy is implicit in the Arkansas Constitution."). As the Arkansas Supreme Court acknowledged, the Arkansas Constitution does not explicitly guarantee a right to privacy. *Id.* at 624, 626, 80 S.W.3d at 345, 346. Unlike the Arkansas Constitution, a few other states' constitutions have been amended to expressly grant a right of privacy. *Shaman*, *supra* note 20, at 974–75 (listing Alaska, California, Florida, Hawaii, and Montana); *see also Jegley*, 349 Ark. at 626, 80 S.W.3d at 346; Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PENN. L. REV. 477, 483 & n.25 (2006). For a thoughtful and comprehensive history of the Arkansas Constitution and its amendment and interpretation, see Jerald A. Sharum, Note, *Arkansas's Tradition of Popular Constitutional Activism and the Ascendancy of the Arkansas Supreme Court*, 32 U. ARK. LITTLE ROCK L. REV. 33 (2009). As Sharum has observed, the Arkansas Supreme Court has taken an increasingly active role in interpreting the state constitution to confer civil rights broader in scope than those protected by the United States Constitution, perhaps triggered by *Arkansas v. Sullivan*, 532 U.S. 769 (2001). Sharum, *supra*, at 80. In *Sullivan*, the Court reversed a holding of the Arkansas Supreme Court interpreting the United States Constitution to provide more generous protections against pretextual searches than had the U.S. Supreme Court. *Sullivan*, 532 U.S. at 772. But the Court explicitly held that state courts may interpret their own state constitutions to do so. *See id.* On remand, the Arkansas Supreme Court reached the same result it had before, but this time by interpreting the Arkansas Constitution's protection against unreasonable searches and seizures more generously than the counterpart protections in the Fourth Amendment. *State v. Sullivan*, 348 Ark. 647, 657–58, 74 S.W.3d 215, 222 (2002).

22. *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350 (striking down the Arkansas sodomy statute, Ark. Code Ann. § 5-14-122 (Repl. 1997) (current version at § 5-14-122 (Supp. 2011)), as applied to private, consensual, noncommercial, same-sex sodomy); *see also Paschal v. State*, 2012 Ark. 127, at 11–12, 388 S.W.2d 429, 436 (reversing conviction of high school teacher for engaging in a consensual sexual relationship with an 18-year-old student as violating defendant's constitutional right of privacy).

23. *See Ark. Dep't. of Human Servs. v. Cole*, 2011 Ark. 145, at 26, 380 S.W.3d 429, 443.

striking down a statute, enacted by initiative in 2008,²⁴ that would have barred individuals from adopting or serving as foster parents if living with a sexual partner outside a marriage relationship recognized as valid under Arkansas law.²⁵ Yet the court has not decided whether the privacy protections recognized as implicit in the Arkansas Constitution extend to *informational* privacy.

This Article outlines Arkansas's civil right of privacy as it stands in 2013. Compared to the civil and constitutional privacy protections of many other states, Arkansas's privacy law for the most part is quite progressive.²⁶ But while the Arkansas Supreme Court has broadly interpreted the state constitution to grant a fundamental right of privacy to Arkansans, the constitutional right protects against intrusions only by government agencies and officials. Over the last two decades, the Arkansas General Assembly has enacted a number of sectoral statutes that sanction privacy invasions by specific means such as spyware and phishing.²⁷ But the enforcement of criminal privacy statutes largely depends upon the discretion of state and local prosecutors. These statutory efforts to protect privacy, however well meaning, are unlikely to have much effect because of limited government resources and the political priorities of elected prosecutors.

For all of these reasons, Arkansas common law, which offers civil remedies against privacy invasions by non-governmental entities, remains an important source of privacy protection. As this Article will explain, state common law privacy rights have evolved substantially since 1962 when the Arkansas Supreme Court first implicitly recognized a cause of action for invasion of privacy by misappropriation of one's likeness.²⁸ Yet several issues remain unresolved, including the scope of the privacy protection the court has found implicit in the Arkansas Constitution.

This Article synthesizes legal authority defining the Arkansas civil right of privacy and identifies issues yet to be resolved. Part I provides a brief overview of the fascinating history of privacy law in the United States.²⁹ Part II addresses the evolution of the common law right of privacy

24. Arkansas Adoption and Foster Care Act, commonly known as "Act 1" (approved Nov. 4, 2008, effective Jan. 1, 2009) (codified at ARK. CODE ANN. §§ 9-8-301 to -305 (Repl. 2009), *invalidated by Cole*, 2011 Ark. at 26, 380 S.W.3d at 443).

25. *Cole*, 2011 Ark. at 26, 380 S.W.3d at 443 (holding ARK. CODE ANN. §§ 9-8-301 to -305 unconstitutional).

26. An exception is the Arkansas Supreme Court's recent decision in *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, ___ S.W.3d ___. See *infra* notes 361-96 and accompanying text.

27. See, e.g., ARK. CODE ANN. § 4-111-103 (Repl. 2011).

28. See *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 498, 353 S.W.2d 22, 24 (1962) (dicta).

29. This section is largely drawn from J. Lyn Entrikin, *The Right to Be Let Alone: The Kansas Right of Privacy*, 53 WASHBURN L.J. ___ (forthcoming 2014).

in Arkansas beginning as early as 1909, as well as the state constitutional right of privacy first acknowledged in *Jegley v. Picado*.³⁰ Part III details the elements of each of the four iterations of the Arkansas common law right of privacy as interpreted by state and federal courts. Part IV identifies issues related to the Arkansas right of privacy that the courts have not yet fully resolved, including the extent to which Arkansas law recognizes a private cause of action for invasion of privacy as an alternative means of enforcing criminal statutes implicating privacy interests. Part V concludes.

II. THE HISTORICAL DEVELOPMENT OF THE COMMON LAW RIGHT OF PRIVACY IN THE UNITED STATES

Not often does a law review article lead the way for United States courts to recognize a novel legal right that was unrecognized at common law.³¹ The earliest cases debating the existence of the personal right of privacy were a direct outgrowth of an 1890 article co-authored by two law partners and published in the law review of their alma mater.³² The trigger for the article was the proliferation of news media commentary on the social events of the day, facilitated by invasive new technologies.³³

By the close of the nineteenth century, photography had become ubiquitous in the United States.³⁴ George Eastman patented the Kodak box camera on September 4, 1888, making photography accessible to the general

30. 349 Ark. 600, 80 S.W.3d 332 (2002).

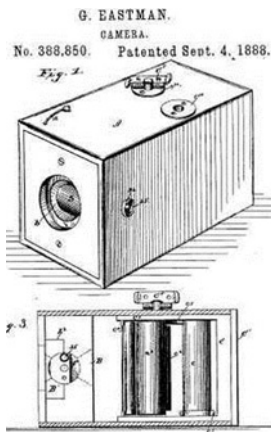
31. RAYMOND WACKS, *PRIVACY: A VERY SHORT INTRODUCTION* 57, 63 (2010); see FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* 61–62 (2009) (“‘The Right to Privacy’ was that rarest of law review articles: a treatise so well reasoned and so compellingly argued that it helped to reshape American legal theory.”). While most American states have judicially recognized the right of privacy, “other common law jurisdictions languish in a quagmire of indecision and hesitancy.” WACKS, *supra*, at 63. Underscoring the increasing worldwide interest in privacy rights is the Great Britain controversy about reporters employed by now-defunct *News of the World* hacking into the voice mail of cell phone users. See James Poniewozik, *The Humbling of Rupert Murdoch*, *TIME MAG.*, Aug. 8, 2011, at 32. See generally ABA *PRIVACY & COMPUTER CRIME COMM.*, *INTERNATIONAL GUIDE TO PRIVACY* (Jody R. Westby ed., 2004).

32. See Samuel D. Warren & Louis D. Brandeis, *The Right of Privacy*, 4 *HARV. L. REV.* 193, 196 (1890); see also Benjamin C. Bratman, *Brandeis and Warren’s “The Right of Privacy and the Birth of the Right to Privacy,”* 69 *TENN. L. REV.* 623, 624 (2002); Amy Gajda, *What If Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage That Led to “The Right to Privacy,”* 2008 *MICH. ST. L. REV.* 35, 36.

33. JON L. MILLS, *PRIVACY: THE LOST RIGHT* 5 (2008) (citing Warren & Brandeis, *supra* note 32); see also Bratman, *supra* note 32, at 626; Gajda, *supra* note 32, at 59–60. See generally MILLS, *supra*, at 29–35 (describing evolution of increasingly intrusive technology and resulting challenges for protection of personal privacy).

34. See Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 *AM. Q.* 24, 28 (1991).

public.³⁵ The portable Kodak camera enabled surreptitious photography,³⁶ triggering legal actions for violating “the right of circulating portraits.”³⁷



In 1890, Samuel D. Warren and his former law partner, future Supreme Court Justice Louis D. Brandeis, co-authored an article calling for a new cause of action for invasion of privacy.³⁸ The motivation for the article may have been “a series of articles in a Boston high-society gossip magazine, describing Warren’s swanky dinner parties.”³⁹ In the age of “yellow journalism,” the co-authors famously observed, “[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.”⁴⁰

During the next decade, New York trial courts issued a series of decisions enjoining defendants from publishing photographs of individuals without their consent.⁴¹ But in 1902, in *Roberson v. Rochester Folding*

35. MICHAEL S. MALONE, *THE GUARDIAN OF ALL THINGS: THE EPIC STORY OF HUMAN MEMORY 187–88* (2012). Eastman also originated the advertising slogan, “You Push the Button, We Do the Rest.” The Brownie camera, introduced in 1901 and advertised to sell for \$1.00, was enormously popular. *Id.*

36. Dorothy J. Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 409–17 (1990) (describing uncontested 1890 injunction secured by renowned comic opera star Marion Manola barring theater manager from distributing flash photographs taken during her performance); see *Schuyler v. Curtis*, 15 N.Y.S. 787, 789 (Sup. Ct. N.Y. Co. 1891) (reciting facts from *Manola v. Stevens & Myers* (unpublished) decided by the same court in 1890), *aff’d*, 19 N.Y.S. 264 (Sup. Ct. Gen. Term 1892).

37. Warren & Brandeis, *supra* note 32, at 196.

38. *Id.*

39. WACKS, *supra* note 31, at 53; see William L. Prosser, *The Right of Privacy*, 48 CAL. L. REV. 383, 383 (1960).

40. Warren & Brandeis, *supra* note 32, at 205. Warren and Brandeis drew from Professor Thomas Cooley’s treatise, first published in 1878, which sketched the outlines of the general right of “personal immunity” that would later become known more specifically as the right of privacy. *Id.* “The right to one’s person may be said to be a right of complete immunity; to be let alone.” THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (2d ed. 1888) (emphasis added), *quoted in* *Henry v. Cherry & Webb*, 73 A. 97, 99–100, 109 (R.I. 1909) (declining to judicially recognize right of privacy absent legislative action); see also *Barber v. Time*, 159 SW.2d 291, 294 (Mo. 1942) (“The basis of the right of privacy is the right to be let alone.” (citing THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT* 444, § 135 (4th. ed. 1934))).

41. *E.g.*, *Marks v. Jaffa*, 26 N.Y.S. 908, 909 (Super. Ct. Spec. Term 1893) (enjoining defendant newspaper editor from publishing photograph of plaintiff actor-law student without his consent); *Mackenzie v. Soden Mineral Springs Co.*, 18 N.Y.S. 240, 240 (Sup. Ct. N.Y.

Box,⁴² a deeply divided New York Court of Appeals reversed a judgment awarding money damages to Abigail Roberson, an eighteen-year-old whose photograph had been displayed without her consent on 25,000 advertising posters for baking flour.⁴³ The court's refusal to recognize a cause of action drew criticism from across the country.⁴⁴ In response to the public outcry, the 1903 New York Legislature hastily enacted a statutory right to privacy, narrowly framed to provide a civil remedy for those whose names or likenesses have been appropriated for trade or advertising purposes without their written consent.⁴⁵

Like New York, other state appellate courts declined to recognize a common law right to privacy, instead deferring the issue to their respective state legislatures.⁴⁶ A few states followed suit, enacting legislation similar to New York's.⁴⁷ But several other states, by judicial declaration, recognized a more sweeping right to privacy.

Co. 1891) (granting continuing injunction barring use of plaintiff's name and endorsement on defendants' advertising). *But cf.* *Murray v. Gast Lithographic & Engraving Co.*, 28 N.Y.S. 271, 271–72 (Sup. Ct. N.Y. Co.) (declining to enjoin unauthorized distribution of photos of plaintiff's infant daughter absent claim to vindicate property rights belonging to plaintiff), *aff'd*, 31 N.Y.S. 17 (N.Y.C. & Co. Comm. Pleas Ct. 1894); *see* *Schuyler v. Curtis*, 42 N.E. 22, 26 (N.Y. 1895) (declining to enjoin defendants from erecting statue of plaintiffs' decedent, a private philanthropist, on grounds that subject of alleged privacy invasion was deceased); *see also* *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 288 (Mich. 1899) (“We are not satisfied that . . . one has a right of action either for damages or to restrain the possessor of a camera from taking a snap shot at the passer-by for his own uses.”). Note that the earliest recognition of the right of privacy was by courts sitting in equity. *See generally* *Roberson v. Rochester Folding Box*, 64 N.E. 442, 444–47 (N.Y. 1902).

42. 64 N.E. 442 (N.Y. 1902) (4-3 opinion) (holding that New York does not recognize common law right of privacy), *rev'g* 71 N.Y.S. 876 (App. Div. 1901). *But see* N.Y. CIV. RIGHTS LAW § 51 (enacted 1903) (recognizing civil right of privacy for using one's name or likeness, without written consent, for trade or advertising purposes).

43. *Roberson*, 64 N.E. at 442. For a fascinating and humorous account of the aftermath of this decision for Ms. Roberson and Chief Judge Parker, who authored the decision (and later ran for public office), see Daniel J. Kornstein, *The Roberson Privacy Controversy*, *The Historical Soc'y of the Courts of the State of N.Y.* (Issue 4, 2006), at 3, available at <http://www.courts.state.ny.us/history/pdf/HSNLVol.4.pdf>; *see also* LANE, *supra* note 31, at 64–70 (discussing *Roberson* controversy).

44. Bratman, *supra* note 32, at 641, 648–50.

45. N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009); *see* N.Y. LAWS 1903, ch. 132, § 2. The companion criminal statute, § 50, defines the conduct as a misdemeanor. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); *see* N.Y. LAWS 1903, ch. 132, § 1. Section 51 creates a private cause of action for a violation of the criminal statute.

46. *E.g.*, *Henry v. Cherry & Webb*, 73 A. 97, 99–100, 109 (R.I. 1909) (declining to judicially recognize right of privacy absent legislative action); *Yoeckel v. Samonig*, 75 N.W.2d 925, 927 (Wis. 1956) (declining to judicially recognize the right because state legislature had recently failed to enact bills that would have done so).

47. Bratman, *supra* note 32, at 641 (citing Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1354 n.90). Examples are Virginia (enacted 1904) and Utah

The first to do so was Georgia. In *Pavesich v. New England Life Insurance Co.*,⁴⁸ the Georgia Supreme Court held that a plaintiff had stated a claim against an insurance company for printing his photograph in a newspaper advertisement without his consent.⁴⁹ In recognizing a civil remedy for invasion of privacy, the court drew from natural law principles, state and federal constitutional protection of individual liberty interests, and a Georgia statute authorizing any court to “□frame” a remedy, if necessary, for a violation of any right within its jurisdiction.⁵⁰ In the end, the Georgia Supreme Court boldly (and accurately) predicted that one day the right of privacy would be generally recognized in the United States:

So thoroughly satisfied are we that the law recognizes, within proper limits . . . the right of privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability⁵¹

After *Pavesich*, other state and federal courts adopted varied perspectives on the question.⁵² The Rhode Island Supreme Court, following the New York Court of Appeals, rejected the common law right of privacy in 1909, noting it was “unable to discover the existence of the right of privacy contended for.”⁵³ That same year, the Arkansas Supreme Court first acknowledged⁵⁴ but then narrowly sidestepped the issue in an action challenging the use of photographs of two criminal detainees in a “rogues’ gal-

(enacted 1909). See Note, *The Virginia “Right of Privacy” Statute*, 38 VA. L. REV. 117, 117 (1952).

48. 50 S.E. 68 (Ga. 1905).

49. *Id.* at 80–81.

50. *Id.* at 69–70 (quoting Ga. Civ. Code § 4929 (1895)).

51. *Id.* at 80–81; see DAVID A. ELDER, *PRIVACY TORTS* § 1:1, at 1-7 (2002) (nearly all jurisdictions recognize right of privacy).

52. See, e.g., *Henry v. Cherry & Webb*, 73 A. 97, 108 (R.I. 1909) (refusing to judicially recognize right of privacy, following *Roberson v. Rochester Folding Box*, 64 N.E. 442 (N.Y. 1902)); *Hillman v. Star Publ’g Co.*, 117 P. 594, 596 (Wash. 1911) (rejecting right of privacy absent legislation outlining parameters). But see, e.g., *Pritchett v. Bd. of Comm’rs of Knox Cnty.*, 85 N.E. 32, 35 (Ind. App. 1908) (following *Pavesich*); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. App. 1909) (following *Pavesich*); *Munden v. Harris*, 134 S.W. 1076, 1080 (Mo. App. 1911) (following *Pavesich*).

53. *Henry*, 73 A. at 109.

54. *Mabry v. Kettering*, 89 Ark. 551, 551, 117 S.W. 746, 747 (1909) (dissolving temporary restraining order prohibiting federal officers from using photographs of arrestees solely to identify them in various localities where federal offenses charged were allegedly committed). “The complaint . . . present[s] an interesting question concerning what is now termed by modern authorities the ‘right of privacy,’ or the right of an individual to . . . restrain an improper use of his photograph without his consent.” *Id.*, 117 S.W. at 747.

lery.”⁵⁵ On the merits, the court declared that law enforcement officers’ use of detainees’ photographs solely for identification purposes was not improper.⁵⁶ Thus, it declined to address whether Arkansas would recognize a common law right of privacy in other contexts.

In 1911, the Missouri Court of Appeals, relying on *Pavesich*, recognized a five-year-old boy’s common law cause of action against a Kansas City jewelry store for using his image in a newspaper advertisement without consent.⁵⁷ Just a year later, a federal district court, also in Missouri, pointedly declined to resolve “the irreconcilable conflict of opinions and views of courts of last resort in various jurisdictions.”⁵⁸ The court posited that even if a right of privacy did exist, it would surely not extend to a public educational institution seeking to enjoin a biscuit company from using the college’s name and emblems for commercial purposes.⁵⁹ Thus, Vassar College was denied an injunction prohibiting the marketing of “Vassar Chocolates” in packaging that displayed knock-offs of the college seal, pennant, and motto.⁶⁰

In 1939, the American Law Institute (ALI) recognized the evolving common law right of privacy in the first version of the Restatement of Torts.⁶¹ The Restatement outlined a single common law cause of action for invasion of privacy based on two alternatives: first, disclosing another person’s private affairs to others; and second, exhibiting another’s likeness to the public.⁶² To recover, a plaintiff was required to establish not only that the invasion was an unreasonable and serious interference with the plain-

55. *Mabry v. Kettering*, 92 Ark. 81, 81, 122 S.W. 115, 115–16 (1909) (declining to address alleged common law right of privacy in action to enjoin publication of arrestees’ photographs in “rogues’ gallery” absent allegation of use by law enforcement officers for purposes other than identification).

56. *Id.*, 122 S.W. at 115.

57. *Munden*, 134 S.W. at 1077. “If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent.” *Id.* at 1078.

58. *Vassar Coll. v. Loose-Wiles Biscuit Co.*, 197 F. 982, 985 (W.D. Mo. 1912) (bill in equity).

59. *See id.* at 984–85. The federal district court distinguished cases involving private persons suing for invasion of privacy, observing that a public corporate institution depends on publicity to fulfill its role as an institution of higher education. “Where a person is a public character, the right of privacy disappears.” *Id.* at 985 (citing *Corliss v. E.W. Walker Co.*, 57 F. 434 (D. Mass. 1893)); *see id.* at 994. Today, the common law right of privacy is generally considered a personal right that does not apply to corporations. RESTATEMENT (SECOND) OF TORTS § 652I cmt. a (1977); *see also* *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) (right to privacy cannot attach to corporations or other business entities).

60. *Vassar Coll.*, 197 F. at 984–85.

61. RESTATEMENT OF TORTS § 867 (1939). “A person who unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other.” *Id.*

62. *Id.*

tiff's privacy interests, but also that the defendant should have foreseen that the plaintiff would justifiably feel "seriously hurt" by the challenged conduct.⁶³ Having met these requirements, the plaintiff was not required to prove either physical harm or pecuniary loss to recover damages.⁶⁴

Almost from the beginning, state courts citing the Restatement provision recognized privacy invasions that went beyond the essential elements outlined by the ALI. For example, in 1941 the Oregon Supreme Court recognized an invasion of privacy when an optical corporation, without consent, signed the plaintiff's name to a telegram urging the Governor to veto a bill that would have prohibited corporations from dispensing optical glasses.⁶⁵ While the facts involved neither disclosure of the plaintiff's private affairs to the public nor the exhibition of the plaintiff's likeness, the court nevertheless recognized a right of privacy that was invaded when the defendant "appropriated . . . for [its] own purposes . . . [plaintiff's] name, his personality, and whatever [political] influence he may have possessed."⁶⁶

In 1960, Dean William Prosser published an influential law review article acknowledging four related but distinct aspects of the common law right of privacy.⁶⁷ Prosser's proposed formulation included (1) intrusion on seclusion, solitude, or private affairs; (2) public disclosure of embarrassing private facts; (3) publicity casting plaintiff in a false light in the public eye; and (4) appropriation of name or likeness for the defendant's advantage.⁶⁸ Each of the four privacy torts protects related but distinct privacy interests.⁶⁹

63. *Id.* § 867 cmt. d.

[L]iability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues. These limits are exceeded where intimate details of the life of one who has never manifested a desire to have publicity are exposed to the public, or where photographs of a person in an embarrassing pose are surreptitiously taken and published. . . . It is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists. If these conditions exist, however, the fact that the plaintiff suffered neither pecuniary loss nor physical harm is unimportant.

Id.

64. *Id.*

65. *Hinish v. Meier & Frank Co.*, 113 P.2d 438, 439-40 (Or. 1941).

66. *Id.* at 448.

67. Prosser, *supra* note 39, at 383.

68. *Id.* at 389.

69. For a concise but accurate delineation of the differences among them, see *Williams v. Am. Broad. Cos., Inc.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983).

Intrusion and disclosure require the invasion of something secret, secluded or private; false light and appropriation do not. Disclosure and false light depend upon publicity while intrusion and appropriation do not. False light requires falsity or fiction while none of the other three do. Appropriation requires a use for defendant's advantage while the other three do not.

Soon after publication of Dean Prosser's article, the Arkansas Supreme Court acknowledged a narrow common law right of privacy for the first time when a photography corporation used the plaintiff's studio photographs for advertising purposes without her consent.⁷⁰ Citing Prosser's seminal article at the end of a footnote along with several other secondary authorities addressing the right of privacy, the court implicitly recognized the tort he had classified as appropriation of likeness for the defendant's advantage.⁷¹

Fifteen years after the Arkansas Supreme Court acknowledged the common law right of privacy in *Olan Mills, Inc. of Texas v. Dodd*,⁷² the ALI adopted Dean Prosser's formulation of the four privacy torts in the Restatement (Second) of Torts.⁷³ Since then, the great majority of states, including Arkansas,⁷⁴ have adopted all or most of the four distinct causes of action outlined by Dean Prosser in 1960.⁷⁵

III. EVOLUTION OF THE ARKANSAS RIGHT OF PRIVACY

Although the point is seldom emphasized in the cases, each variation of the common law right of privacy recognized in Arkansas is an intentional tort.⁷⁶ Because intent is an essential element of the claim, the plaintiff must prove by a preponderance of the evidence that the defendant acted intentionally. To establish intent, Arkansas law requires more than proof that the

Id.

70. *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 498, 353 S.W.2d 22, 24 (1962) (dicta).

71. *Id.* at 497 n.1, 353 S.W.2d at 23 n.1. *Olan Mills* has been cited numerous times as the first case in which the Arkansas Supreme Court recognized the common law right of privacy. *E.g.*, HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS LAW OF DAMAGES § 33:11, at 639 (5th ed. 2004). However, the defendant in that case did not dispute either the invasion of privacy or plaintiff's lack of consent. *Olan Mills*, 234 Ark. at 497, 353 S.W.2d at 23. Rather, the defendant appealed only the \$2,500 award of damages, arguing the plaintiff could not recover for mental anguish alone in the absence of physical injury. *Id.* at 498, 353 S.W.2d at 24. The court rejected the argument, analogizing the facts to cases in which the court had upheld damages for mental suffering and humiliation caused by wanton or willful conduct without accompanying physical injury. *Id.*, 353 S.W.2d at 24 (citations omitted). *Olan Mills* admitted that it had customarily secured written consent before using customers' portraits for advertising purposes, but had failed to do so in this case. Therefore, the court simply concluded that the evidence supported the jury's verdict. *Id.*, 353 S.W.2d at 24.

72. 234 Ark. 495, 498, 353 S.W.2d 22, 24 (1962) (dicta).

73. RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977).

74. *See* *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 638 n.8, 590 S.W.2d 840, 845 n.8 (1979).

75. ELDER, *supra* note 51, § 1:1. The sole exceptions are Wyoming and North Dakota. *Id.* *But cf.* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) (narrowly recognizing only misappropriation of name or likeness for trade or advertising purposes).

76. *See, e.g.*, *Smith v. St. Paul Guardian Ins. Co.*, 622 F. Supp. 867, 872 (W.D. Ark. 1985) (dicta) (most forms of invasion of privacy require intent as an element).

defendant intended to do the act that in turn caused the harm.⁷⁷ The plaintiff must show that the defendant believed the tortious results were substantially certain to follow from defendant's conduct.⁷⁸ In other words, the tortious harm not only must have been reasonably foreseeable to the defendant; the injury also must have been subjectively foreseen by the defendant to support liability.

Moreover, a plaintiff who files a privacy claim in state court must satisfy Arkansas pleading requirements to withstand a motion to dismiss for failure to state a claim. Arkansas is a fact pleading state and does not recognize notice pleading.⁷⁹ In alleging violation of the right of privacy, a claimant must, at minimum, specifically identify the nature of the privacy claim asserted.⁸⁰

A. Common Law Right of Privacy

While the Arkansas Supreme Court gave an approving nod to the development of the common law right of privacy in other states as early as 1909,⁸¹ it was a relative latecomer in fully recognizing the cause of action grounded in Arkansas common law. In 1957, in *Webber v. Gray*,⁸² the Arkansas Supreme Court upheld an injunction against a jilted paramour who

77. See *Talley v. MFA Mut. Ins. Co.*, 273 Ark. 269, 274, 620 S.W.2d 260, 263 (1981) (declining to adopt "tort concept that one intends the natural and foreseeable consequences of his acts" for purposes of construing insurance policy exclusion for results of intentional conduct); accord RESTATEMENT (SECOND) OF TORTS § 8A (1965) (defining "intent").

78. Under Arkansas law, "intentional torts involve consequences which the actor believes are substantially certain to follow his actions." *Miller v. Ensko, Inc.*, 286 Ark. 458, 460, 692 S.W.2d 615, 617 (1985), cited with approval in *Baptist Health v. Murphy*, 365 Ark. 115, 123, 226 S.W.3d 800, 808 (2006); cf. *Angle v. Alexander*, 328 Ark. 714, 719–20, 945 S.W.2d 933, 935–36 (1997) (for employee to file tort action against employer for damages in lieu of workers' compensation, employer must have had "desire" to bring about consequences of acts, or must have premeditated the tortious acts with specific intent to injure; intentional torts involve consequences the actor believes are substantially certain to follow from the actions (citing *Miller*, 286 Ark. at 461–62, 692 S.W.2d at 617–18)).

79. See Ark. R. Civ. P. 8; see also *Dunlap v. McCarty*, 284 Ark. 5, 7, 678 S.W.2d 361, 363 (1984) ("Simply because the complaint said that the action was one for 'invasion of privacy' would not make it so; we must look to the alleged facts." (citing *Bankston v. Pulaski Cnty. Sch. Dist.*, 281 Ark. 476, 665 S.W.2d 859 (1984))); cf. *Steinbuch v. Hachette Book Grp.*, No. 4:08CV00456 JLH, 2009 WL 963588, at *2 (E.D. Ark. Apr. 8, 2009) (dismissing false light claim for failing to "make any specific allegations as to how the book casts him in a false light").

80. See *Milam v. Bank of Cabot*, 327 Ark. 256, 264, 937 S.W.2d 653, 657 (1997) (refusing to develop privacy claim for plaintiffs, who failed to identify which privacy theory applied and cited no authority to support alleged invasion of privacy).

81. *Mabry v. Kettering*, 89 Ark. 551, 552, 117 S.W. 746, 747 (1909); see *Mabry v. Kettering*, 92 Ark. 81, 83, 122 S.W. 115, 115 (1909); see also *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 498, 353 S.W.2d 22, 24 (1962) (dicta).

82. 228 Ark. 289, 307 S.W.2d 80 (1957).

had repeatedly harassed the plaintiff over several years.⁸³ While the allegations might have supported a common law cause of action for what is now commonly known as intrusion on seclusion,⁸⁴ the complaint sounded in equity and failed to raise the right of privacy as the basis for a common law claim.⁸⁵ While sitting in equity, the court's reasoning was nevertheless consistent with the policies underlying recognition of the common law right of privacy.⁸⁶

In *Olan Mills, Inc. of Texas v. Dodd*, the Arkansas Supreme Court upheld a jury verdict awarding damages to a woman whose photograph had been used without her consent to advertise the defendant's photography studio.⁸⁷ The only dispute on appeal was whether the court would sustain the

83. *Id.* at 295–96, 307 S.W.2d at 84.

84. See RESTATEMENT (SECOND) OF TORTS § 652B (1977); see also ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 (Ark. Supreme Court Comm. on Jury Instructions 2013).

85. As a general rule, an equitable remedy is not available unless the plaintiff lacks a complete legal remedy. *Townsend v. Ark. State Hwy. Comm'n*, 326 Ark. 731, 734, 933 S.W.2d 389, 391 (1994); *McGehee v. Mid South Gas Co.*, 235 Ark. 50, 55, 357 S.W.2d 282, 286 (1962). In *Webber*, because the Arkansas Supreme Court upheld the injunction in substantial part, the court implicitly held that no common law right of privacy existed in Arkansas at that time. See *Webber*, 228 Ark. at 295–96, 307 S.W.2d at 84 (“He has no remedy at law against the almost incessant harassment which the record discloses he has been subjected to over a period of years.”).

86. See *Webber*, 228 Ark. at 293, 307 S.W.2d at 82–83.

For several years appellant has written numerous letters and notes to appellee in an effort to force him to renew their association. These notes and letters, signed and unsigned, were delivered by mail and by the appellant leaving them in or upon appellee's automobile, his residence and place of business. Similar letters have been written by appellant to appellee's mother, wife, employer and the real estate company from which appellee purchased his home and, in which, appellant states that appellee is the father of her unborn child and is soon to be faced with a paternity suit. Appellee estimated that he had received at least 200 such communications within a year prior to the last hearing.

[A]ppellant caused a picture of herself and the announcement of their approaching marriage to be published in a local newspaper. [S]he made written application for a marriage license in their names . . . without his knowledge or consent. Almost daily appellant accosts appellee on the streets in an attempt to engage him in conversation. Since appellee's marriage . . . , appellant has followed appellee and his wife to town in her car nearly every work day and left a note or letter in or upon his car when he refused to talk to her. On numerous occasions she has parked her car within a few feet of appellee's home for long periods. The telephone at appellee's home rings frequently when the caller merely ‘hangs up’ upon answer being made.

Id. at 292, 307 S.W.2d at 82. Upholding the injunction even though the rights implicated were not property rights, the court concluded, “The acts of the appellant . . . might be classed as trivial if they had been merely sporadic or of short duration. But appellee has the right to pursue his lawful daily occupation and family activities unhampered by the protracted molestations of the appellant . . .” *Id.* at 293, 307 S.W.2d at 84.

87. 234 Ark. 495, 498–99, 353 S.W.2d 22, 24 (1962).

award of damages for emotional distress alone in the absence of physical injury.⁸⁸ The court did not address the privacy claim on its merits because the defendant conceded that the plaintiff had established the elements of invasion of privacy; the only issue in dispute was the amount of damages awarded.⁸⁹ Nevertheless, *Olan Mills* has been cited repeatedly by the Arkansas appellate courts as the first case in which the common law right of privacy was recognized.

Not until 1979 did the court explicitly adopt the four common law privacy actions as defined in the Restatement (Second) of Torts. In *Dodrill v. Arkansas Democrat Co.*,⁹⁰ the court upheld summary judgment granted to the news publisher in a case filed by an attorney plaintiff for defamation and invasion of privacy.⁹¹ In a previous action, the attorney had been suspended from the practice of law, subject to readmission if he successfully sat for the Arkansas bar exam.⁹² After retaking the exam and passing it, he alleged that the defendant newspaper erroneously reported that he had failed the exam.⁹³ Before affirming summary judgment on the merits, the Arkansas Supreme Court expressly adopted the four privacy torts as “codified” in the Restatement.⁹⁴

Since 1979, the Arkansas courts have repeatedly acknowledged the four common law privacy torts as defined in the Restatement.⁹⁵ After *Olan Mills*, no cases involving appropriation of name or likeness have reached the

88. *Id.*, 353 S.W.2d at 24.

89. *Id.*, 353 S.W.2d at 24.

90. 265 Ark. 628, 590 S.W.2d 840 (1979).

91. *Id.* at 637–38 & n.8, 590 S.W.2d at 844–45 & n.8.

92. *Id.* at 631, 590 S.W.2d at 841; see *In re Dodrill*, 260 Ark. 223, 538 S.W.2d 549 (1976).

93. *Dodrill*, 265 Ark. at 633, 590 S.W.2d at 842. The trial court granted summary judgment on both claims, reasoning that the attorney plaintiff was a public figure and that he failed to show that the newspaper acted with actual malice. *Id.* at 633–34, 590 S.W.2d at 842. The Arkansas Supreme Court affirmed this holding on appeal. *Id.* at 639–40, 590 S.W.2d at 846.

94. *Id.* at 637–38, 590 S.W.2d at 844–45; see *id.* at 638 n.8, 590 S.W.2d at 845 n.8 (holding that “Arkansas has been included in [the] majority [of jurisdictions that recognize the right of privacy] with the decision in *Olan Mills* . . .”).

95. *E.g.*, *Milam v. Bank of Cabot*, 327 Ark. 256, 263, 937 S.W.2d 653, 657 (1997) (citations omitted) (“Arkansas has recognized the existence of four actionable forms of invasion of privacy”); *CBM of Cent. Ark. v. Bemel*, 274 Ark. 223, 225–26, 623 S.W.2d 518, 519–20 (1981) (recognizing intrusion on seclusion); *Dodrill*, 265 Ark. at 638, 590 S.W.2d at 845 (recognizing false light publicity); see ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421 (Ark. Supreme Court Comm. on Jury Instructions 2013) (appropriation of name or likeness) (citing *Olan Mills Inc. of Tex. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962)); ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422 (public disclosure of private facts); see also *Wood v. Nat’l Computer Sys.*, 814 F.2d 544, 545 (8th Cir. 1987) (applying Arkansas law) (publicity given to private facts); *Stanley v. Gen. Media Comm’ns*, 149 F. Supp. 2d 701, 706–07 (W.D. Ark. 2001) (appropriation of likeness; false light).

Arkansas appellate courts. Intrusion on seclusion and false light publicity appear to be the privacy torts most often litigated in Arkansas appellate courts.⁹⁶ While the state courts have not addressed a claim for publicity given to private facts, the federal courts have done so on occasion.⁹⁷ Part III addresses each of the four privacy torts in more detail.

B. Constitutional Right of Privacy

The underpinnings of the Arkansas Constitution's right of privacy were recognized by the Arkansas Supreme Court as early as 1924 in *Coker v. City of Fort Smith*.⁹⁸ A city ordinance prohibiting prostitution also prohibited any male over the age of fourteen from accompanying, day or night, "without there being any necessity therefor . . . any woman known or generally reputed to be a prostitute or lewd woman."⁹⁹ Coker was convicted of a misdemeanor and fined for violating the statute, and he appealed, challenging its constitutionality.¹⁰⁰ The Arkansas Supreme Court held that the ordinance went too far by effectively denying a prostitute the value of residing in the city by denying the privileges that "give that right its value."¹⁰¹ While the ordinance did not directly prohibit a prostitute from accompanying a male in the city, it effectively denied her that right by criminalizing the conduct of her male companion.¹⁰²

Coker did not expressly rely on the Arkansas Constitution as the basis for invalidating the Fort Smith ordinance. The court simply held that the relevant portion of the ordinance was "too broad in its terms, and was beyond the power of the [city] council to enact, and [was] therefore invalid."¹⁰³ The court reasoned, however, that the ordinance limited the liberty interests of "lewd" women as well as their male companions,¹⁰⁴ directly implicating what would later become known as the "right to be let alone." Further, the

96. See, e.g., *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, ___ S.W.3d ___ (intrusion on seclusion); *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002) (intrusion on seclusion, false light); *Dunlap v. McCarty*, 284 Ark. 5, 678 S.W.2d 361 (1984) (intrusion on seclusion); *Bemel*, 274 Ark. 223, 623 S.W.2d 518 (intrusion on seclusion); *Dodrill*, 265 Ark. 628, 590 S.W.2d 840 (false light); *Coombs v. J.B. Hunt Transp., Inc.*, 2012 Ark. App. 24, 388 S.W.3d 456 (2012) (intrusion on seclusion); *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003) (intrusion on seclusion, false light).

97. See *Wood*, 814 F.2d 544; *Dunbar v. Cox Health Alliance*, 446 B.R. 306 (Bankr. E.D. Ark. 2011).

98. 162 Ark. 567, 258 S.W. 388 (1924).

99. *Id.* at 568–69, 258 S.W. at 389 (quoting Fort Smith city ordinance).

100. *Id.*, 258 S.W. at 389.

101. *Id.* at 573, 258 S.W. at 390.

102. *Id.*, 258 S.W. at 390.

103. *Id.*, 258 S.W. at 390.

104. *Coker*, 162 Ark. at 573, 258 S.W. at 390.

court cited two cases from Texas and Missouri, each of which had struck down similar enactments on state and federal constitutional grounds.¹⁰⁵

In 1973 in *Carter v. State*,¹⁰⁶ the Arkansas Supreme Court addressed the constitutional privacy issue more directly. The appellants challenged the constitutionality of the Arkansas criminal sodomy statute¹⁰⁷ on multiple grounds. They had been convicted for engaging in intimate conduct in a vehicle parked at a public rest stop and tourist information facility, within view of others who had parked trucks, automobiles, and campers there.¹⁰⁸ The appellants' main argument was that the statute violated their right of privacy under various amendments to the United States Constitution.¹⁰⁹

The Arkansas Supreme Court refused to strike down the statute, observing that it carried a strong presumption of constitutionality.¹¹⁰ Moreover, the presumption of validity was "enhanced by the highly persuasive fact that the [criminal sodomy] statute was long unassailed."¹¹¹ The court emphasized that the defendants' conduct leading to the conviction occurred not in private, but in a public place.¹¹² The appellants unsuccessfully cited cases that "demonstrate[d] . . . the expansion of the 'right to privacy in matters of intimate personal preference' . . . based upon the courts' having taken cognizance of dramatic changes in social conditions which have made legal doctrines once appropriate become unsuited for contemporary society."¹¹³ The court avoided the issue by deferring to the legislative branch, observing that "[i]f social changes have rendered our sodomy statutes unsuitable to the society in which we now live, we need not be concerned about the matter

105. *Id.* at 571–72, 258 S.W. at 390; see *Ex parte Smith*, 36 S.W. 628, 629 (Mo. 1896) ("We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be."); *Ex parte Cannon*, 250 S.W. 429, 430 (Tex. Crim. App. 1923) ("[T]he various subdivisions of section 2 of this ordinance . . . demonstrate that it is violative of the fundamental guaranty of both the federal and state Constitutions to every citizen of life, liberty, and property.").

106. 255 Ark. 225, 500 S.W.2d 368 (1973).

107. ARK. CODE ANN. § 41-813 (Repl. 1964), *invalidated by* *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

108. *Carter*, 255 Ark. at 227, 500 S.W.2d at 370.

109. *Id.*, 500 S.W.2d at 370.

110. *Id.*, 500 S.W.2d at 370.

111. *Id.* at 228, 500 S.W.2d at 370 (citations omitted). "[I]f such a statute were in violation of federal constitutional principles, surely the thought would have long since occurred to the many legal scholars and jurists of this state. Appellants have not, by their multifaceted attack, met their very heavy burden of showing that this statute is unconstitutional." *Id.*, 500 S.W.2d at 370.

112. *Id.*, 500 S.W.2d at 370. The court could have avoided the constitutional issue entirely simply by holding that even if the appellants did have a right of privacy, they had waived it by virtue of engaging in prohibited conduct in a public place in view of others.

113. *Id.* at 230, 500 S.W.2d at 371.

because there is a branch of our government within whose purview the making of appropriate adjustment and changes peculiarly lies."¹¹⁴

Five years later in 1978, the court addressed the constitutional rights of arrestees in *Bolden v. State*.¹¹⁵ The appellants argued in part that they were prejudiced because the prosecution had failed to comply with Rule 8.1 of the Arkansas Rules of Criminal Procedure, which provides that "[a]n arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay."¹¹⁶ The court agreed with the appellants' argument that Rule 8.1 was mandatory, but disagreed that the State's failure to comply warranted dismissal of the charges.¹¹⁷ Nevertheless, the court acknowledged in passing that the rule was designed in part to protect arrestees' privacy and liberty interests, which are among the fundamental constitutional rights of arrestees protected by both the state and federal constitutions.¹¹⁸

A decade later, a divided court addressed asserted constitutional privacy interests with respect to public records in *McCambridge v. City of Little Rock*.¹¹⁹ The case involved certain records and photographs associated with the 1987 murder-suicide of John Markle, the son of Mercedes McCambridge, then a well-known actress.¹²⁰ McCambridge and the Markle estate sued the City and its police department in an effort to prevent the release of information as to which McCambridge claimed a constitutional right of privacy.¹²¹ The trial court held that the challenged records were subject to disclosure under the Arkansas Freedom of Information Act.¹²² On

114. *Carter*, 255 Ark. at 230, 500 S.W.2d at 371.

115. 262 Ark. 718, 723–24, 561 S.W.2d 281, 284 (1978).

116. ARK. R. CRIM. P. 8.1.

117. *Bolden*, 262 Ark. at 724, 561 S.W.2d at 284.

118. *Id.*, 561 S.W.2d at 284. As the court observed,

Rule 8.1 is designed and has as its purpose to afford an arrestee protection against unfounded invasion of liberty and privacy. Moreover, the person under arrest taken before a judicial officer without unnecessary delay will have the charges explained, will be advised of his constitutional rights and will have counsel appointed for him, if an indigent, and arrangements for bail can be made expeditiously. Such action may avoid the loss of the suspect's job and eliminate the prospect of the loss of income and the disruption and impairment of his family relationship. Indeed, *these are basic and fundamental rights which our state and federal constitutions secure to every arrestee*. Hence, we conclude that Rule 8.1 is mandatory in its scope.

Id., 561 S.W.2d at 284 (emphasis added).

119. 298 Ark. 219, 766 S.W.2d 909 (1989).

120. *Id.* at 224–25, 766 S.W.2d at 911; see *Archive of Obituary of Mercedes McCambridge*, N.Y. TIMES, Mar. 18, 2004, <http://www.nytimes.com/2004/03/18/arts/mercedes-mccambridge-87-actress-known-for-strong-roles.html>.

121. *McCambridge*, 298 Ark. at 224–25, 766 S.W.2d at 911.

122. *Id.* at 225, 766 S.W.2d at 911.

appeal, McCambridge argued in part that releasing the records would amount to a violation of her constitutional right of privacy.¹²³

Relying on recent United States Supreme Court decisions, the Arkansas Supreme Court acknowledged that McCambridge had a valid privacy interest in at least some of the criminal investigation records.¹²⁴ The court observed that fundamental privacy interests include the protection of family relationships.¹²⁵ Those interests were directly implicated in *McCambridge* because one of the documents she sought to protect from disclosure was a long letter her deceased son had written to her just before committing the murder-suicide.¹²⁶ However, the court reasoned that her constitutional privacy interest extended only to “personal matters,” defined as information that a person has intentionally kept private, that could be kept private absent governmental action, and that would be embarrassing to a reasonable person if disclosed.¹²⁷ Applying that standard to the facts, the court concluded that some of the documents in question involved matters personal to McCambridge.¹²⁸

Having determined that McCambridge had a constitutional privacy interest in some of the documents, the court proceeded to balance her constitutional privacy interest against the government’s interest in public disclosure recognized by the Arkansas Freedom of Information Act.¹²⁹ After considering each record one by one, the court concluded that the balance weighed in the government’s favor, and therefore none of the records were exempt from disclosure under the Act.¹³⁰ The court acknowledged that McCambridge’s privacy interest in the contents of the letter her son had written to her was especially high, observing that “[w]hile public figures cannot expect the same degree of privacy as private citizens, they can reasonably expect privacy in personal letters to or from their children.”¹³¹ Nevertheless, the government also had a strong interest in the letter’s content because it was relevant

123. *Id.* at 226, 766 S.W.2d at 912.

124. *Id.* at 228–30, 766 S.W.2d at 913–14 (citing *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977) (holding that one facet of constitutional privacy interests includes the right of an individual not to have his private affairs made public)).

125. *Id.* at 230, 766 S.W.2d at 914 (citing *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 458 (1977); *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

126. *Id.* at 231–32, 766 S.W.2d at 915.

127. *McCambridge*, 298 Ark. at 230, 766 S.W.2d at 914 (citing with approval Bruce E. Falby, Comment, *A Constitutional Right to Avoid Disclosure of Personal Matter: Perfecting Privacy Analysis in J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), 71 GEO. L.J. 219, 240 (1981)).

128. *Id.*, 766 S.W.2d at 914. In particular, she had a privacy interest in two letters Markle had written to his attorney, in Markle’s diary, in the letter Markle had written to her, and in the photographs. *Id.*, 766 S.W.2d at 914.

129. *Id.* at 231, 766 S.W.2d at 915 (citing *Nixon*, 433 U.S. at 458).

130. *Id.* at 231–32, 766 S.W.2d at 915.

131. *Id.* at 232, 766 S.W.2d at 915.

to solving the crime.¹³² The court concluded that the government's interest in disclosure outweighed McCambridge's privacy interests.¹³³

McCambridge was an important case in the development of Arkansas privacy law because it recognized, for the first time, evolving federal precedent recognizing a constitutional privacy interest in *information* regarding intimate personal matters. The case also expressly acknowledged that the right of privacy extends to family relationships.¹³⁴ In citing *Whalen v. Roe*,¹³⁵ the Arkansas Supreme Court acknowledged two basic aspects of constitutional privacy interests: informational privacy, the interest in avoiding disclosure of information pertaining to private matters; and personal autonomy, "the interest in independence in making certain kinds of important decisions."¹³⁶ The first of these was implicated in *McCambridge*; the second would await direct recognition by the Arkansas Supreme Court thirteen years later in *Jegley v. Picado*.¹³⁷

The Arkansas Supreme Court once again addressed a constitutional argument pertaining to informational privacy in *Arkansas Department of Human Services v. Heath*.¹³⁸ Heath, a middle school principal, was the subject of a report to the Department of Human Services alleging a possible incident of child abuse for paddling a student.¹³⁹ He challenged the report and ultimately obtained a ruling from the circuit court declaring that the report of child abuse was "unsubstantiated."¹⁴⁰ While the Department did not appeal that decision, it challenged the circuit court's order directing it to remove the report from the state's Child Abuse and Neglect Central Registry.¹⁴¹

The challenge was based on a state statute¹⁴² that required the Department to expunge all unfounded reports from the registry after three years.¹⁴³ The Department interpreted the statute's affirmative mandate to mean that expungement *before* three years was not discretionary but rather prohibited as a matter of law.¹⁴⁴ The issue on appeal was whether retaining the report in

132. *Id.*, 766 S.W.2d at 915.

133. *McCambridge*, 298 Ark. at 232, 766 S.W.2d at 915.

134. *Id.* at 230, 766 S.W.2d at 914.

135. 429 U.S. 589 (1977).

136. *McCambridge*, 298 Ark. at 229, 766 S.W.2d at 913 (quoting *Whalen*, 429 U.S. at 599–600).

137. 349 Ark. 600, 80 S.W.3d 332 (2002).

138. 312 Ark. 206, 848 S.W.2d 927 (1993).

139. *Id.* at 208, 848 S.W.2d at 928.

140. *Id.*, 848 S.W.2d at 928.

141. *Id.* at 208–09, 848 S.W.2d at 928.

142. ARK. CODE ANN. § 12-12-505 (Supp. 1991) (repealed 2009).

143. *Id.*

144. *Heath*, 312 Ark. at 209, 848 S.W.2d at 928.

the state registry after the circuit court had found it unsubstantiated violated Heath's constitutional due process, equal protection, and privacy rights.¹⁴⁵

First, after reviewing the legislative history, the Arkansas Supreme Court agreed with the Department's interpretation that the statute required even unsubstantiated reports of child abuse to be retained in the registry for three years.¹⁴⁶ Nevertheless, the court held that the statute did not violate due process because the plaintiff did not demonstrate that it implicated any property interest, even after the court conceded that the registry information may have been harmful to his professional reputation.¹⁴⁷ The court also rejected Heath's equal protection argument, concluding that the state had a rational basis for classifying subjects of unsubstantiated reports of child abuse differently than innocent persons who had never been accused of child abuse.¹⁴⁸

Finally, the court turned to the appellant's privacy challenge. Considering the statutory safeguards that required the Department to flag unfounded reports of child abuse and to restrict disclosure of the information,¹⁴⁹ the court held that no constitutional privacy interest was implicated by maintaining Heath's name in the state registry.¹⁵⁰ In reaching that conclusion, the court cited United States Supreme Court and Eighth Circuit precedents upholding analogous government listings of data over privacy challenges.¹⁵¹

With this background, the Arkansas Supreme Court revisited the constitutionality of the Arkansas criminal sodomy statute in 2002 in the watershed case *Jegley v. Picado*,¹⁵² which struck down the state's criminal sodomy statute¹⁵³ as applied to private adult consensual sexual relationships.¹⁵⁴ A group of gay and lesbian Arkansas citizens filed a declaratory judgment

145. *Id.*, 848 S.W.2d at 928. The circuit court held in part that retaining the record in the registry would violate Heath's due process rights. *Ark. Dep't of Human Servs. v. Heath*, 307 Ark. 147, 148, 817 S.W.2d 885, 886 (1991). On appeal, the Arkansas Supreme Court did not specify whether it resolved the issue on state or federal constitutional grounds. *See Heath*, 312 Ark. at 209, 848 S.W.2d at 928.

146. *Heath*, 312 Ark. at 209, 848 S.W.2d at 928.

147. *Id.* at 211–14, 848 S.W.2d at 929–31 (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

148. *Id.* at 214, 848 S.W.2d at 931.

149. *Id.* at 215, 848 S.W.2d at 932 (citing ARK. CODE ANN. § 12-12-506 (Supp. 1991) (repealed 2009)).

150. *Id.* at 215–16, 848 S.W.2d at 931–32.

151. *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (declining to address privacy issue because challenged state statutory scheme evidenced proper concern with individual privacy interests); *Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir. 1988) (observing that the “constitutional right to privacy is generally limited to only the most intimate aspects of human affairs”).

152. 349 Ark. 600, 80 S.W.3d 332 (2002).

153. ARK. CODE ANN. § 5-14-122 (Repl. 1997) (current version at § 5-14-122 (Supp. 2011)).

154. *Jegley*, 349 Ark. at 632, 638, 80 S.W.3d at 350, 354.

action challenging the constitutionality of the statute.¹⁵⁵ The court reviewed the ongoing development of the federal right of privacy, observing that the United States Supreme Court at that time had declined to recognize “a fundamental right to engage in homosexual sodomy”¹⁵⁶ under the federal Constitution. Yet the court concluded that the Arkansas Constitution did protect that right, holding that “the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults.”¹⁵⁷ The court cited *Coker* in support of a broad reading of the Arkansas Constitution to the extent of protecting a prostitute’s right to be accompanied by a man within city limits.¹⁵⁸ The court also reasoned that the Arkansas Constitution requires the General Assembly to extend all privileges and immunities to all citizen classes alike.¹⁵⁹

Jegley represented the Arkansas Supreme Court’s willingness to read the Arkansas Constitution to provide greater privacy protections for personal autonomy than did the United States Constitution, as then interpreted. In 2002, the United States Constitution’s zones of privacy had not yet been interpreted to protect consensual private sexual activity by same-sex couples.¹⁶⁰ Yet *Jegley* foreshadowed by just a year the United States Supreme Court’s 2003 decision overruling its own precedent by holding that the United States Constitution affords homosexuals a fundamental right to engage in consensual sexual activity.¹⁶¹

155. *Id.* at 608, 80 S.W.3d at 334.

156. *Id.* at 624, 80 S.W.3d at 344.

157. *Id.* at 632, 80 S.W.3d at 350 (Imber, J., writing for the majority). A concurring justice agreed but in narrower language: “I agree with the majority that the right to privacy is a fundamental right under the Arkansas Constitution and that it is violated by enforcement of the sodomy statute against consenting adults engaged in noncommercial sexual activity *in the bedroom of their homes.*” *Id.* at 640, 80 S.W.3d at 355 (Brown, J., concurring) (emphasis added). The distinction between all consensual sexual activity between adults and that occurring “in the bedroom of their homes” would later cause Justice Brown to dissent from a decision extending *Jegley* to protect consensual adult sexual activity outside a couple’s own bedroom. See *infra* notes 219–31 and accompanying text (discussing *Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429).

158. *Jegley*, 349 Ark. at 628, 80 S.W.3d at 347 (citing *Coker v. City of Ft. Smith*, 162 Ark. 567, 258 S.W. 388 (1924)).

159. See *id.*, 80 S.W.3d at 347 (quoting ARK. CONST. art. II, §§ 3, 18).

160. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

161. *Lawrence*, 539 U.S. at 578.

Th[is] case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State [of Texas] cannot demean their existence or control their destiny by making their private sexual conduct a crime [of sodomy]. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

As might be anticipated, *Jegley* has opened the door to a number of other challenges to Arkansas statutes implicating the fundamental constitutional right of privacy recognized by the Arkansas Supreme Court. These cases raise important questions about the scope of the state constitutional privacy right. In particular, it remains debatable whether the right applies solely to decision making about intimate private consensual sexual activity between adults in their own homes, or whether it reaches more broadly to include informational privacy rights.

For example, in 2005, in *Polston v. State*,¹⁶² the court considered the constitutional right of privacy of felons in the context of a statute authorizing DNA sampling.¹⁶³ Under the State Convicted Offender DNA Database Act,¹⁶⁴ felons must submit to the taking of DNA samples for inclusion in the State Convicted Offender DNA Database.¹⁶⁵ *Polston* had been convicted on guilty pleas to several drug-related offenses.¹⁶⁶ The court first held that mandatory DNA sampling was not an unreasonable search under the Fourth Amendment, in particular because “a convicted person has a diminished expectation of privacy in the penal context.”¹⁶⁷ Also, the court reasoned that the nature of the challenged intrusion was not substantial under United States Supreme Court precedent.¹⁶⁸ Given these considerations, the appellant’s privacy interests were outweighed by the state government’s substantial interest in collecting and maintaining DNA samples from convicted felons.¹⁶⁹

The appellant, citing *Jegley*, also asserted that by collecting DNA samples from non-violent felons, the state violated his state constitutional right of privacy, independent of any protections against unreasonable searches and seizures.¹⁷⁰ The court crisply dismissed the argument without elaboration, implicitly distinguishing *Jegley* as having implicated only the right to intimate sexual activity in one’s own home.¹⁷¹

Id.

162. 360 Ark. 317, 201 S.W.3d 406 (2005).

163. *Id.*, 201 S.W.3d 406.

164. ARK. CODE ANN. §§ 12-12-1101 to -1120 (Repl. 2009).

165. *Id.* §§ 12-121-1103(9) to -1109(a).

166. *Polston*, 360 Ark. at 322, 201 S.W.3d at 407.

167. *Id.* at 326, 201 S.W.3d at 410 (citing *Hudson v. Palmer*, 468 U.S. 517, 530 (1984)).

168. *Id.*, 201 S.W.3d at 410–11 (citing, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 762 (1985)).

169. *Id.* at 327, 201 S.W.3d at 411.

170. *Id.* at 331, 201 S.W.3d at 414.

171. *Id.* at 331–32, 201 S.W.3d at 414. “We fail to see how our precedents recognizing a citizen’s fundamental right to privacy in his or her home offer any support for *Polston*’s argument that he, a convicted felon, has a fundamental right to privacy implicit in Arkansas law that would exempt him from the DNA testing at issue in this case.” *Id.* at 332, 201 S.W.3d at 414.

A year later in 2006, a clergyman challenged the constitutionality of an Arkansas criminal statute,¹⁷² contending that it infringed his constitutional right of privacy.¹⁷³ The statute in question in *Talbert v. State*¹⁷⁴ prohibits clergymen from using their positions of trust and authority to engage in sexual activity with another;¹⁷⁵ the victim's consent is not a defense.¹⁷⁶ On appeal from his conviction, the clergyman argued that the statute infringed his constitutional right to privacy under both the United States and Arkansas Constitutions, citing *Lawrence v. Texas*¹⁷⁷ and *Jegley v. Picado* respectively.¹⁷⁸ As for the due process argument based on *Lawrence*, the Arkansas Supreme Court held that the appellant had no constitutional right to abuse his position of trust and authority as a clergyman to engage in *unwanted* sexual activity with his victims.¹⁷⁹ Turning to his claim based on the Arkansas Constitution, the court held that the statute did not infringe on the appellant's constitutionally protected right to engage in "private, consensual sex," readily distinguishing *Jegley* on its facts.¹⁸⁰

Also in 2006, in *Department of Human Services & Child Welfare Agency Review Board v. Howard*,¹⁸¹ the Arkansas Supreme Court upheld a ruling declaring unconstitutional a regulation adopted in 1999 by the Child Welfare Agency Review Board providing that "[n]o person may serve as a foster parent if any adult member of that person's household is a homosexual."¹⁸² On appeal by the State Department of Human Services, the Arkansas Supreme Court agreed with the circuit court that the regulation exceeded the agency's statutory authority and violated the doctrine of separation of powers. The court reasoned that the regulation failed to promote the health, safety, and welfare of children as required by the agency's authorizing statute¹⁸³ and "rather act[ed] to exclude a set of individuals from becoming foster parents based upon morality and bias."¹⁸⁴ The majority declined to address the alternative constitutional arguments the plaintiffs had asserted to the circuit

172. ARK. CODE ANN. § 5-14-126(a)(1)(B) (Repl. 2006) (current version at § 5-14-126(a)(1)(C)). The statute prohibits "a member of the clergy [who] is in a position of trust or authority over the victim [from using] the position of trust or authority to engage in sexual intercourse or deviate sexual activity." *Id.*

173. *Talbert v. State*, 367 Ark. 262, 239 S.W.3d 504 (2006).

174. *Id.*, 239 S.W.3d 504.

175. *Id.* at 265, 239 S.W.3d at 508 (citing ARK. CODE ANN. § 5-14-126(a)(1)(B)).

176. ARK. CODE ANN. § 5-14-126(b).

177. 539 U.S. 558, 578 (2003).

178. *Talbert*, 367 Ark. at 269–71, 239 S.W.3d at 511–12.

179. *Id.* at 270, 239 S.W.3d at 512.

180. *Id.*, 239 S.W.3d at 512 (emphasis added).

181. 367 Ark. 55, 238 S.W.3d 1 (2006).

182. *Howard*, 367 Ark. at 58, 238 S.W.3d at 3.

183. ARK. CODE ANN. § 9-28-405 (Supp. 2011).

184. *Howard*, 367 Ark. at 62, 238 S.W.3d at 6.

court, including the argument that the regulation violated their state constitutional right of privacy, because those issues were not properly before the court on appeal.¹⁸⁵

Justice Brown concurred but wrote separately to emphasize that he would have reached the privacy issue.¹⁸⁶ Citing *Jegley*, Justice Brown reasoned that the challenged regulation “overtly and significantly burden[ed] the privacy rights of couples engaged in sexual conduct in the bedroom which . . . has [been] specifically declared to be impermissible as violative of equal-protection and privacy rights.”¹⁸⁷

There is no question but that gay and lesbian couples have had their equal-protection and privacy rights truncated without any legitimate and rational basis in the form of foster-child protection for doing so. Indeed, in *Jegley*, this court held that privacy rights attending sexual conduct in the bedroom between two consenting adults was a fundamental right under the Arkansas Constitution that required strict scrutiny and a compelling state interest to justify interference with it.¹⁸⁸

As explained later, Justice Brown’s concurring opinion in *Howard* foreshadowed the court’s unanimous decision five years later in *Arkansas Department of Human Services v. Cole*.¹⁸⁹

The same year the Arkansas Supreme Court decided *Talbert and Howard*, the Eighth Circuit addressed the federal and state constitutional right of privacy in *Sylvester v. Fogley*.¹⁹⁰ A former Arkansas police officer alleged that his superiors had violated his constitutional right of privacy under both the United States and Arkansas Constitutions by investigating his consensual sexual relationship with a complaining witness.¹⁹¹ The officer had been assigned to investigate a complaint by a married couple who believed one of their employees had embezzled funds from their co-owned business.¹⁹² The husband later complained to police superiors that the officer had engaged in sexual relations with the complainant wife.¹⁹³ After an investigation confirmed the complaint and revealed other indiscretions by the officer, he was dismissed.¹⁹⁴ He later sued, alleging that defendants’ investigation into his consensual sexual relationship with the female complaining witness violated

185. *Id.* at 66, 238 S.W.3d at 8–9.

186. *Id.* at 66–70, 238 S.W.3d at 9–11 (Brown, J., concurring).

187. *Id.* at 68, 238 S.W.3d at 10 (citing *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002)).

188. *Id.* at 70, 238 S.W.3d at 11.

189. 2011 Ark. 145, 380 S.W.3d 429. See *infra* notes 203–17 and accompanying text.

190. 465 F.3d 851 (8th Cir. 2006).

191. *Id.* at 852.

192. *Id.*

193. *Id.*

194. *Id.* at 854–55.

his constitutional right to privacy under both the United States and Arkansas Constitutions.¹⁹⁵

The Eighth Circuit affirmed the summary judgment entered for the defendants,¹⁹⁶ but declined to consider the substantive right of privacy on which the officer's claim was based.¹⁹⁷ Nevertheless, the court expressed pointed skepticism about the asserted constitutional privacy right, noting that "[o]bscure" might best describe the right of privacy.¹⁹⁸ The panel acknowledged that the Arkansas Supreme Court had identified a fundamental state constitutional right of privacy in the context of private, noncommercial, consensual sexual relationships, and therefore strict scrutiny was the appropriate judicial standard for reviewing an alleged government infringement.¹⁹⁹ Assuming, without deciding, that the plaintiff officer had such a right, the court nevertheless held that the government had a compelling interest in investigating allegations that his conduct had seriously compromised the embezzlement investigation.²⁰⁰ Furthermore, the court held that the nature and scope of the investigation had been narrowly tailored to the government's compelling interest.²⁰¹ Therefore, the government's interest in protecting the integrity of the criminal investigation and thus "administering a fair and unbiased criminal-justice system" was compelling, and the investigation had been narrowly tailored to serve that interest.²⁰²

Next in the chronology came *Cole*,²⁰³ an important case that helped clarify the boundaries of the state constitutional privacy right recognized in *Jegley v. Picado*. In 2008, a majority of the voting electorate approved an initiative enactment—the Arkansas Adoption and Foster Care Act of 2008

195. *Id.* at 852–55.

196. *Fogley*, 465 F.3d at 860.

197. The court acknowledged that "police officers generally have a right of privacy in their private sexual relations." *Id.* at 858 n.6 (citing cases from other circuits). But the court also observed that the courts did not agree on the appropriate standard of constitutional review when those activities are investigated by police departments. *Id.*

198. *Id.* at 857.

199. *Id.* at 857–58 (citing *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002)). The court also observed that unlike the Arkansas Supreme Court in *Jegley v. Picado*, the United States Supreme Court in *Lawrence v. Texas* had implicitly applied a rational-basis standard, suggesting that the constitutional right to engage in consensual homosexual sexual conduct was not a fundamental right. *Id.* at 857 (citing *Lawrence*, 539 U.S. at 578).

200. "First, we conclude that a police force has a compelling interest in precluding a criminal investigator from having sexual relations with witnesses or victims involved in an underlying criminal investigation." *Fogley*, 465 F.3d at 859.

201. "Second, we conclude that the [Arkansas State Police's] investigation of [the] allegations was narrowly tailored to serve the state's compelling interest in administering a fair and unbiased criminal-justice system." *Id.* at 860.

202. *Id.*

203. *Ark. Dep't of Human Servs. v. Cole*, 2011 Ark. 145, 380 S.W.3d 429.

or “Act I”—in the general election.²⁰⁴ The statute provided that no individual could adopt a child or serve as a foster parent in Arkansas if that person were cohabiting in a sexual relationship outside a marriage considered valid under Arkansas law.²⁰⁵ By its express terms, the statute applied both to cohabiting heterosexual couples as well as same-sex couples.²⁰⁶

The plaintiffs were unmarried adults who sought to become adoptive or foster parents in Arkansas, as well as adult parents who wished to preserve their right to determine who might adopt their children in the event of their death.²⁰⁷ They challenged the statute’s constitutionality on various grounds.²⁰⁸ The circuit court, following a hearing, agreed with the plaintiffs and granted summary judgment on their argument that the statute violated their due process, equal protection, and privacy rights under the Arkansas Constitution.²⁰⁹ Specifically, the circuit court reasoned that the initiative statute “‘significantly burden[ed] non-marital relationships and acts of sexual intimacy between adults because it force[d] them to choose between becoming a parent and having any meaningful type of intimate relationship outside of marriage, [which] infringes upon the fundamental right to privacy guaranteed to all citizens of Arkansas.’”²¹⁰

On appeal by the state, the Arkansas Supreme Court affirmed.²¹¹ First, the court agreed that the statute burdened the plaintiffs’ fundamental constitutional right to privacy, and therefore heightened scrutiny applied.²¹² The court articulated that interest as prohibiting “[t]he intrusion by the State into a couple’s bedroom to enforce a sexual prohibition.”²¹³ Act I substantially burdened the constitutionally protected interest in “engag[ing] in private, consensual sexual conduct in the bedroom by foreclosing their eligibility to foster or adopt children, should they choose to cohabit with their sexual partner.”²¹⁴ The court’s reasoning reflects that the state constitutional right implicated was the right of personal autonomy to make decisions implicating relationship and familial interests.

Second, while the state asserted that the enactment sought to advance a compelling interest in protecting the welfare of Arkansas children, the court concluded that the initiative measure failed to use the least restrictive means

204. *Id.* at 2, 380 S.W.3d at 431.

205. ARK. CODE ANN. § 9-8-304(a) (Repl. 2009).

206. *Id.* § 9-8-304(b).

207. *Cole*, 2011 Ark. at 3, 380 S.W.3d at 432.

208. *Id.* at 4, 380 S.W.3d at 432.

209. *Id.* at 5–6, 380 S.W.3d at 432–33.

210. *Id.* at 6–7, 380 S.W.3d at 433 (quoting unpublished circuit court opinion).

211. *Id.* at 25–26, 380 S.W.3d at 442.

212. *Id.* at 21, 380 S.W.3d at 440.

213. *Cole*, 2011 Ark. at 18, 380 S.W.3d at 439.

214. *Id.*, 380 S.W.3d at 439.

to serve that interest because it categorically prohibited unmarried couples from adopting or becoming foster parents.²¹⁵

In deciding *Cole*, the unanimous majority opinion repeatedly referenced the constitutional privacy rights of cohabiting sexual partners, whether heterosexual or homosexual, to decide whether to become parents.²¹⁶ The constitutional challenge by the plaintiffs, who were all cohabiting partners, would not have permitted the court to go further in its holding. Yet the opinion left open the question whether the court would extend the state constitutional privacy right beyond a cohabiting couple's bedroom.²¹⁷ That opportunity was presented recently in a criminal case involving a high school teacher who had engaged in a consensual sexual relationship with an eighteen-year old high school student.²¹⁸

A deeply divided court addressed the parameters of the state constitutional privacy right in *Paschal v. State*.²¹⁹ Paschal appealed his convictions for second-degree sexual assault and bribing a witness.²²⁰ He and an eighteen-year-old high school student had engaged in a consensual sexual relationship²²¹ in violation of an Arkansas statute prohibiting a public school teacher from engaging in sexual contact with a student under age twenty-one.²²² A majority of the court affirmed his conviction for witness bribery but reversed his convictions for sexual assault, reasoning that the criminal statute was unconstitutional as applied because it criminalized private consensual sexual activity between adults and therefore infringed Paschal's fundamental right to privacy.²²³ The majority quoted directly from *Jegley v. Picado* in defining the Arkansas constitutional right of privacy: "[T]he fundamental right to privacy implicit in our law protects *all private, consensual, noncommercial acts of sexual intimacy between adults*."²²⁴ The statute in

215. *Id.* at 21, 380 S.W.3d at 440.

216. *Id.* at 9–11, 14–15, 380 S.W.3d at 434–35, 437.

217. *See id.*, 380 S.W.3d at 434–35, 437.

218. *See Paschal v. State*, 2012 Ark. 127, 388 S.W.3d 429.

219. 2012 Ark. 127, 388 S.W.3d 429 (4-3 opinion).

220. *Id.* at 1, 388 S.W.3d at 431.

221. The state did not dispute that the sexual relationship was consensual or that the student was an adult for the duration of the relationship. *Id.* at 8, 388 S.W.3d at 434; *see* ARK. CODE ANN. § 9-25-101(a) (Repl. 2009) (defining anyone age 18 to have reached the age of majority for all purposes).

222. *Paschal*, 2012 Ark. at 8, 388 S.W.3d at 434 (quoting ARK. CODE ANN. § 5-14-125(a)(6) (Supp. 2011)).

223. *Id.* at 14–15, 388 S.W.3d at 437 (Hannah, C.J., writing for the majority). Justice Daniel wrote a separate opinion concurring with the majority opinion to the extent it reversed the sexual assault convictions. However, he also would have reversed the conviction for witness bribery for reasons beyond the scope of this Article. *See id.* at 15–17, 388 S.W.3d at 438–39 (Danielson, J., concurring in part and dissenting in part).

224. *Id.* at 11, 388 S.W.3d at 435 (majority opinion) (emphasis added) (quoting *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002)).

question made consensual sexual activity between these two adults a crime, and therefore it could not survive constitutional challenge.²²⁵ The fact that one was a high school teacher and the other an adult student was not relevant.

Three justices joined in two lengthy dissenting opinions.²²⁶ They interpreted *Jegley v. Picado* narrowly, reasoning that the state constitutional privacy right protects “the right . . . for consenting adults to have sexual relations *in the privacy of their homes*.”²²⁷ They also characterized as “absurd” the majority’s interpretation of the Arkansas constitutional right of privacy to extend to a teacher’s sexual contact with an eighteen-year-old student at a school where the defendant taught.²²⁸ Analogizing to *Talbert*, the dissenting justices reasoned that the teacher-student relationship is inherently fraught with potential coercion because teachers hold a position of trust and authority that is subject to misuse.²²⁹ Under the circumstances, the dissenters reasoned that the statute did not implicate a fundamental constitutional right, and therefore the court needed only a rational basis to uphold it.²³⁰ From the dissenters’ perspective, the state had a legitimate interest in enacting a statute protecting schoolchildren from the problems inherently associated with sexual conduct involving school employees, and the challenged statute was rationally related to that interest.²³¹

In *Paschal*, a bare majority of the Arkansas Supreme Court interpreted the Arkansas fundamental constitutional right of privacy broadly enough to protect any noncommercial sexual activity or conduct between consenting adults. Over the objections of three justices, the majority declined to confine the privacy right to the bedrooms of cohabiting adults, a rationale the court had unanimously embraced in *Cole* in striking down Act I. Because the court was so divided, *Paschal* raises unanswered questions about just how

225. *Id.* at 11–12, 388 S.W.3d at 436. The majority recognized the possibility that the Arkansas General Assembly may have intended the statute to mean that a high school teacher is inherently in a position of trust and authority over all students, even adults, but the court observed that the legislature had not done so. *Id.* at 11, 388 S.W.3d at 436 (implicitly distinguishing *Talbert v. State*, 349 Ark. 600, 239 S.W.3d 504 (2002), in which the court upheld a conviction of a clergyman who had engaged in unwanted sexual activity with two victims by abusing his position of trust and authority).

226. *Id.* at 17–23, 388 S.W.3d at 439–42 (Brown, J., joined by Gunter & Baker, JJ., dissenting in part and concurring in part); *see also id.* at 23–26, 388 S.W.3d at 442–43 (Baker, J., joined by Brown & Gunter, JJ., dissenting in part and concurring in part).

227. *Id.* at 19, 388 S.W.3d at 440 (Brown, J., dissenting in part and concurring in part) (emphasis added) (citing *Ark. Dep’t of Human Servs. v. Cole*, 2011 Ark. 145, at 14, 380 S.W.3d 429, 437).

228. *Paschal*, 2012 Ark. at 24, 388 S.W.3d at 442 (Baker, J., dissenting in part and concurring in part).

229. *Id.* at 25–26, 388 S.W.3d at 443.

230. *Id.* at 26, 388 S.W.3d at 443.

231. *Id.*, 388 S.W.3d at 443.

far the court is willing to go in interpreting the fundamental right to privacy protected by the Arkansas Constitution. To date, for example, the court has not addressed the extent to which the state constitutional right extends to informational privacy interests, or whether it protects personal autonomy with respect to matters other than intimate sexual relationships and familial interests.

IV. THE ARKANSAS COMMON LAW RIGHT OF PRIVACY

As noted above, the Arkansas courts have generally recognized the four variations on the common law right of privacy enumerated in the Restatement (Second) of Torts. This section comprehensively addresses each of the four privacy torts as developed by judicial interpretation of Arkansas common law.

A. Appropriation of Name or Likeness

The Arkansas Supreme Court has never had the opportunity to resolve a disputed claim for appropriation of name or likeness on the merits. In *Olan Mills, Inc. of Texas v. Dodd*, the plaintiff prevailed in a jury trial alleging the unconsented use of her photograph for advertising purposes.²³² On appeal, the parties did not dispute the jury's finding that Olan Mills had invaded the plaintiff's privacy, and the defendant conceded that she was entitled to nominal damages.²³³ But the court upheld a jury verdict awarding the plaintiff \$2,500 over the defendant's objection that the law did not support compensatory damages for mental anguish in the absence of physical injury.²³⁴ The *Olan Mills* court made a point of limiting its holding to the "particular facts of [the] case and the extent of the damages . . . awarded."²³⁵

Thus, the sole legal issue resolved by *Olan Mills* was the availability of damages for mental anguish; the court had no occasion in that case to adopt a common law right of privacy.²³⁶ A later decision by the Arkansas Supreme Court would underscore this point and the central substantive question presented in *Olan Mills*.²³⁷ In 1980, the court suggested that the *Olan Mills* court had strained to uphold the challenged award of damages on appeal, even to the extent of recognizing an invasion of privacy as a subterfuge to allow recovery for mental injury not accompanied by any physical injury,

232. 234 Ark. 495, 353 S.W.2d 22 (1962).

233. *Id.* at 498–99, 353 S.W.2d at 24.

234. *Id.* at 499, 353 S.W.2d at 24.

235. *Id.* at 498, 353 S.W.2d at 24.

236. *See id.*, 353 S.W.2d at 24.

237. *See M.B.M. Co. v. Counce*, 268 Ark. 269, 596 S.W.2d 681 (1980).

contrary to the traditional “impact” rule in Arkansas.²³⁸ The court observed that *Olan Mills* had even “resorted to the right of privacy to support an award” of damages for mental anguish, suggesting that the right of privacy was merely a foil for avoiding the “constructive” physical impact Arkansas courts had long required to support a damage award for mental distress alone.²³⁹

The fact that the Arkansas appellate courts have never directly addressed a claim for appropriation of name or likeness on its merits means that the federal courts have taken the lead in diversity cases to predict how the state courts would rule on the issue. In doing so, the federal courts have too narrowly interpreted *Olan Mills* in identifying the elements of a claim for appropriation of name or likeness. The Arkansas Supreme Court has repeatedly cited the Restatement in clarifying the elements of a privacy claim. For the misappropriation tort, the elements required by the Restatement reflect the underlying basis for the claim: to remedy the mental anguish of a plaintiff whose name or likeness is used by a defendant for its own advantage without the plaintiff’s permission. As explained in detail below, the federal courts have unduly limited the claim to commercial uses by the defendant, in the absence of any contrary holding by the Arkansas courts.²⁴⁰

For example, in *Stanley v. General Media Communications, Inc.*,²⁴¹ two high school girls sued the publisher of *Penthouse Magazine* for publishing their names and photograph alongside an article reporting the results of a

238. *Id.* at 274–77, 596 S.W.2d at 684–86.

239. *Id.* at 279, 596 S.W.2d at 687. Ultimately, the court squarely adopted the common law cause of action for intentional infliction of emotional distress, thereby “abandon[ing] [its] strained efforts to find a tort or a theoretical physical impact or injury and the consequent tenuous reasoning in order to justify the award of damages for mental anguish.” *Id.* at 279–80, 596 S.W.2d at 687.

240. In 1992, the federal courts addressed a case involving what appears to have been a classic case of appropriation of likeness. *See Peoples Bank & Trust Co. of Mountain Home v. Globe Int’l, Inc.*, 786 F. Supp. 791 (W.D. Ark.), *aff’d in part sub nom.* *Peoples Bank & Trust Co. of Mountain Home v. Globe Int’l Publ’g, Inc.*, 978 F.2d 1065 (8th Cir. 1992), *modified on remand sub nom.* *Mitchell v. Globe Int’l Publ’g, Inc.*, 817 F. Supp. 72 (W.D. Ark. 1993). A 96-year-old woman’s photograph was used without her consent by the defendant publisher to accompany a fictitious story in a supermarket tabloid with the headline, “Pregnancy forces granny to quit work at age 101.” *Id.* at 792. A decade earlier, the same tabloid had published a “fairly accurate account” of the plaintiff using the same photograph, which it had purchased from a local newspaper. *People’s Bank*, 978 F.2d at 1069. While the facts appear to have clearly supported a claim for commercial appropriation of the plaintiff’s likeness, the case went to trial and the Eighth Circuit affirmed on a false light invasion of privacy theory. *Id.* at 1070. For a discussion of the case in the context of false light, see *infra* notes 502–14 and accompanying text.

241. 149 F. Supp. 2d 701 (W.D. Ark. 2001).

Florida beach contest held during spring break.²⁴² They filed a complaint in federal court asserting various claims, including invasion of privacy by misappropriation and false light publicity.²⁴³ In enumerating the elements of the misappropriation claim, the federal court cited a comment to the Restatement (Second) of Torts explaining that mere publication of one's likeness in a commercial newspaper or magazine is not alone sufficient to support a claim for misappropriation.²⁴⁴ Citing a Texas federal district court case, the court held that the defendant must have capitalized on the plaintiff's likeness to sell more publications,²⁴⁵ citing *Olan Mills* in concluding that the misappropriation privacy tort requires *commercial* use of the plaintiff's name or likeness.²⁴⁶

On this reasoning, the federal district court granted the defendants summary judgment.²⁴⁷ First, even though *Penthouse* had identified the plaintiffs by name and hometown in the article, the court reasoned that they failed to show that they "would be easily identified by the general public," relying once again on the Texas federal district court case.²⁴⁸ Second, the plaintiffs failed to show that their names or photographs had been used to advertise or otherwise promote sales of the magazine.²⁴⁹ The court concluded that summary judgment was proper because the publisher had not appropriated the plaintiffs' names or likeness for *commercial* use.²⁵⁰

The *Stanley* court incorrectly interpreted *Olan Mills* and the Restatement in holding that the plaintiff must establish a commercial use to support a claim for invasion of privacy by misappropriation. To the contrary, the relevant section of the Restatement and its accompanying comments do not require a commercial use to support the claim.²⁵¹ Rather, like the Arkansas Model Jury Instructions, the Restatement requires only that the use of plaintiff's name or likeness must be to the defendant's advantage, *commercial or*

242. *Id.* at 704. The plaintiffs had voluntarily participated in the contest to determine who, while blindfolded, could most quickly unwrap and fit a condom on a white plastic phallus. *Id.*

243. *Id.* The false light claim was dismissed because the plaintiffs admitted that the photograph was accurate, and the court reasoned that the text accompanying the photo could not reasonably be interpreted as a false statement of fact. *Id.* at 707.

244. *Id.* at 706 (citing RESTATEMENT (SECOND) OF TORTS § 652(c) [sic] cmt. (1977)).

245. *Stanley*, 149 F. Supp. at 706 (citing *Fredrickson v. Hustler Mag.*, 607 F. Supp. 1341, 1360 (N.D. Tex. 1985)).

246. *Id.* (citing *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 353 S.W.2d 22 (1962), without a specific pinpoint reference).

247. *Id.* at 706–07.

248. *Id.* at 706 (citing *Fredrickson*, 607 F. Supp. at 1360).

249. *Id.*

250. *Id.* at 706–07.

251. *See* RESTATEMENT (SECOND) OF TORTS § 652C & cmt. b (1977).

otherwise.²⁵² The Restatement's requirement concerning the nature of the defendant's use is a straightforward disjunctive standard. Commercial use by the defendant is sufficient, but not necessary, as long as the defendant uses the plaintiff's name or likeness for the defendant's own purposes or benefit.²⁵³

Unfortunately, the mistake in *Stanley* was recently replicated in *LasikPlus Murphy, M.D., P.A. v. LCA-Vision, Inc.*²⁵⁴ In that case, an ophthalmologist sued his former affiliate, a laser surgery corporation, in part for sending a patient notification letter bearing his forged digital signature without his consent, and for displaying his name and likeness in its advertising after the affiliation had terminated.²⁵⁵ While the court denied the defendant's motion to dismiss, it erred in holding that under Arkansas law, "the defendant must have capitalized on the use of the plaintiff's likeness or name by selling more of a product or service."²⁵⁶

Olan Mills, the only case the Arkansas Supreme Court has ever decided concerning a claim for misappropriation of name or likeness, undoubtedly involved a use of plaintiff's likeness for commercial purposes.²⁵⁷ But the defendant in that case did not dispute the merits of the plaintiff's privacy claim.²⁵⁸ While the *Olan Mills* court expressly recognized the privacy claim only to the extent of the facts presented, the court's holding was limited to the sole issue on appeal: whether the plaintiff could recover more than nominal damages despite the lack of physical injury accompanying her claim for mental anguish.²⁵⁹ Nevertheless, the Arkansas Supreme Court has repeatedly cited *Olan Mills* as authority for having adopted the common law right of

252. *Id.*; see also ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421 (Ark. Supreme Court Comm. on Jury Instructions 2013) ("Fourth, that [defendant]'s use of [plaintiff]'s [name][or][likeness] was for [defendant]'s own purposes or benefit, commercial or otherwise") (emphasis added). *But see id.* cmt. (citing *Stanley*, 149 F. Supp. 2d at 706, as having "confirmed" that the tort requires commercial use of the plaintiff's name or likeness).

253. See RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (plaintiff may recover "even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one"); ELDER, *supra* note 51, § 6:3 (citing a host of cases allowing recovery for appropriation of name or likeness for noncommercial uses). Only in a very limited number of states like New York, which does not recognize a common law privacy cause of action but has enacted a restrictive statutory cause of action for misappropriation, do the cases restrict recovery to commercial uses only. ELDER, *supra* note 51, § 6:3 (text accompanying note 16).

254. 776 F. Supp. 2d 886, 899 (E.D. Ark. 2011).

255. *Id.* at 893, 894.

256. *Id.* at 899 (citing *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, 706 (W.D. Ark. 2001)).

257. See *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 496, 353 S.W.2d 22, 23 (1962).

258. *Id.* at 498, 353 S.W.2d at 24.

259. *Id.* at 498-99, 353 S.W.2d at 24.

privacy in the four iterations defined in the Restatement.²⁶⁰ If the Arkansas courts were to squarely address the issue, they would most likely recognize a noncommercial use as sufficient to support a claim for misappropriation, as long as the defendant uses the plaintiff's identity for its own benefit without consent.²⁶¹

The other elements of the appropriation claim are straightforward as outlined in the Arkansas Model Jury Instructions.²⁶² First, the plaintiff must prove damages.²⁶³ Second, the defendant must have used the plaintiff's name or likeness.²⁶⁴ Third, the plaintiff must be identifiable by the public from the defendant's use of the plaintiff's identity.²⁶⁵ Fourth, as discussed above, the use must be for the defendant's own purposes or benefit, commercial or otherwise.²⁶⁶ Fifth, the defendant's use must be the proximate cause of the plaintiff's compensable harm.²⁶⁷

Related to the privacy tort for misappropriation of name or likeness is the cause of action for invasion of what is now commonly known as the "right of publicity."²⁶⁸ Neither the Arkansas courts nor the federal courts applying Arkansas law have ever explicitly recognized this cause of action, nor have they had occasion to distinguish it from the right of privacy based on appropriation of the plaintiff's identity.²⁶⁹ A later section of this Article addresses the right of publicity in more detail.²⁷⁰ For now, it is sufficient to note that neither Arkansas statutes nor case law has addressed the issue.

260. *E.g.*, *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 636–38 & n.8, 590 S.W.2d 840, 844–45 & n.8 (1979); *see* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421 cmt. (Ark. Supreme Court Comm. on Jury Instructions 2013) (citing *Dunlap v. McCarty*, 284 Ark. 5, 9, 678 S.W.2d 361, 364 (1984), in support of the Restatement definition).

261. *See* RESTATEMENT SECOND OF TORTS § 652C (1977). *But see* HOWARD W. BRILL & CHRISTIAN H. BRILL, *ARKANSAS LAW OF DAMAGES* § 33:11, at 639 (5th ed. 2004) ("The tort of appropriation is limited to instances of commercial use of a person's name or likeness." (citing *Stanley*, 149 F. Supp. 2d at 701)).

262. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *See generally* 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* 2D §§ 1:1–1:7 (2012).

269. *See generally* Rashauna A. Norment, *Post-Mortem Right of Publicity in Arkansas: Protecting Against the Unauthorized Use of a Person's Identity for Commercial Purposes*, 34 U. ARK. LITTLE ROCK L. REV. 507 (2012) (advocating that Arkansas adopt a post-mortem right of publicity).

270. *See infra* Part V.B. and accompanying notes.

B. Intrusion on Seclusion

Unlike other privacy claims, intrusion on seclusion has been a frequent subject of litigation in Arkansas.²⁷¹ The Arkansas Supreme Court first addressed the claim in 1981 in *CBM of Central Arkansas v. Bemel*,²⁷² a debt collection case. The plaintiff sued after the defendant collection agency repeatedly called her at work and at home over a period of ten months to recover a small unpaid balance on a hospital bill for her son, who had been hospitalized after attempting suicide.²⁷³ Insurance coverage paid most of the hospital expenses, but a balance of about \$400 remained unpaid.²⁷⁴ The collection agency sent the plaintiff some fifty letters and made about seventy phone calls to her during this period.²⁷⁵ Although plaintiff had protested to the defendant's agents that she worked until midnight and therefore slept until about 10:00 a.m., many calls were made to her home in the early morning hours while she was sleeping.²⁷⁶

The case was tried to a jury on alternate theories of invasion of privacy and intentional infliction of emotional distress.²⁷⁷ After the jury awarded Bemel \$1,000 in compensatory damages and \$4,000 in punitive damages, the trial court denied the collection agency's motion for a directed verdict.²⁷⁸ The Arkansas Supreme Court affirmed, holding that the evidence presented at trial was sufficient to support the jury verdict for intrusion on seclusion, as defined in section 652B of the Restatement (Second) of Torts.²⁷⁹ In particular, the court focused on the frequency and persistence of the collection agency's efforts to collect the debt, which it considered a substantial enough interference with the plaintiff's seclusion to support the claim.²⁸⁰

271. See *supra* note 96 and accompanying text.

272. 274 Ark. 223, 623 S.W.2d 518 (1981).

273. *Id.* at 224, 623 S.W.2d at 519.

274. *Id.*, 623 S.W.2d at 519.

275. *Id.*, 623 S.W.2d at 519.

276. *Id.* at 225, 623 S.W.2d at 519.

277. *Id.* at 224, 623 S.W.2d at 519.

278. *Bemel*, 274 Ark. at 224, 623 S.W.2d at 519.

279. *Id.* at 225–26, 623 S.W.2d at 519–20. The court observed that it had “recognized such a cause of action in *Olan Mills*.” *Id.* at 225, 623 S.W.2d at 519. In that case, however, the court merely referenced section 867 of the 1939 Restatement, which then recognized a general claim for invasion of privacy, including “unauthorized publication of a person who is not in public life.” *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 497–98 & n.1, 353 S.W.2d at 23–24 & n.1 (1962). The *Olan Mills* court did not recognize a claim for intrusion on seclusion. Nor did it expressly hold that Arkansas recognizes a claim for invasion of privacy or even misappropriation of likeness, except to the extent the court upheld the jury's damage award on appeal. See *id.*

280. *Bemel*, 274 Ark. at 225–26, 623 S.W.2d at 519–20.

“There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary

The Arkansas Supreme Court next addressed a claim for intrusion on seclusion in *Dunlap v. McCarty*.²⁸¹ The complaint alleged invasion of privacy based on verbal communications in two separate phone calls to Mrs. McCarty made by the wife of Mr. McCarty's former brother-in-law.²⁸² The jury returned a verdict for the plaintiffs but awarded no damages.²⁸³ Nevertheless, the defendants appealed, arguing among other things that the action was time-barred and therefore should have been dismissed.²⁸⁴

The Arkansas Supreme Court agreed. The court observed that if the plaintiffs had a privacy claim of any sort, it was a claim for intrusion on seclusion.²⁸⁵ Relying on the Restatement, the court cited several illustrations of conduct that could support a claim for intrusion on seclusion, finding none analogous to two phone calls.²⁸⁶ The court then questioned whether oral communications alone could even support a claim for invasion of privacy, noting that courts had been divided on the issue.²⁸⁷ Leaving that issue aside,²⁸⁸ the court observed that the facts presented did not qualify as either a "classic case of invasion of privacy by intrusion on seclusion or one of defamation."²⁸⁹ But no matter how the claim was denominated, the court observed that the plaintiffs were seeking special damages based solely on oral communications, for which an Arkansas statute specifically provides a one-year statute of limitation.²⁹⁰ Because the complaint was filed more than one

reasonable man, as a result of conduct to which the reasonable man would strongly object. . . . It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded."

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977)).

281. 284 Ark. 5, 678 S.W.2d 361 (1984).

282. *Id.* at 6, 678 S.W.2d at 362.

283. *Id.*, 678 S.W.2d at 362.

284. *Id.*, 678 S.W.2d at 362.

285. *Id.* at 9, 678 S.W.2d at 364.

286. *Id.*, 678 S.W.2d at 364 (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, *illus.* (1977)).

287. *Dunlap*, 284 Ark. at 9–10, 678 S.W.2d at 364 (citations omitted); *see* ELDER, *supra* note 51, § 1:2.

288. *Dunlap*, 284 Ark. at 10, 678 S.W.2d at 364. The court has not resolved the issue since first acknowledging it in *Dunlap*. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421 cmt. (2012) (citing *Dunlap* in observing that the court has expressly declined to resolve the issue).

289. *Dunlap*, 284 Ark. at 10, 678 S.W.2d at 364. The court had earlier characterized *Bemel* as a "case of harassment by a bill collector and a classic case of invasion of privacy." *Id.* at 9, 678 S.W.2d at 364 (citing *Bemel*, 274 Ark. 223, 623 S.W.2d 518). While the court downplayed the conduct in this case as dissimilar from a classic invasion of privacy, several jurisdictions have found defendants liable for intrusion on seclusion for actions interfering with family or other nonmarital relationships. *See* ELDER, *supra* note 51, § 2:25 (citing cases).

290. *Dunlap*, 284 Ark. at 10, 678 S.W.2d at 364 (citing ARK. CODE ANN. § 37-201).

year after the defendant made the phone calls, the court concluded that the claim was time-barred.²⁹¹

Soon after, the court upheld an award of compensatory and punitive damages for invasion of privacy in *AAA T.V. & Stereo Rentals, Inc. v. Crawley*.²⁹² The defendant repossessed a rented television set from the plaintiff's home when she was just one week behind in making payments.²⁹³ To effect the repossession, the defendant's employees forced open her front door and removed the television while the plaintiff was at work.²⁹⁴ She testified that she had been called off the assembly line, and she was embarrassed and frightened for her children when she learned that unknown intruders had broken into her home.²⁹⁵

On her invasion of privacy claim, the jury awarded \$4,590 in compensatory damages and \$15,000 in punitive damages.²⁹⁶ Among other issues on appeal, the defendant challenged the trial court's jury instructions, including its failure to define invasion of privacy as "an unreasonable and substantial intrusion upon the seclusion of another."²⁹⁷ The defendant also complained that the jury was instructed that if it found an invasion of privacy, the plaintiff was entitled to "*substantial* damages."²⁹⁸ The court affirmed, observing that the "jury may well have felt a degree of indignation over the flagrant intrusion suffered by Mrs. Crawley at the hands of AAA's employees"²⁹⁹ Moreover, having interposed only a general objection to the jury instructions at trial, the defendant failed to show reversible error.³⁰⁰

The Arkansas appellate courts once again addressed claims of intrusion on seclusion in a pair of companion cases in which co-employees sought damages from Wal-Mart based on an investigation of its employees and recovery of allegedly stolen property.³⁰¹ In the first, *Wal-Mart Stores, Inc. v. Lee*,³⁰² the court upheld a jury verdict awarding the plaintiff a total of

291. *Id.* at 10, 678 S.W.2d at 365. For most invasion of privacy claims under Arkansas law, the three-year statute of limitations applies. *See* *Norris v. Bakker*, 320 Ark. 629, 634, 899 S.W.2d 70, 72 (1995) (citing ARK. CODE ANN. § 16-56-105 (Repl. 2005)) (affirming summary judgment in invasion of privacy case on statute of limitations grounds); *see infra* Part IV.G.1. and accompanying notes (discussing statute of limitations defense).

292. 284 Ark. 83, 679 S.W.2d 190 (1984).

293. *Id.* at 84, 679 S.W.2d at 191.

294. *Id.*, 679 S.W.2d at 191.

295. *Id.* at 85, 679 S.W.2d at 191.

296. *Id.* at 84, 679 S.W.2d at 191.

297. *Id.* at 86, 679 S.W.2d at 191–92 (citing, *e.g.*, *CBM of Cent. Ark. v. Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981)).

298. *Crawley*, 284 Ark. at 86, 679 S.W.2d at 191–92.

299. *Id.* at 85, 679 S.W.2d at 191.

300. *Id.* at 86, 679 S.W.2d at 192 (quoting ARK. R. CIV. P. 51).

301. *See* *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002); *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003).

302. 348 Ark. 707, 74 S.W.3d 634.

\$1,651,000 in compensatory and punitive damages.³⁰³ Among other claims, the plaintiff alleged intrusion on seclusion and publicity placing him in a false light.³⁰⁴ On appeal, Wal-Mart argued that the plaintiff's evidence was insufficient to establish the essential elements of intrusion,³⁰⁵ which the majority carefully enumerated by directly quoting the jury instruction.³⁰⁶

In affirming the judgment and jury verdict, the court explicitly adopted the Restatement definition of intrusion on seclusion,³⁰⁷ observing that the "touchstone" of the privacy tort for intrusion is "[a] legitimate expectation of privacy."³⁰⁸ While neither party challenged the jury instruction, it was closely patterned after the Restatement definition,³⁰⁹ listing the following elements: (1) damages sustained by plaintiff; (2) intrusion by defendant, physically or otherwise, on plaintiff's solitude without permission, invitation, or valid consent; (3) substantial interference by defendant with plaintiff's solitude; (4) interference of a kind an ordinary person would consider highly offensive; (5) conduct by defendant to which a reasonable person would object; and (6) proximate causation.³¹⁰ The jury was also instructed that "[a] person validly consents to an intrusion if, in the totality of circumstances, the consent is given freely and without coercion."³¹¹

On appeal, Wal-Mart argued that the plaintiff offered insufficient evidence to support two essential elements of the intrusion claim: that the defendant's interference was substantial, and that the plaintiff had a legitimate expectation of privacy.³¹² Both points rested on the underlying argument that the plaintiff had consented to defendant's allegedly intrusive conduct not only verbally and in writing, but also implicitly by failing to object while the investigation and search were underway on his property.³¹³

The court observed that an actionable intrusion occurs only if the defendant believes or is substantially certain that he lacks permission to engage in the intrusive conduct.³¹⁴ Because the defendant's actual knowledge

303. *Id.* at 744, 74 S.W.3d at 660.

304. *Id.* at 713, 74 S.W.3d at 640.

305. *Id.* at 719, 74 S.W.3d at 644.

306. *Id.* at 720–21, 74 S.W.3d at 644–45. Because neither party objected to the jury instruction, the appellate court did not address whether or not the instruction accurately described the claim for intrusion. *See id.* at 721, 74 S.W.3d at 645.

307. *Id.* at 720, 74 S.W.3d at 644 (citing with approval *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871 (8th Cir. 2000)).

308. *Lee*, 348 Ark. at 720, 74 S.W.3d at 644 (citing *Fletcher*, 220 F.3d at 877).

309. *See id.* at 720–21, 74 S.W.3d at 644–45.

310. *Id.* at 720, 74 S.W.3d at 644; *see also* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

311. *Lee*, 348 Ark. at 721, 74 S.W.3d at 644–45.

312. *Id.*, 74 S.W.3d at 645.

313. *See id.* at 721–27, 74 S.W.3d at 645–49.

314. *Id.* at 721, 74 S.W.3d at 645 (citing *Fletcher*, 220 F.3d at 876); *see* RESTATEMENT (SECOND) OF TORTS § 652B.

that he lacks permission is an essential element, the plaintiff has the burden to prove the defendant was aware, or at least substantially certain, that the plaintiff did not consent.³¹⁵ In this respect, the plaintiff must prove not only that he did not consent, but also that the defendant in fact believed (or at least was substantially certain) that the plaintiff did not consent.³¹⁶

Despite this heavy burden of proof, the Arkansas Supreme Court in *Lee* upheld the jury verdict, along with its finding that the plaintiff had successfully established each required element.³¹⁷ The majority reasoned that the evidence showed that any verbal consent he gave was limited in scope, which the defendant's investigation and search had far exceeded.³¹⁸ With respect to the plaintiff's written consent, the jury correctly concluded that it was involuntary and hence invalid because it had been coerced.³¹⁹

One justice added a lengthy dissent challenging the majority's conclusion that the plaintiff had not validly consented to the defendant's investigation and search.³²⁰ The dissenter reasoned that the plaintiff could not have had a legitimate expectation of privacy when he gave both verbal and written consent to the search.³²¹ Further, the dissent would have held that the evidence "overwhelmingly" established that plaintiff's consent was both knowing and voluntary because the written form he signed had specifically authorized the defendant's agents to search plaintiff's entire premises and

315. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424 (Ark. Supreme Court Comm. on Jury Instructions 2013) (consent defense). The consent instruction is not to be used with the instruction for intrusion on seclusion because "the absence of consent or other authority is part of a plaintiff's burden of proof under such a claim." *Id.* note on use.

316. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 (second element). Although the issue is not free from doubt, the court's reasoning that nonconsent is an element of a claim for intrusion on seclusion, rather than an affirmative defense, appears to be consistent with the majority rule. See ELDER, *supra* note 51, § 2:12 (citations omitted) ("[T]he preferable perspective . . . is that consent, whether express or implied, negates the existence of the tort itself."). The plaintiff's legitimate interest in solitude or seclusion, a required element of the claim, may be negated by his own conduct implying consent. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B). Nevertheless, the plaintiff can vitiate express or implied consent by showing that it was involuntary, that it was procured by fraud, or that the intrusion exceeded the scope of the consent given. *Id.* (citing cases, including *Lee*, 348 Ark. at 720, 74 S.W.3d at 644).

317. *Lee*, 348 Ark. at 727, 74 S.W.3d at 649.

318. *Id.* at 724–27, 74 S.W.3d at 646–48.

319. *Id.* at 726, 74 S.W.3d at 648. "The jury determined that [plaintiff's] written consent was not given freely and without coercion and, thus, was not valid consent. Considering the totality of the circumstances now before us, we conclude that there is substantial evidence to support the jury's decision." *Id.*, 74 S.W.3d at 648.

320. *Id.* at 745, 74 S.W.3d at 660 (Thornton, J., dissenting).

321. *Id.*, 74 S.W.3d at 660.

take any property they deemed necessary.³²² Nor did the plaintiff object or otherwise indicate that the search should be limited in scope.³²³

The dispositive issue in *Lee* turned out to be whether the plaintiff's verbal, written, and implied consent was "valid," defined as "given freely and without coercion."³²⁴ As the majority observed, the issue of consent and the scope of any consent are both fact questions for the jury.³²⁵ The plaintiff believed he had verbally consented only to a limited search for fishing equipment and lifejackets, and he was under the impression he would be fired if he refused consent.³²⁶ While the defendant's evidence contradicted the plaintiff's testimony, the majority correctly observed that the credibility of witness testimony was a question of fact for the jury to resolve.³²⁷ In this case, the majority identified substantial evidence in the record supporting the jury's decision.³²⁸

In the second companion case, *Addington v. Wal-Mart Stores, Inc.*,³²⁹ the plaintiff did not fare so well before the trial court. The defendant won summary judgment on all claims, including intrusion on seclusion.³³⁰ On appeal, the Arkansas Court of Appeals followed the precedent established in *Lee*,³³¹ holding that summary judgment on the intrusion claim was precluded because genuine issues of material fact remained concerning whether Addington's consent to the search was valid.³³² The court cited *Lee* in reasoning that while the standard for determining the validity of consent to search in a criminal context was not controlling, it was nevertheless "helpful."³³³ Thus, "[c]onsent must be given freely and voluntarily to be valid."³³⁴

It must be shown that there was no duress or coercion, actual or implied. The voluntariness of consent must be judged in light of the totality of the circumstances. In a civil case, the issue of whether consent was valid is a question of fact that must be decided by the trier of fact.³³⁵

322. *Id.* at 749, 74 S.W.3d at 663.

323. *Lee*, 348 Ark. at 749, 74 S.W.3d at 663.

324. *Id.* at 721, 74 S.W.3d at 644–45 (majority opinion).

325. *Id.*, 74 S.W.3d at 645.

326. *Id.* at 721–22, 74 S.W.3d at 645–46.

327. *Id.* at 724, 74 S.W.3d at 646.

328. *Id.* at 726–27, 74 S.W.3d at 648.

329. 81 Ark. App. 441, 105 S.W.3d 369 (2003).

330. *Id.* at 445, 105 S.W.3d at 373 (outrage, false light invasion of privacy, intrusion invasion of privacy, defamation, and negligence).

331. *See supra* notes 302–28 and accompanying text.

332. *Addington*, 81 Ark. App. at 457, 105 S.W.3d at 380.

333. *Id.* at 456, 105 S.W.3d at 380.

334. *Id.*, 105 S.W.3d at 380 (citing *Walmart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002)).

335. *Id.*, 105 S.W.3d at 380 (citations omitted).

Observing that the Arkansas Supreme Court had upheld a jury verdict for the plaintiff under similar circumstances, the Court of Appeals reversed the summary judgment and remanded for trial.³³⁶

More recently, in *Coombs v. J.B. Hunt Transport, Inc.*,³³⁷ the Arkansas Court of Appeals addressed a claim for intrusion on seclusion against the plaintiff's former employer and two of its vice-presidents. The employer sued a former employee for violating a covenant not to compete, and the plaintiff counterclaimed; he also filed a third-party complaint against two of his former co-employees for invasion of privacy, wrongful discharge, and related claims.³³⁸ During an out-of-town retreat with several other employees, Coombs had become intoxicated and retreated to the hotel room he shared with Allensworth, one of the third-party defendants.³³⁹ There, Coombs passed out on the floor, still fully clothed.³⁴⁰ Sometime later, Allensworth and Emerson, the other third-party defendant, entered the hotel room and found Coombs asleep on the floor.³⁴¹ Using a cell phone, the two photographed Coombs in a prone position after placing a cigarette in his mouth, spraying his face with shaving cream, and writing messages on his person.³⁴² One of the pranksters called other employees into the hotel room to view Coombs in this vulnerable state.³⁴³ Coombs recalled none of these events the next morning, but he later learned what happened when he viewed the photographs depicting him in various states of undress.³⁴⁴ The photographs were also allegedly displayed to other employees.³⁴⁵

The trial court granted the employer summary judgment on the intrusion counterclaim, reasoning that Coombs was aware that he was sharing the hotel room with another person and had voluntarily become intoxicated.³⁴⁶ On appeal, the Court of Appeals reversed after reiterating the elements of the intrusion claim as enumerated in the Arkansas Model Jury Instructions.³⁴⁷ The court rejected the trial court's reasoning that the hotel room was shared, noting that a physical intrusion is not necessary to support the

336. *Id.* at 456–57, 459, 105 S.W.3d at 380, 382.

337. 2012 Ark. App. 24, 388 S.W.3d 456.

338. *Id.* at 3–4, 388 S.W.3d at 460.

339. *Id.* at 1–3, 388 S.W.3d at 459–60.

340. *Id.* at 2, 388 S.W.3d at 459.

341. *Id.*, 388 S.W.3d at 459.

342. *Id.* at 2–3, 388 S.W.3d at 459–60.

343. *Coombs*, 2012 Ark. App. at 3, 388 S.W. 3d at 460.

344. *Id.*, 388 S.W. 3d at 460.

345. *Id.*, 388 S.W. 3d at 460.

346. *Id.* at 5, 388 S.W.3d at 461.

347. *Id.* at 4–5, 388 S.W.3d at 460–61 (quoting ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 (Ark. Supreme Court Comm. on Jury Instructions 2013)).

claim.³⁴⁸ “Thus, protection is afforded not just for the physical realm but for a person’s emotional sanctum and to safeguard the notions of civility and personal dignity. Further, a person’s visibility to some does not necessarily strip him of the right to remain secluded from others.”³⁴⁹ The court could not agree with the trial court that no intrusion had occurred as a matter of law.³⁵⁰

The Court of Appeals also rejected the employer’s argument that the intrusion, if any, was not highly offensive to a reasonable person.³⁵¹ It reasoned that a fact finder could view the acts of the third-party defendants as “an invasion of Coombs’s bodily space during a time when he was unaware of his surroundings and as making him an object of ridicule among his co-workers.”³⁵²

Finally, the court identified an unresolved fact issue: whether Coombs had comported himself in a manner consistent with an “actual” expectation of privacy.³⁵³ The court reviewed the allegations by both parties and found them inconclusive enough to present a fact issue precluding summary judgment.³⁵⁴

The Court of Appeals also addressed an issue of first impression in the context of a claim for invasion of privacy: whether an employer can be vicariously liable for intrusive conduct committed by its supervisory employees.³⁵⁵ Coombs argued in part that the former employer could be liable for the acts of its employees under a *respondeat superior* theory.³⁵⁶ The court agreed, relying on Arkansas cases holding that an employer may be vicariously liable for acts of its employees carried out in the scope of employment.³⁵⁷ In this case, the co-employees’ conduct occurred during a work retreat at which the plaintiff’s attendance was mandatory.³⁵⁸ It was a fact question whether the offensive conduct was “purely personal” or occurred while the co-employees were acting in the course of their employment responsibilities.³⁵⁹ The court concluded that “[w]hen an overlap of the busi-

348. *Id.* at 5, 388 S.W.3d at 461. “An intrusion may occur physically ‘or otherwise.’” *Id.*, 388 S.W.3d at 461 (quoting ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420).

349. *Coombs*, 2012 Ark. App. at 5, 388 S.W.3d at 461 (multiple citations to cases from other jurisdictions omitted).

350. *Id.* at 6, 388 S.W.3d at 461.

351. *Id.*, 388 S.W.3d at 461.

352. *Id.*, 388 S.W.3d at 461–62.

353. *Id.*, 388 S.W.3d at 462.

354. *Id.* at 7, 388 S.W.3d at 462.

355. *Coombs*, 2012 Ark. App. at 7–8, 388 S.W.3d at 462–63.

356. *Id.* at 7, 388 S.W.3d at 462.

357. *Id.*, 388 S.W.3d at 462 (citing, *e.g.*, *Porter v. Harshfield*, 329 Ark. 130, 948 S.W.2d 83 (1997)). Whether an employee is acting within the scope of employment or not depends on whether the employee is carrying out the purpose of the employer’s enterprise or instead is acting exclusively in the employee’s own interest. *Id.*, 388 S.W.3d at 462 (citations omitted).

358. *Coombs*, 2012 Ark. App. at 2, 388 S.W.3d at 459.

359. *Id.* at 8, 388 S.W.3d at 462–63.

ness and the personal are present in an employee's actions, an employer may be vicariously liable under the doctrine of respondeat superior, depending on the circumstances.³⁶⁰

In late 2012, the Arkansas Supreme Court addressed some intriguing issues of first impression with respect to an intrusion claim in *Cannady v. St. Vincent Infirmary Medical Center*.³⁶¹ Compared to the court's progressive resolution of privacy issues over the last decade, the Arkansas Supreme Court took a surprisingly regressive approach to the novel legal issues the case presented. The case involved the tragic murder of Anne Pressly, a well-known Little Rock newswoman.³⁶² Her mother, Patricia Cannady, sued the hospital and three of its employees alleging invasion of privacy and intentional infliction of emotional distress.³⁶³ Cannady sued on her own behalf and as administratrix of Pressly's estate.³⁶⁴

Cannady claimed that the defendant hospital employees had unlawfully accessed Pressly's medical records and failed to take proper steps to prevent improper access to medical records in the hospital's electronic database.³⁶⁵ The three employees were each convicted after pleading guilty to violating the federal Health Insurance Portability and Accountability Act (HIPAA),³⁶⁶ which criminalizes wrongful disclosure of individually identifiable health information.³⁶⁷ Therefore, the defendants had no basis for disputing either the intrusion itself or that it was intentional.

Cannady appealed after the trial court granted summary judgment on all claims, not only those filed on her own behalf but also those filed on behalf of the Pressly estate.³⁶⁸ With respect to the intrusion claim on behalf of the estate, the trial court held that the claim did not survive the decedent.³⁶⁹ On appeal, Cannady argued that the trial court had erred in interpret-

360. *Id.*, 388 S.W.3d at 463 (citing *J.B. Hunt Transp. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995)).

361. 2012 Ark. 369, ___ S.W.3d ___, *reh'g denied*, Nov. 8, 2012.

362. *Id.*, ___ S.W.3d ___.

363. *Id.* at 1, ___ S.W.3d at ___.

364. *Id.*, ___ S.W.3d at ___.

365. *Id.* at 2, ___ S.W.3d at ___.

366. 42 U.S.C. § 1320(d)(6)(a)(2) (2006).

367. *Id.* Upon conviction, federal statutes classify a "simple criminal violation" for knowingly obtaining health information in violation of HIPAA as a misdemeanor punishable by up to one year in prison, a fine of up to \$50,000, or both. 42 U.S.C. § 1320d-6 (2006); *see* PROSKAUER ON PRIVACY § 3:2.5 (2007). A violation of HIPAA's Privacy Rule, however, does not allow the victim to file a civil cause of action against the perpetrator. *See Bonney v. Stephens Mem. Hosp.*, 17 A.3d 123, 127-28 (Me. 2011). "[A]ll courts that have decided this question have concluded that HIPAA does not provide a private cause of action." *Id.* at 127. *But cf.* ARK. CODE ANN. § 16-118-107 (Supp. 2011) (authorizing civil cause of action by a victim of conduct by another person that would constitute a felony under Arkansas law).

368. *Cannady*, 2012 Ark. at 1, ___ S.W.3d at ___.

369. *Id.* at 1, 4, ___ S.W.3d at ___.

ing the Arkansas survival statute³⁷⁰ to mean that Pressly's privacy claim did not survive.³⁷¹ The Arkansas Supreme Court affirmed on the survival issue.³⁷² In rejecting the privacy claim on behalf of the estate, the court relied primarily on *Ward v. Blackwood*,³⁷³ an Arkansas case decided nearly a century and a half earlier, long before any court in the United States had ever recognized the right of privacy.³⁷⁴

Under the Restatement, a claim for invasion of privacy is generally considered personal in nature because it involves an injury to a personal right.³⁷⁵ Thus, the legal question before the *Cannady* court was whether a claim for invasion of the personal right of privacy survives after the death of the person whose privacy has been invaded.³⁷⁶

The court quoted the following subsections of the applicable Arkansas survival statute:

(a)(1) For *wrongs done to the person* or property of another, an action may be maintained against a wrongdoer, and the action may be brought

370. ARK. CODE ANN. § 16-62-101(a)(1) (Repl. 2005).

371. *Cannady*, 2012 Ark. at 4, ___ S.W.3d at ___.

372. *Id.* at 8, ___ S.W.3d at ___.

373. 41 Ark. 295 (1883). The court also quoted RESTATEMENT (SECOND) OF TORTS § 652I cmt. b (1977). *Cannady*, 2012 Ark. at 7, ___ S.W.3d at ___ (absent a statute to the contrary, an invasion of privacy claim "cannot be maintained after the death of the individual whose privacy is invaded," excepting a claim for appropriation of name or likeness). However, the court ignored the language quoted from the Restatement recognizing that states may allow for survival of claims *by statute*. *Id.*, ___ S.W.3d at ___. The Arkansas survival statute does just that. Nevertheless, the court interpreted the language of the statute referring to "wrongs done to the person . . . of another" to *exclude* invasion of privacy claims, even though they protect a right the Restatement itself characterizes as a "personal right." *Id.*, ___ S.W.3d at ___.

374. *Cannady*, 2012 Ark. at 5–6, ___ S.W.3d at ___. In 1883, neither Arkansas nor any other state recognized the common law right of privacy. *See supra* notes 31–51 and accompanying text. Moreover, Arkansas law at that time did not recognize *any* claim for mental anguish or emotional distress alone apart from physical injury. *See St. Louis, I.M. & S. Ry. Co. v. Taylor*, 84 Ark. 42, 48, 104 S.W. 551, 553 (1907) (no recovery for mental anguish or humiliation independent of physical injury or other recoverable damages, even if legal duty was willfully violated). The rationale for that holding was that "mental suffering unaccompanied by physical injury . . . is deemed to be too remote, uncertain, and difficult of ascertainment . . ." *Id.*, 104 S.W. at 553. *But see M.B.M. Co. v. Counce*, 268 Ark. 269, 275–76, 596 S.W.2d 681, 684–685 (1980) (expressly recognizing, for the first time, a claim seeking recovery for emotional distress independent of physical injury or other recoverable damages; observing that *Taylor* had been implicitly abrogated); *Wilson v. Wilkins*, 181 Ark. 137, 139, 25 S.W.2d 428, 428 (1930) (mental suffering alone was recoverable as an element of damages that proximately resulted from defendant's *willful* act); *Lyons v. Smith*, 176 Ark. 728, 729, 3 S.W.2d 982, 983 (1928) (mental suffering, annoyance, fear, intimidation, and so forth, will support a cause of action for damages even when unaccompanied by physical injury, if caused by "willful and wanton wrong"). For a brief discussion of *Counce* and its interpretation of the court's reasoning in *Olan Mills*, see *supra* notes 236–39 and accompanying text.

375. RESTATEMENT (SECOND) OF TORTS § 652I cmt. a.

376. *Cannady*, 2012 Ark. at 4, ___ S.W.3d at ___.

by the person injured *or, after his or her death, by his or her executor or administrator* against the wrongdoer or, after the death of the wrongdoer, against the executor or administrator of the wrongdoer, in the same manner and with like effect in all respects as actions founded on contracts.

(2) Nothing in subdivision (a)(1) of this section shall be so construed as to extend its provisions to actions of slander or libel.³⁷⁷

The plain language of the subsection (a) suggests that the estate may assert a claim for invasion of privacy after the person's death because invasion of privacy is undoubtedly a "wrong[] done to the person . . . of another."³⁷⁸

To the contrary, the Arkansas Supreme Court held otherwise.³⁷⁹ Relying on the 1883 case of *Ward*, which had interpreted "an earlier version" of the survival statute,³⁸⁰ the court held that the current version preserves only actions substantially characterized by bodily injury or physical damage, not "torts which do not directly affect the person, but only the feelings or reputation, such as malicious prosecution."³⁸¹ The court rejected Cannady's argument that the only torts excepted from the survival statute are libel and slander, as expressly provided in subsection (a)(2).³⁸²

In reaching its conclusion, the court acknowledged but declined to follow other jurisdictions that have allowed a cause of action for invasion of privacy by surviving relatives based on facts similar to those presented in *Cannady*.³⁸³ Instead, the court cited and quoted at length from a 1913 Arkansas case³⁸⁴ holding that claims on behalf of a defunct *corporation* did not survive its dissolution.³⁸⁵ In that case, the court had reasoned in part that

377. ARK. CODE ANN. § 16-62-101(a) (Repl. 2005) (emphasis added).

378. *Id.*

379. *Cannady*, 2012 Ark. at 8, ___ S.W.3d at ___.

380. *Id.* at 5-6, ___ S.W.3d at ___. In 1883, when *Ward v. Blackwood* was decided, the survival statute read as follows:

For wrongs done to the person or property of another, an action may be maintained against the wrong-doers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrong-doer, or, after his death, against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts.

Gantt's. Dig. § 4760.

381. *Cannady*, 2012 Ark. at 5, ___ S.W.3d at ___ (quoting *Ward v. Blackwood*, 41 Ark. 295, 298 (1883)).

382. *Id.* at 5, ___ S.W.3d at ___.

383. *Id.* at 6, ___ S.W.3d at ___ (citing *Reid v. Pierce Cnty.*, 961 P.2d 333 (Wash. 1998) (holding that immediate relatives of decedent had a privacy interest in decedent's autopsy records that supported claim against county employees for improperly accessing and displaying autopsy photographs)).

384. *Ark. Life Ins. Co. v. Am. Nat'l Life Ins. Co.*, 110 Ark. 130, 137, 161 S.W. 136, 138 (1913).

385. *Cannady*, 2012 Ark. at 6, ___ S.W.3d at ___.

“the statute means injuries of a physical character to actual, visible, and tangible property, and not to property rights or interests which in their nature are invisible and intangible.”³⁸⁶

The court ultimately agreed with the defendants’ arguments that the survival statute “[did] not provide for the claim of invasion of privacy to survive the death of the decedent.”³⁸⁷ In doing so, the court ignored the undisputed fact that the defendants’ conduct had been so egregious with respect to the decedent’s privacy interests that they had pleaded guilty to federal criminal offenses for violating HIPAA’s privacy protections.³⁸⁸ The Arkansas Supreme Court’s reasoning relied largely on common law that long predates not only the court’s own recognition of the right of privacy, but also the court’s recognition of other intentional tort claims that allow recovery for emotional injury independent of any physical injury or property damage.³⁸⁹

In relying on century-old common law, the court also disregarded the language of the modern Arkansas survival statute, which plainly allows for the survival of claims “[f]or wrongs done to *the person* or property of another,”³⁹⁰ excepting only claims for slander or libel.³⁹¹ While the Arkansas Supreme Court has not questioned its own outdated interpretation of the survival statute, the Arkansas General Assembly itself has amended the statute to recognize “wrongs” to the person manifested by emotional and other intangible harm.³⁹² Most recently, the survival statute was amended in 2001 to include a new subsection (b) that explicitly allows an estate to seek damages for “loss of life,” a category of *intangible* injury,³⁹³ in addition to any other

386. *Id.* at 6, ___ S.W.3d at ___ (quoting *Ark. Life Ins. Co.*, 110 Ark. at 137, 161 S.W. at 138). The quoted language has nothing whatsoever to do with personal rights, but rather distinguishes injuries to corporate *intangible* property interests from injuries to *tangible* property. In stark contrast, Patricia Cannady asserted a privacy claim for intrusion on her deceased daughter’s *personal* interest in seclusion, not her property interests.

387. *Id.* at 8, ___ S.W.3d at ___. After summarizing the parties’ respective arguments and without elaborating, the court simply observed, “This holding is in line with this court’s adoption of the Restatement (Second) of Torts and our case law, most notably *Ward*. Thus, we affirm the grant of summary judgment on this point.” *Id.*, ___ S.W.3d at ___.

388. *Id.* at 2, ___ S.W.3d at ___. The complaint alleged, apparently without objection, that defendants Holland, Griffin, and Miller had each pled guilty to a violation of HIPAA, specifically 42 U.S.C. § 1320(d)(6)(a)(2) (2006), which prohibits wrongful disclosure of individually identifiable health information. *Cannady*, 2012 Ark. at 2, ___ S.W.3d at ___.

389. *E.g.*, *M.B.M. Co. v. Counce*, 268 Ark. 269, 273–77, 596 S.W.2d 681, 684–85 (1980); see *supra* notes 237–39 and accompanying text.

390. ARK. CODE ANN. § 16-62-101(a)(1) (Repl. 2005) (emphasis added).

391. See *id.* § 16-62-101(a)(2).

392. See *id.* § 16-62-101.

393. See Joshua Michael Robles, Note, *Arkansas’s Application of Hedonic Damages to Wrongful-Death Suits: Is Arkansas’s Method Misconceived?*, 33 U. ARK. LITTLE ROCK L. REV. 299, 308–09 (2011) (loss of life, like mental anguish and emotional distress, is considered a type of noneconomic harm).

elements of recoverable damages.³⁹⁴ Yet the *Cannady* court completely omitted that subsection from the statutory language the opinion directly quoted.³⁹⁵

In short, the *Cannady* court erred by ignoring the plain language of the current survival statute, considered in the context of common law developments in the latter half of the twentieth century. At the very least, the court should have acknowledged the 2001 amendment and its implications for outmoded case law that interpreted former survival statutes to exclude personal torts resulting in noneconomic or intangible harm. *Cannady* represents an unfortunate step backward in Arkansas privacy law. The opinion fails to acknowledge that the survival statute itself is a departure from the common law rule that tort actions did not survive the plaintiff.³⁹⁶

Especially in light of the 2001 amendment, the fact that the Arkansas courts have never questioned century-old case interpretations of the predecessor survival statutes is irrelevant. The court has held that in construing statutes, the language in question must be considered “in the context of the statute *as a whole*.”³⁹⁷ The Arkansas General Assembly had no reason to include a specific provision in the survival statute excluding defamation claims unless it had intended the general reference to “wrongs to the person” to allow survival of other “wrongs done to the person or property of another.”³⁹⁸ Moreover, a statute must be interpreted “just as it reads, giving the words their ordinary and usually accepted meaning in common language.”³⁹⁹ *Cannady* reflects an unduly strained interpretation of the Arkansas survival statute given the developments in Arkansas privacy law over the last half century.

Occasionally the federal courts have interpreted Arkansas common law in resolving claims alleging intrusion on seclusion. While not binding on Arkansas courts, a number of these federal cases are cited in commentary to

394. ARK. CODE ANN. § 16-62-101(b). “In addition to all other elements of damages provided by law, a decedent’s estate may recover for the decedent’s loss of life as an independent element of damages.” *Id.*

395. See *Cannady*, 2012 Ark. at 5, ___ S.W.3d ___. See also *supra* note 377 and accompanying text.

396. “At common law, all actions for tort died with the tortfeasor. That rule is still in effect in [Arkansas], except where changed by statute. *Arkansas Code Annotated § 16-62-101 (1987) has removed that bar as to tortious injury to the person.*” *Westridge v. Byrd*, 37 Ark. App. 72, 73, 823 S.W.2d 930, 930–31 (1992) (emphasis added) (citations omitted); see *Lauderdale v. Smith*, 186 F. Supp. 958, 959 (E.D. Ark. 1960) (observing that Arkansas survival statute allowing survival of personal tort claims, other than libel and slander, is contrary to federal common law rule that only contract and property tort actions survive).

397. *Green v. Mills*, 339 Ark. 200, 205, 4 S.W.3d 493, 496 (1999) (emphasis added).

398. ARK. CODE ANN. § 16-62-101(a)(1).

399. *Green*, 339 Ark. at 205, 4 S.W.3d at 495.

the Arkansas Model Jury Instructions.⁴⁰⁰ The earliest was *Williams v. American Broadcasting Companies, Inc.*⁴⁰¹ The opinion primarily addressed a question of federal evidence law pertaining to the reporter's privilege asserted in consolidated cases involving the same incident.⁴⁰² However, the court also addressed one of the plaintiffs' claims for invasion of privacy.⁴⁰³

The facts of *Williams* presented a classic example of intrusion on seclusion by virtue of overzealous news reporting. Defendant ABC aired a segment of its 20/20 television program in January 1981, addressing the extent to which the medical profession was engaging in unnecessary surgery.⁴⁰⁴ The program allegedly included portions of a videotape taken by defendant's reporters of Mrs. Davidson, without her knowledge or consent, while she was undergoing hip replacement surgery at Boone County Hospital, performed by Dr. Williams.⁴⁰⁵ In considering the parties' respective interests relevant to the assertion of the reporter's privilege, the court delineated the four distinct causes of action for invasion of privacy recognized by Professor Prosser, including intrusion on seclusion.⁴⁰⁶

This tort requires actions on the defendant's part in the nature of prying or intrusion which is offensive or objectionable to a reasonable person. The "thing" into which there is intrusion or prying must be, and be entitled to be, private. As Prosser notes, "when the plaintiff is confined to a hospital bed, and in all probability when he is merely in the seclusion of his home, the making of a photograph is an invasion of a private right, of which he is entitled to complain."⁴⁰⁷

The court concluded that the reporters' "outtakes" sought in discovery might be relevant to prove the fact of the alleged intrusion and its extent, so they were "clearly discoverable."⁴⁰⁸

The United States Court of Appeals for the Eighth Circuit also addressed a claim for intrusion on seclusion under Arkansas law in *Alexander v. Pathfinder, Inc.*⁴⁰⁹ Mrs. Alexander filed several state and federal claims against the defendants, an intermediate care facility for the mentally retard-

400. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 cmt. (Ark. Supreme Court Comm. on Jury Instructions 2013).

401. 96 F.R.D. 658 (W.D. Ark. 1983).

402. *Id.* at 660.

403. *Id.* at 668-69.

404. *Id.* at 660.

405. *Id.*

406. *Id.* at 669 (citing WILLIAM PROSSER, *THE LAW OF TORTS* § 112, ch. 22 (3d ed. 1964); Bill Prewett, Note, *The Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388 (1951)).

407. *Williams*, 96 F.R.D. at 669 (quoting PROSSER, *supra* note 406, § 112, ch. 22).

408. *Id.*

409. 189 F.3d 735 (8th Cir. 1999).

ed, its employees, and others, after her son was discharged from the facility.⁴¹⁰ Among other state law claims, she sued for intrusion on seclusion.⁴¹¹ She alleged that the facility's employees had improperly audiotaped her conversations with her son, including some conversations in his room, as well as her personal conversations with facility staff.⁴¹²

The Eighth Circuit upheld the dismissal of Alexander's intrusion claims on the basis of implied consent because she had not objected when facility staff overtly audiotaped her conversations.⁴¹³ Alexander had previously testified at an administrative hearing that she had not objected when facility employees entered her son's room carrying tape recorders for the apparent purpose of recording her conversations with him.⁴¹⁴ Although the administrative record indicated that she had later objected, the court held that her failure to do so at the inception was "fatal" to that part of her intrusion claim.⁴¹⁵ With respect to the recording of her own conversations with facility staff, Mrs. Alexander knew the staff had been directed to record all her conversations, and the court observed that no Arkansas law precluded one party to a conversation from recording a conversation with the other party's knowledge.⁴¹⁶ Therefore, the trial court had properly dismissed both of her intrusion claims.⁴¹⁷

In 2000, the Eighth Circuit once again addressed a claim under Arkansas law for intrusion on seclusion in *Fletcher v. Price Chopper Foods of Trumann, Inc.*⁴¹⁸ The plaintiff, a food service worker, sued her former employer for intrusion on seclusion for contacting her physician to determine whether she had a staph infection at the time she was terminated.⁴¹⁹ When the plaintiff applied for unemployment compensation, she denied having a staph infection at the time of her termination.⁴²⁰ To secure the medical information, the defendant's corporate manager supplied plaintiff's physician with a worker's compensation authorization the plaintiff had signed previ-

410. *Id.* at 738.

411. *Id.* at 735.

412. *Id.* at 742.

413. *See id.* at 742-43.

414. *Id.*

415. *Alexander*, 189 F.3d at 742-43.

416. *Id.* at 743. While not directly relevant to the facts presented, ARK. CODE ANN. § 5-60-120(a) (Repl. 2005) allows a party to a cordless or cell phone conversation to record it with or without the other party's knowledge. *Alexander*, 189 F.3d at 743.

417. *See id.* at 742-43.

418. 220 F.3d 871 (8th Cir. 2000).

419. *Id.* at 874. Arkansas health regulations forbid food preparation establishments from employing workers with communicable diseases such as staph infections. *Id.* at 874 n.2 (citing Ark. Dept. of Health Regs., Food Service Establishments § 3-101 (effective Oct. 28, 1993)).

420. *Id.* at 874.

ously after she sustained an on-the-job injury a few days before developing the infection.⁴²¹

The jury awarded plaintiff compensatory and punitive damages.⁴²² The trial court set aside the punitive damages award but allowed the verdict awarding compensatory damages to stand.⁴²³ Because the sole cause of action was intrusion on seclusion, the Eighth Circuit panel⁴²⁴ reviewed applicable Arkansas law in some detail.⁴²⁵ The majority concluded that the evidence was insufficient to permit the jury to find that the manager's intrusion highly offensive to a reasonable person,⁴²⁶ that plaintiff's conduct in telling a co-worker about her staph infection was consistent with any subjective intent to keep the medical information private,⁴²⁷ and that any expectation of privacy she did have was objectively reasonable considering her employment in the food service industry.⁴²⁸

Summarizing Arkansas law defining the privacy tort of intrusion on seclusion, the courts have repeatedly deferred to the applicable provisions of the Restatement (Second) of Torts and its commentary.⁴²⁹ Consistent with the Restatement, the Arkansas Model Jury Instruction requires five elements: (1) damages sustained by the plaintiff; (2) an intentional intrusion, either physical or otherwise, on the plaintiff's seclusion or solitude, to which the defendant believed or was substantially certain the plaintiff did not validly consent; (3) an intrusion highly offensive to a reasonable person, caused by defendant's conduct to which a reasonable person would strongly object; (4) an actual expectation of privacy manifested by the plaintiff's conduct; and (5) a proximate nexus between the intrusion and plaintiff's damages.⁴³⁰ The second and fourth elements impose on the plaintiff the burden to show the absence of valid consent, whether express or implied, to the defendant's intrusion.⁴³¹ Notwithstanding the plain language of the Arkansas survival

421. *Id.* at 873–74.

422. *Id.* at 873.

423. *Id.*

424. One member of the panel concurred specially on the basis that the evidence in the record negated the third element of the intrusion claim, a legitimate expectation of privacy, because plaintiff had told two of her co-workers about the staph infection shortly after learning about it from her doctor. *Fletcher*, 220 F.3d at 879 (McMillian, J., concurring specially).

425. *See id.* at 871.

426. *Id.* at 877.

427. *Id.* at 877–78.

428. *Id.* at 878–79. In this respect, the majority reasoned that the defendant employer had a legitimate reason to inquire about her infectious medical condition out of concern for public health. *Id.* Under such conditions, “an employer’s need to know trumps an employee’s right to privacy.” *Id.* at 879 (citation omitted).

429. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

430. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 (Ark. Supreme Court Comm. on Jury Instructions 2013).

431. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424 note on use.

statute, the Arkansas Supreme Court has recently held that a claim for intrusion does not survive the death of the person whose privacy was invaded by the defendant's intrusive conduct.⁴³²

C. Publicity Given to Private Facts

While the Arkansas appellate courts have never directly addressed an action for giving publicity to private facts, on several occasions they have recognized the existence of the claim in dicta.⁴³³ Applying Arkansas law, the federal courts have occasionally addressed this privacy tort, predicting that Arkansas courts would apply the definition and guidelines outlined in the Restatement (Second) of Torts.⁴³⁴ The Arkansas Supreme Court has published a jury instruction enumerating the elements of the claim, modeled after the relevant provisions of the Restatement.⁴³⁵

Consistent with the Restatement,⁴³⁶ the plaintiff must establish seven essential elements to successfully litigate a claim for invasion of privacy by public disclosure of private facts: (1) plaintiff sustained damages; (2) defendant made a public disclosure about plaintiff; (3) before the disclosure, the public lacked knowledge of the fact; (4) the disclosure of the fact would be highly offensive to a reasonable person; (5) the defendant knew or should have known that the fact disclosed was private; (6) the fact disclosed was not of "legitimate public concern"; and (7) the public disclosure was the proximate cause of the plaintiff's damages.⁴³⁷

To satisfy the second element requiring "public disclosure," the plaintiff must establish that the defendant communicated the fact "to the public at large or to so many persons that the matter is substantially certain to become one of public knowledge."⁴³⁸ It is not sufficient to establish "publication" of the fact to just one or a small number of persons; the fact must be highly likely to become a matter of public knowledge.⁴³⁹ The federal courts have

432. See *Cannady*, 2012 Ark. at 8, ___ S.W.3d at ___.

433. E.g., *Doddrill v. Ark. Democrat Co.*, 265 Ark. 628, 637, 590 S.W.2d 840, 844 (1979) (dicta) (citing RESTATEMENT (SECOND) OF TORTS § 652A(2)(c)); see also *Williams v. Am. Broad. Cos.*, 96 F.R.D. 658, 669 (W.D. Ark. 1983) (dicta).

434. See *Wood v. Nat'l Computer Sys., Inc.*, 643 F. Supp. 1093, 1099 (W.D. Ark. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 652D), *aff'd*, 814 F.2d 544, 545 (8th Cir. 1987); *Williams*, 96 F.R.D. at 669; *Boyd v. Thomson Newspaper Publ'g Co.*, 6 Media L. Rptr. (BNA) 1020, 1022 (W.D. Ark. 1980); *Dunbar v. Cox Health Alliance, LLC*, 446 B.R. 306, 314 (Bankr. E.D. Ark. 2011).

435. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422.

436. See RESTATEMENT (SECOND) OF TORTS § 652D.

437. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422.

438. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

439. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

twice rejected privacy claims for publicity given to private facts for lack of evidence to support the “public disclosure” element.⁴⁴⁰

The federal courts first acknowledged such a claim under Arkansas law in *Boyd v. Thomson Newspaper Publishing Co.*⁴⁴¹ In that case, the court held in part that the information disclosed pertained to a matter of legitimate public concern, and therefore the plaintiffs failed to state a claim.⁴⁴² In *Boyd*, the parents of a deceased three-year-old child sued the newspaper for publishing an article that reported the child’s full name and the fact that he had allegedly died as a result of cardiac arrest while under anesthesia administered by a physician, who was then a defendant in an unrelated wrongful death case alleging medical malpractice.⁴⁴³ In a court hearing involving a discovery matter, the trial court suggested that the parties should protect the privacy interests of patients who had died under similar circumstances.⁴⁴⁴ The next morning, the newspaper reported the trial court’s ruling that evidence concerning others who had died under anesthesia, including plaintiffs’ son, would be admissible at trial.⁴⁴⁵ The child’s parents claimed that by printing his name and implying that he had died as a result of improper medical care, the newspaper had invaded their privacy.⁴⁴⁶

The court disagreed and dismissed the complaint for failure to state a claim, citing alternative grounds.⁴⁴⁷ First, the court predicted that Arkansas courts would not recognize a relational privacy interest on behalf of the plaintiffs for an alleged invasion of their deceased son’s privacy.⁴⁴⁸ Second, the court held that the information was a matter of legitimate public concern because their son had been a victim of a tragic fatal accident.⁴⁴⁹ The court reasoned that his death had again become a matter of legitimate public concern ancillary to the then-pending medical malpractice action against his anesthesiologist.⁴⁵⁰

The federal court once again addressed a claim under Arkansas law for publicity given to private facts in *Wood v. National Computer Systems, Inc.*⁴⁵¹ An Arkansas teacher filed a diversity claim for invasion of privacy

440. *Wood v. Nat’l Computer Sys., Inc.*, 643 F. Supp. 1093, 1099 (Bankr. W.D. Ark. 1986), *aff’d*, 814 F.2d 544 (8th Cir. 1987); *Dunbar v. Cox Health Alliance, LLC*, 446 B.R. 306, 314 (Bankr. E.D. Ark. 2011).

441. 6 Media L. Rptr. (BNA) 1020, 1022 (W.D. Ark. 1980).

442. *Id.* at 1023.

443. *Id.* at 1021.

444. *Id.*

445. *Id.*

446. *Id.*

447. *Boyd*, 6 Media L. Rptr. (BNA) at 1020.

448. *Id.* at 1022 (citing RESTATEMENT (SECOND) OF TORTS § 652I cmt. a).

449. *Id.*

450. *Id.* at 1023.

451. 643 F. Supp. 1093, 1099 (W.D. Ark. 1986), *aff’d*, 814 F.2d 544, 545 (8th Cir. 1987).

against a testing company for erroneously mailing her teacher certification test results to another teacher who had taken the same test.⁴⁵² The plaintiff promptly reported the error to the media, and within three days she received her successful test results.⁴⁵³ The district court held in part that she could not support her claim for giving publicity to private facts because her scores had been sent inadvertently to only one other individual.⁴⁵⁴ Furthermore, any public knowledge about the incident was attributable to the plaintiff's own contacts with local media, not any wrongful conduct by the defendant.⁴⁵⁵ Therefore, even if the information had become a matter of public knowledge, it was not the result of defendant's conduct.

In a more recent bankruptcy case, *Dunbar v. Cox Health Alliance, LLC*,⁴⁵⁶ the federal district court once again held that the plaintiff failed to meet the "publicity" requirement of her privacy claim.⁴⁵⁷ A creditor had electronically filed a proof of claim that erroneously included the plaintiff's date of birth and medical information, in violation of court rules.⁴⁵⁸ While the document was accessible via the federal court's electronic case filing system, the court reasoned that the public could not access the document without taking specific affirmative steps to seek out the information.⁴⁵⁹ Just because bankruptcy court records technically qualify as public records was not enough to satisfy the "publicity" element of the claim.⁴⁶⁰ Further, the plaintiff did not assert that anyone had actually accessed the proof of claim or her personal information, which had been accessible by the public for only three days.⁴⁶¹ Therefore, the plaintiff failed to state a claim.⁴⁶²

A disclosure is "highly offensive to a reasonable person" only if a person would be seriously upset or embarrassed by the disclosure.⁴⁶³ The standard excludes normal everyday activities, or even "unflattering conduct" that

452. *Id.* at 1094–95.

453. *Id.* at 1094.

454. *Id.* at 1099.

455. *Id.* Affirming, the Eighth Circuit observed, "Here, there was no 'publicity,' properly so called, but only disclosure to a single other person." *Wood*, 814 F.2d at 545.

456. 446 B.R. 306 (Bankr. E.D. Ark. 2011).

457. *Id.* at 315.

458. *Id.* at 308–09; *see, e.g.*, Fed. R. Bankr. P. 9037 (requiring creditors to redact all private information when filing proofs of claim in bankruptcy court). While the plaintiff argued that disclosure of plaintiff's medical information amounted to a HIPAA violation, the parties agreed that no private cause of action arose from the HIPAA violation. *Dunbar*, 446 B.R. at 309–10.

459. *Dunbar*, 446 B.R. at 314–15.

460. *Id.* at 315 (citing *In re French*, 401 B.R. 295, 318 (Bankr. E.D. Tenn. 2009)).

461. *Id.* at 312, 315.

462. *Id.* at 315.

463. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422 (Ark. Supreme Court Comm. on Jury Instructions 2013).

would cause only minor or moderate annoyance to a person with "ordinary sensitivities."⁴⁶⁴

If the information publicized relates to a matter of "legitimate public concern," a claim for publicity given to private facts is defeated. To determine whether this affirmative defense bars the claim, several factors must be considered:⁴⁶⁵

(1) the social value of the fact published, (2) the depth of the intrusion into [plaintiff's] private affairs, (3) the extent to which [plaintiff] voluntarily placed [himself][herself] into a position of public notoriety, [(4) the nature of the state's interest in preventing the disclosure,] (5) whether the fact is a matter of public record [and (6) if the fact publicized concerned events that occurred in the past, whether there is any continued public interest in the fact published].⁴⁶⁶

As previously noted, a federal district court concluded in 1980 that the information there at issue was a matter of legitimate public concern, and therefore could not support a claim for publicity given to private facts.⁴⁶⁷

One federal case alleging violation of the plaintiff's constitutional right of privacy is particularly instructive on the element requiring proof that the defendant knew the information disclosed was private.⁴⁶⁸ In *Holman v. Central Arkansas Broadcasting Co.*,⁴⁶⁹ plaintiff attorney and his wife were arrested and detained in jail on several charges, including driving while intoxicated.⁴⁷⁰ When counsel arrived to secure the couple's release, the plaintiff attorney began "hollering, cussing and screaming."⁴⁷¹ Defendant's reporter was nearby with a tape recorder, which picked up the outburst.⁴⁷² The court held that the plaintiff could not have made the statements the reporter could easily overhear with an expectation that the communications would be private, and therefore the allegations did not support a civil rights claim under Title 42 U.S.C. § 1983.⁴⁷³ The court also observed that "no right to privacy is invaded when state officials allow or facilitate publication of an official act such as an arrest."⁴⁷⁴

464. *Id.*

465. *Id.*

466. *Id.* The bracketed language is to be included only if supported by the evidence. *Id.* note on use.

467. *Boyd v. Thomson Newspaper Publ'g Co.*, 6 Media L. Rep. (BNA) 1020, 1023 (W.D. Ark. 1980); see *supra* notes 449-50 and accompanying text.

468. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422.

469. 610 F.2d 542 (8th Cir. 1979).

470. *Id.* at 543.

471. *Id.*

472. *Id.*

473. *Id.* at 544-45.

474. *Id.* at 544.

Given the dearth of Arkansas precedent interpreting the seven essential elements of publicity given to private facts, the Arkansas courts are likely to defer to the Restatement (Second) of Torts to resolve any other issues not specifically addressed in the Arkansas Model Jury Instructions, just as they have done for other common law privacy claims.

D. False Light Publicity

After intrusion on seclusion, the most frequently litigated privacy claim in Arkansas is publicity placing plaintiff in a false light. The Arkansas Supreme Court first recognized a claim for false light publicity in *Dodrill v. Arkansas Democrat Co.*⁴⁷⁵ The defendant newspaper had published a story erroneously reporting that the plaintiff, an attorney whose law license had been suspended, failed his required retake of the bar examination.⁴⁷⁶ The plaintiff sued the newspaper for both defamation and false light invasion of privacy.⁴⁷⁷ The trial court granted summary judgment in favor of the defendant on both claims, and the plaintiff appealed.⁴⁷⁸

The Arkansas Supreme Court reversed summary judgment on the defamation claim, rejecting the trial court's conclusion that the plaintiff was a public figure and could not prove the newspaper acted with actual malice.⁴⁷⁹ The court remanded that claim to the trial court with instructions to apply the negligence standard of fault to the plaintiff's defamation claim—whether the defendant failed to exercise ordinary care before publishing the defamatory article.⁴⁸⁰ The court added that a finding of negligence would support the defamation claim, but punitive damages could not be awarded in the absence of a finding of actual malice.⁴⁸¹

The court then turned to the summary judgment denying plaintiff's privacy claim.⁴⁸² After acknowledging the existence of the false light claim under Arkansas law,⁴⁸³ the court affirmed for lack of evidence that the de-

475. 265 Ark. 628, 590 S.W.2d 840 (1979).

476. See *supra* notes 90–94 and accompanying text.

477. *Dodrill*, 265 Ark. at 633, 590 S.W.2d at 842.

478. *Id.* at 631, 590 S.W.2d at 841.

479. *Id.* at 636–37, 590 S.W.2d at 844.

480. *Id.* at 637, 590 S.W.2d at 844.

481. *Id.*, 590 S.W.2d at 844. Three of the seven justices dissented from the court's ruling reversing summary judgment on the defamation claim. They would have held that the plaintiff attorney was in fact a public figure because he held a position of public trust and had breached that trust when suspended from the practice of law. *Id.* at 640–41, 590 S.W.2d at 846 (Hickman, J., joined by Smith & Holt, JJ., dissenting). The dissenters cautioned that the majority's ruling unduly constrained the freedom of speech protected by the First Amendment. *Id.* at 641, 590 S.W.2d at 846.

482. *Id.* at 637, 590 S.W.2d at 844 (majority opinion).

483. *Dodrill*, 265 Ark. at 638, 590 S.W.2d at 845.

fendant either knowingly published the false information, or that the defendant acted with actual malice, defined as reckless disregard as to the truth or falsity of the published material.⁴⁸⁴ The court apparently reasoned that even if the plaintiff was not a public figure, he was still required to prove actual malice to support his false light claim because the publication's subject matter (whether or not a previously suspended lawyer qualified for readmission) was a matter of public concern.⁴⁸⁵ Relying on *New York Times Co. v. Sullivan*,⁴⁸⁶ the court held that the plaintiff had the burden to prove actual malice by clear and convincing evidence.⁴⁸⁷ Because the plaintiff failed to do so, the trial court properly granted summary judgment for the defendant on the false light claim.⁴⁸⁸

The Arkansas Supreme Court next addressed a false light claim in *Dodson v. Dicker*.⁴⁸⁹ The defendant, a private citizen, had written a letter to several state officials making disparaging remarks about the individual then serving as president of the State Board of Therapy Technology and her spouse, David Dicker.⁴⁹⁰ Mr. Dicker alone sued for defamation and false light invasion of privacy.⁴⁹¹ At trial, he won a jury award of \$7,000 in actual damages and \$5,000 in punitive damages.⁴⁹² On appeal, the court reversed, holding that the trial court should have granted a directed verdict on both claims.⁴⁹³ The court reasoned that nothing in the defendant's letter to state officials reasonably could be considered an assertion of objective fact, as required to support a defamation claim.⁴⁹⁴

484. *Id.* at 638–39, 590 S.W.2d at 845–46 (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967); RESTATEMENT (SECOND) OF TORTS § 652E). The Eighth Circuit has held that actual malice in this context means publication of false information with intent that the public construe the information as factual. *People's Bank & Trust Co. of Mountain Home v. Globe Int'l Publ'g, Inc.*, 978 F.2d 1065, 1068 (8th Cir. 1992).

485. *See Dodrill*, 265 Ark. at 639 & n.9, 590 S.W.2d at 845 & n.9 (observing that the Supreme Court had retracted from *Time, Inc. v. Hill* with respect to defamation claims, thus requiring only public figures to prove actual malice, but the Court had not revisited that issue with respect to false light claims (citing *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974))).

486. 376 U.S. 254 (1964).

487. *Dodrill*, 265 Ark. at 639, 590 S.W.2d at 845.

488. *Id.* at 639–40, 590 S.W.2d at 846.

489. 306 Ark. 108, 812 S.W.2d 97 (1991). The court acknowledged the claim in dicta in *Dunlap v. McCarty*, 284 Ark. 5, 9, 678 S.W.2d 361, 364 (1984), which addressed an unsuccessful claim for intrusion on seclusion.

490. *Dodson*, 306 Ark. at 110, 812 S.W.2d at 97–98.

491. The plaintiff characterized the defamation claim as one for libel *per se*. *Id.*, 812 S.W.2d at 98. Marinetta Dicker was not a party to the suit, perhaps because she was then a public figure as president of the State Board of Therapy Technology. *See id.*, 812 S.W.2d at 97.

492. *Id.*, 812 S.W.2d at 98.

493. *Id.* at 110, 112, 812 S.W.2d at 98, 99.

494. *Id.* at 112, 812 S.W.2d at 99.

With respect to the false light claim, the court observed that while Mr. Dicker was not himself a public figure, the letter's content addressed matters of general public concern; therefore, the plaintiff was required to prove by clear and convincing evidence that the defendant had acted with actual malice in transmitting the letter.⁴⁹⁵ The court considered the evidence pertaining to defendant's subjective state of mind when she wrote the letter, concluding that she had been motivated not by actual malice but rather her general dissatisfaction with the State Board's operations.⁴⁹⁶ Under the circumstances, the defendant's First Amendment freedom of speech prevailed over the plaintiff's privacy concerns.⁴⁹⁷

As reflected in *Dodrill* and *Dodson*, a plaintiff may join defamation and false light invasion of privacy claims in the same proceeding.⁴⁹⁸ However, the plaintiff may recover only once for any single publication.⁴⁹⁹ While the claims are related, defamation remedies harm to one's reputation, while a false light claim redresses the emotional injury associated with publicity casting the person in a false light.⁵⁰⁰ While required to support a defamation claim, reputational harm is not required to support an invasion of privacy claim for false light.⁵⁰¹

The Eighth Circuit addressed a claim for false light invasion of privacy in *People's Bank & Trust Co. of Mountain Home v. Globe International Publishing, Inc.*⁵⁰² An elderly woman recovered a sizeable money judgment against a tabloid publisher for portraying her as a pregnant 101-year old woman.⁵⁰³ The publisher argued on appeal that the published story was obviously fictional, and therefore not actionable, because the content of the

495. *Dodson*, 306 Ark. at 113, 812 S.W.2d at 99 (citing *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979)); see also *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, 707 (W.D. Ark. 2001) (citing *Dodrill*, 265 Ark. 628, 590 S.W.2d 840; *People's Bank & Trust v. Globe Int'l Publ'g, Inc.*, 978 F.2d 1065, 1068 (8th Cir. 1992)).

496. *Dodson*, 306 Ark. at 115, 812 S.W.2d at 100.

497. See *id.*, 812 S.W.2d at 100.

498. *Id.*, 812 S.W.2d at 98; *Dodrill*, 265 Ark. at 638, 590 S.W.2d at 845; see also *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 739 n.4, 74 S.W.3d 634, 656 n.4 (2002).

499. *Dodson*, 306 Ark. at 108, 812 S.W.2d at 98; *Dodrill*, 265 Ark. at 638, 590 S.W.2d at 845 (citing, e.g., RESTATEMENT SECOND OF TORTS § 652E cmt. b (1977)).

500. See *Dunlap v. McCarty*, 284 Ark. 5, 10, 678 S.W.2d 361, 364 (1984). While the Arkansas courts recognize false light invasion of privacy as a claim distinct from defamation, they have also held that the defenses applicable to defamation claims apply as well to claims for false light invasion of privacy and publicity given to private facts, which both require publicity as a necessary element. E.g., ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422, 423 (Ark. Supreme Court Comm. on Jury Instructions 2013) (citing RESTATEMENT (SECOND) OF TORTS §§ 652F to 652G).

501. See *Dodson*, 306 Ark. at 113, 812 S.W.2d at 99 (citing *Dodrill*, 265 Ark. 628, 590 S.W.2d 840; RESTATEMENT (SECOND) OF TORTS § 652E).

502. 978 F.2d 1065 (8th Cir. 1992).

503. *Id.* at 1067. The jury awarded her \$650,000 in compensatory damages and \$850,000 in punitive damages. *Id.*

story was not reasonably believable.⁵⁰⁴ The court disagreed, holding that it could not say as a matter of law that the story accompanying the plaintiff's photograph, when read as a whole, was not reasonably believable to readers as conveying actual facts about the plaintiff, even though some would strain credulity.⁵⁰⁵ Moreover, the court rejected the publisher's argument that the supermarket tabloid was obviously intended as fiction and therefore could not support a claim for portraying the plaintiff in a false light.⁵⁰⁶ To the contrary, the court held that the tabloid's style and format suggested the publisher's intent that readers believe its material was factual.⁵⁰⁷ Therefore, the story was a calculated falsehood that would support a remedy without implicating First Amendment considerations.⁵⁰⁸

Finally, the publisher challenged the sufficiency of the evidence to support a finding of actual malice.⁵⁰⁹ The court observed that mere failure to investigate the accuracy of a published falsity is not sufficient.⁵¹⁰ However, "purposeful avoidance of the truth is in a different category."⁵¹¹ In this case, the editor who selected the photograph to accompany the story was aware that it portrayed the plaintiff ten years earlier, but he assumed she had since died.⁵¹² In 1980, the defendant's editor had been working for the local newspaper when it published the same photograph to illustrate an accurate story about the plaintiff.⁵¹³ Under the circumstances, the court held that the evidence was sufficient to support the jury's finding that the defendant had purposefully avoided the truth when it published the plaintiff's photograph to accompany a fabricated story.⁵¹⁴

In two companion cases discussed earlier in this Article,⁵¹⁵ the Arkansas Supreme Court addressed claims for false light invasion of privacy as well as other privacy claims.⁵¹⁶ In *Lee*, the court addressed the appellant's argument that the evidence failed to show actual malice.⁵¹⁷ In doing so, the

504. *Id.* at 1068.

505. *Id.* at 1069.

506. *Id.* at 1069–70.

507. *People's Bank*, 978 F.2d at 1070.

508. *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)).

509. *Id.* at 1069–70.

510. *Id.* at 1070.

511. *Id.* (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989)).

512. *Id.*

513. *People's Bank*, 978 F.2d at 1070.

514. *Id.*

515. *See supra* notes 301–36 and accompanying text.

516. *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002); *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 105 S.W.3d 369 (2003). The claims for intrusion on seclusion, also advanced in these cases based upon the defendant's search of each plaintiff's property, were addressed in an earlier subsection of this Article. *See supra* notes 301–36 and accompanying text.

517. *Lee*, 348 Ark. at 742–43, 74 S.W.3d at 658–59.

court carefully sidestepped whether a private figure is required to prove actual malice in the first place when the facts publicized do not pertain to a matter of public concern.⁵¹⁸ Citing *Gertz v. Robert Welch, Inc.*,⁵¹⁹ the court held that plaintiffs other than public figures need not prove actual malice to recover for defamation.⁵²⁰ Nevertheless, noting that neither party had challenged the trial court's jury instruction requiring proof of the elements by clear and convincing evidence, the court reviewed the evidence with that standard in mind.⁵²¹ On the issue of actual malice, the record included clear and convincing evidence, when viewed most favorably to the plaintiff, that supported the finding of actual malice.⁵²²

In *Addington*, the court reached the opposite conclusion.⁵²³ The plaintiff's false light claim was denied on summary judgment.⁵²⁴ On appeal, the court upheld the disposition of that claim.⁵²⁵ The court reasoned that the plaintiff failed to present evidence that the offending statements were false.⁵²⁶ Even if they were, the court held that they were protected by qualified privilege.⁵²⁷ In this case, unlike in *Lee*, the court held that the defendant had good reason to believe that *Addington* possessed property that was rightfully the defendant's, and therefore the plaintiff failed to overcome the qualified immunity defense.⁵²⁸

518. *Id.* at 740, 74 S.W.3d at 656–57. The Arkansas Model Jury Instructions acknowledge that the Supreme Court has expressly left the issue open. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 423 cmt. (Ark. Supreme Court Comm. on Jury Instructions 2013) (citing *Lee*, 348 Ark. 707, 74 S.W.3d 634).

519. 418 U.S. 323 (1974).

520. *Lee*, 348 Ark. at 740, 74 S.W.3d at 657.

521. *Id.*, 74 S.W.3d at 657.

522. *Id.* at 744, 74 S.W.3d at 659.

523. *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 454, 105 S.W.3d 369, 379 (2003).

524. *Id.* at 445, 105 S.W.3d at 373.

525. *Id.* at 454, 105 S.W.3d at 379. In doing so, however, the court erroneously held that a plaintiff must prove the elements of the false light claim by clear and convincing evidence, citing *Dodrill. Addington*, 81 Ark. App. at 452, 105 S.W.3d at 377. This statement is not consistent with the holdings of the court in false-light claims. If applicable, the plaintiff must prove only the element of actual malice by clear and convincing evidence to satisfy First Amendment considerations announced in *New York Times Co., Inc. v. Sullivan*, 376 U.S. 254 (1964). And in *Lee*, the jury was given an instruction erroneously requiring proof of every element by clear and convincing evidence, but neither party challenged the instruction on appeal. *Lee*, 348 Ark. at 740, 74 S.W.3d at 657. No court in Arkansas has ever held that a plaintiff must prove each required element of a claim for false light publicity by clear and convincing evidence. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 423 (confirming that only actual malice, if applicable, must be proved by clear and convincing evidence; all other elements require proof only by a preponderance of evidence).

526. *Addington*, 81 Ark. App. at 453, 105 S.W.3d at 378.

527. *Id.* at 453–54, 105 S.W.3d at 378–79. The qualified privilege defense is discussed *infra* Part IV.G.3. and accompanying notes.

528. *Id.* at 454, 105 S.W.3d at 378–79.

The most recent case addressing a claim for invasion of privacy by false light publicity was *Hobbs v. Pasdar*.⁵²⁹ The plaintiff, the stepfather of one of the three young murder victims in the case commonly known as the “West Memphis 3,” sued the members of the Dixie Chicks, a singing group, for defamation and false light invasion of privacy.⁵³⁰ The plaintiff challenged the veracity of a statement posted on the defendants’ website as well as certain statements they had made at a fundraising rally implicating him in the murders.⁵³¹ After lengthy analysis, the trial court granted summary judgment on both claims.⁵³² The dispositive issue was whether the plaintiff was a “limited purpose” public figure. The court reasoned that he was because he had voluntarily injected himself in various ways into the public controversy regarding the murders.⁵³³ The court also correctly observed that a limited purpose public figure must establish the element of actual malice by clear and convincing evidence to substantiate a claim for either defamation or false light invasion of privacy.⁵³⁴

As the court observed, to establish actual malice requires “sufficient evidence to permit the conclusion that the Defendant, in fact, entertained serious doubts as to the truth of his publication.”⁵³⁵ Because the plaintiff’s evidence failed to support a finding of actual malice, the court granted summary judgment on both claims.⁵³⁶

In summary, to support a claim for publicity casting plaintiff in a false light under Arkansas law, the plaintiff must establish each of the following elements: (1) damages, (2) publicity by the defendant given to a matter that placed the plaintiff in a false light, (3) publicity pertaining to a matter that would cause a reasonable person to justifiably feel seriously offended and aggrieved, and (4) proximate cause.⁵³⁷ Each of these four elements must be established by a preponderance of the evidence.⁵³⁸ In addition, for public figures, or for publicity relating to a matter of public concern, the plaintiff

529. 682 F. Supp. 2d 909 (E.D. Ark. 2009). While the parties disputed whether Arkansas or Tennessee law applied in that case, the court held that summary judgment was appropriate no matter which state’s law applied. *Id.* at 925.

530. *Id.* at 909.

531. *Id.* at 912–14.

532. *Id.* at 932.

533. *Id.* at 926–30.

534. *Id.* at 930, 932 (citing *Dodrill v. Ark. Democrat Co.*, 265 Ark. 628, 638–39, 590 S.W.2d 840, 845 (1979)).

535. *Hobbs*, 682 F. Supp. 2d at 932 (quoting *Dodrill*, 265 Ark. at 638–39, 590 S.W.2d at 845).

536. *Id.*

537. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 423 (Ark. Supreme Court Comm. on Jury Instructions 2013).

538. *Id.*

must prove actual malice by clear and convincing evidence, meaning proof that enables a conclusion without hesitation that the allegation is true.⁵³⁹

E. Breach of Fiduciary Duty

The Arkansas courts have not expressly held whether a party otherwise aggrieved by an invasion of privacy may have a cause of action for breach of fiduciary duty as an alternative remedy. However, the Arkansas Supreme Court has held on several occasions that a party to a fiduciary relationship may sue another party to that relationship for breach of a duty arising from the nature of the relationship.⁵⁴⁰ Unlike a claim for invasion of privacy, breach of fiduciary duty does not require proof of intentional conduct, at least not when self-dealing is alleged.⁵⁴¹

Many fiduciary relationships impose a duty of confidentiality.⁵⁴² But whether or not a breach of a specific duty of confidentiality may give rise to a cause of action by a party aggrieved by the breach remains an open question in Arkansas. Other jurisdictions have held that a breach of a fiduciary's duty of confidentiality may support an action for damages for the resulting harm, including emotional distress.⁵⁴³ The Arkansas Supreme Court has recently limited remedies in actions for breach of fiduciary duty; damages for emotional distress unaccompanied by "quantifiable economic loss" are not recoverable.⁵⁴⁴ Nevertheless, breach of fiduciary duty may be a proper basis for recovery for disclosure of confidences, as long as the plaintiff sustains some amount of pecuniary damages to accompany a claim for emotional distress or mental anguish.

539. *Id.* Whether a plaintiff who is not a public figure and who claims invasion of privacy by false light publicity pertaining to a matter not of public concern must prove actual malice remains an open question in Arkansas by virtue of the court's reasoning in *Lee*. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 423 cmt. (citing *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 74 S.W.3d 634 (2002)).

540. *E.g.*, *Sexton Law Firm, P.A. v. Milligan*, 329 Ark. 285, 298, 948 S.W.2d 388, 395 (1997). See generally RESTATEMENT (SECOND) OF TORTS § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation."); ELDER, *supra* note 51, §§ 5:1–5.3.

541. *Cole v. Laws*, 349 Ark. 177, 185–86, 76 S.W.3d 878, 883 (2002) ("Self-dealing breaches the fiduciary duty even when the action taken is innocent and unintentional." (citing *Hosey v. Burgess*, 319 Ark. 183, 890 S.W.2d 262 (1995))).

542. See generally ELDER, *supra* note 51, § 5:1. Whether a fiduciary duty exists in any particular case is a question of law. See *Long v. Lampton*, 324 Ark. 511, 520, 922 S.W.2d 692, 698 (1996).

543. *E.g.*, *Fierstein v. DePaul Health Ctr.*, 24 S.W.3d 220, 224 (Mo. Ct. App. 2000).

544. See *Rees v. Smith*, 2009 Ark. 169, at 3–4, 301 S.W.3d 467, 471 (reversing jury award of \$10,000 for emotional distress based on alleged breach of fiduciary duty arising from attorney-client relationship when defendant demanded sexual favors from plaintiff in exchange for his continued legal representation).

F. Remedies

1. Damages

A plaintiff who successfully litigates a common law invasion of privacy claim in Arkansas may recover compensatory damages⁵⁴⁵ for mental anguish and pecuniary loss.⁵⁴⁶ Because all four privacy torts require proof of intent, Arkansas law does not preclude an award of purely economic damages.⁵⁴⁷ Compensatory damages are not presumed; the plaintiff must demonstrate actual damages as an element of the privacy claim.⁵⁴⁸ However, once the evidence establishes that the plaintiff sustained mental anguish, it is for the jury to weigh the plaintiff's feelings that might reasonably follow from the intrusion.⁵⁴⁹ A court will not reverse a jury award of damages unless the amount is "clearly the result of passion or prejudice, or so great as to shock the conscience of the court."⁵⁵⁰

The plaintiff may recover damages even if difficult to quantify, and expert testimony is not required.⁵⁵¹ "Arkansas law has never insisted on exactness of proof in determining damages, and if it is reasonably certain that some loss occurred, it is enough that damages can be stated only approximately."⁵⁵²

545. See RESTATEMENT (SECOND) OF TORTS § 652H (1977).

One who has established a cause of action for invasion of his privacy is entitled to recover damages for

- (a) the harm to his interest in privacy resulting from the invasion;
- (b) his mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; and
- (c) special damage of which the invasion is a legal cause.

Id.

546. *E.g.*, *Wal-Mart Stores, Inc. v. Lee*, 348 Ark. 707, 744, 74 S.W.3d 634, 660 (2002) (upholding award of compensatory and punitive damages); *AAA T.V. & Stereo Rentals, Inc. v. Crawley*, 284 Ark. 83, 84, 679 S.W.2d 190, 191 (1984) (affirming award of compensatory and punitive damages for invasion of privacy in repossessing rented television).

547. *Cf.* *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, at 15, 385 S.W.3d 822, 832–33 (declining to resolve whether purely economic losses may be recovered in negligence actions).

548. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 419–423 (Ark. Supreme Court Comm. on Jury Instructions 2013). On the other hand, a plaintiff may recover nominal damages for the privacy invasion in the absence of proof of actual damages. *Cf.* *Dunlap v. McCarty*, 284 Ark. 5, 6, 678 S.W.2d 361, 362 (1984) (jury returned verdict for plaintiffs but awarded no damages; judgment reversed on appeal on statute of limitations grounds).

549. See *Crawley*, 284 Ark. at 85, 679 S.W.2d at 191.

550. *Id.*, 679 S.W.2d at 191 (citations omitted).

551. *Agracat, Inc. v. AFS-NWA, LLC*, 2010 Ark. App. 458, at 6–7, 379 S.W.3d 64, 68–69 (citations omitted).

552. *Id.* at 7, 379 S.W.3d at 69.

If the plaintiff secures an award of compensatory damages, punitive damages are also available.⁵⁵³ However, nominal damages⁵⁵⁴ will not support an award of punitive damages.⁵⁵⁵ To recover punitive damages for any claim accruing on or after March 25, 2003, the plaintiff must establish by clear and convincing evidence⁵⁵⁶ (1) that the defendant knew or should have known that the conduct would naturally result in harm and nevertheless continued the conduct with malice or reckless disregard as to the consequences, or (2) that the defendant intentionally pursued a course of conduct for the purpose of causing harm.⁵⁵⁷ Assuming evidence is presented, the jury may consider the defendant's financial status in awarding punitive damages.⁵⁵⁸ Any punitive damage award is subject to the limitations of the Due Process Clause of the United States Constitution.⁵⁵⁹ Under the Arkansas statute, punitive damages awards are subject to judicial scrutiny.⁵⁶⁰

553. ARK. CODE ANN. § 16-55-206 (Repl. 2003) (“In order to recover punitive damages from a defendant, a plaintiff has the burden of proving that the defendant is liable for compensatory damages”); *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 879 (8th Cir. 2000) (citing *Hale v. Ladd*, 308 Ark. 567, 571, 826 S.W.2d 244, 247 (1992)); *Bell v. McManus*, 294 Ark. 275, 277, 742 S.W.2d 559, 560 (1988); see *Bayer CropScience LP v. Schafter*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831 (citations omitted) (“[P]unitive damages are dependent upon the recovery of compensatory damages, as an award of actual damages is a predicate for the recovery of punitive damages.”). For cases upholding punitive damages awards for privacy torts, see *Peoples Bank & Trust Co. v. Globe International Publishing, Inc.*, 978 F.2d 1065 (8th Cir. 1992) (upholding award of \$850,000); *Crawley*, 284 Ark. at 84, 679 S.W.2d at 191 (upholding award of \$15,000); *CBM of Central Arkansas v. Bemel*, 274 Ark. 223, 623 S.W.2d 518 (1981) (upholding award of \$4,000).

554. What constitutes a “nominal” award varies depending on the facts of each case. See *Stoner v. Houston*, 265 Ark. 928, 933, 582 S.W.2d 28, 31 (1979) (citing *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972)).

555. *Id.* at 933, 582 S.W.2d at 31 (citing *Manhattan Credit Co. v. Skirvin*, 228 Ark. 913, 311 S.W.2d 168 (1958)).

556. Clear and convincing evidence is defined as “proof that enables [the jury] without hesitation to reach a firm conviction that [an] allegation is true.” ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 2218 (Ark. Supreme Court Comm. on Jury Instructions 2013).

557. *Id.*; see ARK. CODE ANN. §§ 16-55-206 to -211 (Repl. 2005) (governing punitive damage awards). The Arkansas Supreme Court recently held unconstitutional section 16-55-208, which capped punitive damages in the absence of clear and convincing evidence that the defendant intended to cause injury or damage. *Bayer CropScience LP*, 2011 Ark. at 13, 385 S.W.3d at 831.

558. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 2218; see *Porter v. Lincoln*, 282 Ark. 258, 261-B, 668 S.W.2d 11, 14 (1984); *Bank of Cabot v. Ray*, 279 Ark. 92, 94, 648 S.W.2d 800, 801 (1983).

559. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994).

560. ARK. CODE ANN. § 16-55-210 (referring to judicial duty to “[s]crutinize” all punitive damage awards to ensure compliance with “applicable procedural, evidentiary, and constitutional requirements” and to “[o]rder remittitur where appropriate”).

2. *Injunctive Relief*

In the early part of the twentieth century, before Arkansas courts recognized privacy torts, it was not uncommon to enjoin conduct that would later support an invasion of privacy claim.⁵⁶¹ The Arkansas Supreme Court has long since abandoned the common law rule that equitable relief is not available for infringements implicating only personal rights in the absence of property damages, at least if the plaintiff has an inadequate remedy at law.⁵⁶² The cases are unclear, however, whether equitable relief remains available to prevent disclosure of information pertaining to personal matters. In one case, the Arkansas Supreme Court initially granted the plaintiff a temporary restraining order to prevent disclosure of records but later dissolved it, holding that the specific records in question were not protected under the Arkansas Freedom of Information Act.⁵⁶³

Common law relief for invasion of privacy is now well recognized in Arkansas. Nevertheless, if a plaintiff can establish the traditional elements supporting equitable relief, especially if the plaintiff's remedy at law is inadequate or incomplete, the Arkansas courts would likely be amenable.⁵⁶⁴ However, an injunction that prevents publication or otherwise implicates the First Amendment may be subject to challenge as a prior restraint.⁵⁶⁵

G. Defenses

1. *Statute of Limitations*

A variety of affirmative defenses may be asserted against claims for invasion of privacy. Perhaps the most obvious is the statute of limitations. In Arkansas, because a claim for invasion of privacy is not expressly enumerated in any other statute of limitations, the three-year "catchall" statute of limitations for tort claims generally applies.⁵⁶⁶ However, the Arkansas Su-

561. *E.g.*, *Webber v. Gray*, 228 Ark. 289, 307 S.W.2d 80 (1957).

562. *See id.* at 295-96, 307 S.W.2d at 83-84.

563. *McCambridge v. City of Little Rock*, 298 Ark. 219, 225, 766 S.W.2d 909, 911 (1989).

564. *See Am. Investors Life Ins. Co. v. TCB Transp., Inc.*, 312 Ark. 343, 345, 849 S.W.2d 509, 511 (1993) (mere existence of cause of action at law does not deprive court of equity jurisdiction unless legal remedy is "clear, adequate, and complete" (quoting *Honor v. Yamuchi*, 307 Ark. 324, 870 S.W.2d 267 (1991))).

565. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. 2003). *See generally* ELDER, *supra* note 51, § 6:15.

566. *O'Mara v. Dykema*, 328 Ark. 310, 317, 942 S.W.2d 854, 858 (1997) ("It has long been the law in this state that a three-year statute of limitations applies to all tort actions not otherwise limited by law." (citing *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934))); *see* ARK. CODE ANN. §§ 16-56-104 to -105 (Repl. 2005); *Norris v. Bakker*, 320 Ark. 629,

preme Court has applied the one-year limitation period to bar a privacy claim alleging an invasion solely based on two telephone conversations, after declining to decide whether oral communications alone can support a claim for invasion of privacy.⁵⁶⁷ Absent concealment of the wrong or other tolling conduct, the limitation period begins to run when the wrongful act occurs, not when the plaintiff discovers the wrongful nature of the conduct itself.⁵⁶⁸

2. *Consent*

As for other intentional torts, consent is generally an absolute defense to a privacy claim.⁵⁶⁹ For intrusion on seclusion claims, however, the Arkansas Supreme Court has held that consent *negates* the cause of action, so the plaintiff has the burden of proof to demonstrate that consent was lacking.⁵⁷⁰ As defined by the Arkansas Model Jury Instruction for intrusion on seclusion, the plaintiff's burden of proof is particularly daunting. To establish the claim, the plaintiff must prove that the defendant "believed or was substantially certain that [he or she] lacked the necessary legal authority or personal permission, invitation, or valid consent to commit the intrusive act."⁵⁷¹ The standard appears to require proof of defendant's *subjective* belief or certain-

631–32, 899 S.W.2d 70, 71 (1995); *Dunlap v. McCarty*, 284 Ark. 5, 10, 678 S.W.2d 361, 364 (1984).

567. *Dunlap*, 284 Ark. at 10, 678 S.W.2d at 364–65 (holding that whether the alleged intrusion amounted to defamation or intrusion on seclusion, it sought special damages based on spoken words, to which the one-year statute of limitations applied).

568. *Norris*, 320 Ark. at 633, 899 S.W.2d at 71–72 (citing *Hampton v. Taylor*, 318 Ark. 771, 887 S.W.2d 535 (1994)).

569. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424 (Ark. Supreme Court Comm. on Jury Instructions 2013). Similarly, a constitutional right of privacy may be waived. See *Pulaski Cnty. v. Ark. Democrat-Gazette, Inc.*, 371 Ark. 217, 220–21, 264 S.W.3d 465, 467–68 (2007) (intervenor, a county contractor, waived any constitutional right of privacy she may have had in the content of email messages to county official addressing both business and personal matters).

570. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 (defining intentional intrusion element to include proof that the defendant "believed or was substantially certain that [defendant] lacked the necessary legal authority or personal permission, invitation, or valid consent to commit the intrusive act"); see also ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424 note on use (precluding use of consent instruction with ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420 "since the absence of consent or other authority is part of a plaintiff's burden of proof under such a claim"). The rationale may be that the claim rests on an intrusion on the plaintiff's *seclusion*, so a plaintiff must first establish an objective manifestation of a desire to maintain solitude or seclusion.

571. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420.

ty that consent was lacking; proof of constructive knowledge or objective awareness is not sufficient.⁵⁷²

Scholars have observed that the absence of consent is more accurately described as an element of a privacy claim that the plaintiff must assert and prove.⁵⁷³ While the distinction may appear to be academic, treating consent as an affirmative defense eases the pleading burden on the plaintiff⁵⁷⁴ and reduces the risk of a pre-answer dismissal for failure to allege non-consent. Requiring proof of non-consent as an element of the intrusion claim puts the burden on the plaintiff to establish that the defendant's conduct was unauthorized.

Unlike some states' laws,⁵⁷⁵ Arkansas law does not require written or even express consent to avoid liability; consent may be either express or implied by the plaintiff's conduct or inaction.⁵⁷⁶ However, the plaintiff's consent must be voluntary, and it may be limited in scope. Consent is vitiated if the defendant exceeds the scope of the consent granted.⁵⁷⁷ Whether or not the plaintiff consented is an issue of fact for the jury.⁵⁷⁸

3. *Qualified and Absolute Privilege*

The defenses and privileges applicable to defamation claims apply alike to privacy torts that require publicity as an element, specifically false

572. Contrast the requirement that the intrusion must be "highly offensive to a reasonable person" as a result of defendant's conduct that a "reasonable person" would find strongly objectionable. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420. Under that standard, the plaintiff's subjective feelings about the intrusion are not relevant. Yet the plaintiff is required to prove that the *defendant* subjectively believed he or she lacked valid consent to commit the intrusion. *Id.*

573. *E.g.*, ELDER, *supra* note 51, §§ 2:12, 3:9, 4:8, 6:6; *see, e.g.*, Leggett v. First Interstate Bank of Or., N.A., 739 P.2d 1083, 1086 (Or. Ct. App. 1987) ("Strictly speaking, consent is not a defense to invasion of privacy. Rather, *lack* of consent is an element of the tort . . ."). *But see* Green v. Penn-Am. Ins. Co., 242 S.W.3d 374, 379 n.6 (Mo. Ct. App. 2007) (declining to hold that "lack of consent" is an element of a claim for appropriation of name or likeness).

574. As noted earlier, Arkansas is a fact-pleading state. ARK. R. CIV. P. 8.

575. An example is New York. *See* N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009) (to avoid liability, defendant must establish plaintiff's written consent).

576. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424; *see, e.g.*, Alexander v. Pathfinder, 189 F.3d 735, 742 (8th Cir. 1999) (plaintiff failed to object when defendant's employees tape-recorded her conversations).

577. Wal-Mart Co., Inc. v. Lee, 348 Ark. 707, 727, 74 S.W.3d 634, 649 (2002) (holding that plaintiff's written and implied consent were not voluntary, and defendant's conduct exceeded the scope of plaintiff's verbal consent).

578. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 424; Lee, 348 Ark. at 724, 74 S.W.3d at 647.

light and publicity given to private facts.⁵⁷⁹ The corollary to this principle is that those defenses do not bar either misappropriation of name or likeness or intrusion on seclusion, neither of which require publicity or even publication as an element.⁵⁸⁰ For example, a defendant who commits an intrusion on seclusion may not assert absolute privilege as a defense on the rationale that the intrusion was necessary to secure evidence to be offered in a pending judicial proceeding.⁵⁸¹ Whether a qualified privilege exists in a particular context is a question of law.⁵⁸² But once the court decides that the privilege applies, it is a question of fact whether a particular statement is privileged.⁵⁸³

The Arkansas courts have seldom addressed qualified or absolute privileges in the privacy tort context. However, the Arkansas Supreme Court considered a qualified privilege defense in *Lee* in conjunction with the plaintiff's claims for false light, intrusion, and defamation.⁵⁸⁴ In doing so, the court concisely defined the defense and articulated its parameters:

“A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matters which, without such privilege, would be actionable.” [T]he qualified privilege must be exercised in a reasonable manner and for a proper purpose and . . . does not extend to irrelevant defamatory statements that have no relation to the interest entitled to protection. The qualified privilege is lost if it is abused by excessive publication; if the statement is made with malice; or if the statement is made with a lack of grounds for belief in its truthfulness. The question of whether a particular statement falls outside the scope of the qualified privilege for one of these reasons is a question of fact for the jury.⁵⁸⁵

579. RESTATEMENT (SECOND) OF TORTS §§ 652F-652G (1977); see also ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 422 cmt., 423 cmt.

580. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420, 421; see also *Froelich v. Adair*, 516 P.2d 993, 996 (Kan. 1973) (qualified privilege applicable to defamation claim does not apply to claim for intrusion on seclusion, for which publication is not an element). One scholar has criticized this position as “dubious” and inconsistent with the consensus in other states that the set of qualified privileges applicable to defamation law generally applies to all claims for invasion of privacy. See ELDER, *supra* note 51, § 2:13 (citations omitted).

581. See *Froelich*, 516 P.2d at 996.

582. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 409 cmt. (citing *Minor v. Failla*, 329 Ark. 274, 282, 946 S.W.2d 954, 958 (1997), *overruled on other grounds*, *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (1998)).

583. *Id.* (citing *Lee*, 348 Ark. at 724, 74 S.W.3d at 647).

584. *Lee*, 348 Ark. at 734–37, 743–44, 74 S.W.3d at 653–55, 659.

585. *Id.* at 735, 74 S.W.3d at 653–54 (quoting *Minor*, 329 Ark. at 283, 946 S.W.2d at 958–59) (other internal citations omitted); see also *id.* at 743–44, 74 S.W.3d at 659 (reiterating the same standard). The elements of the qualified privilege defense in the context of a defamation claim are set out in ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 409.

In *Lee*, the court concluded that the communications in question were not privileged because the defendant's agent who made the challenged statements had no basis for believing they were truthful.⁵⁸⁶ But in *Addington*, the Arkansas Court of Appeals upheld summary judgment for the defendant in a related claim, holding that the plaintiff failed to overcome the qualified immunity defense with respect to his claims for false light invasion of privacy and defamation.⁵⁸⁷

The general definition of qualified privilege encompasses several more specific variations.⁵⁸⁸ They include the reporter's privilege (sometimes known as the newsworthiness privilege), the fair-report privilege, and the public records privilege. Each of these will be addressed in turn.

a. Reporter's privilege

A defendant is generally entitled to a qualified privilege for communications pertaining to public figures and matters of public concern.⁵⁸⁹ More specifically, First Amendment considerations weigh especially heavily in favor of news publishers and reporters. But unlike some other states' laws,⁵⁹⁰ Arkansas law does not recognize absolute or qualified immunity for reporters or news media in defending defamation or privacy claims; nor does it carve out any general exception for "newsworthy" publications.

In *Williams v. American Broadcasting Cos.*,⁵⁹¹ the federal district court addressed Arkansas substantive law governing news media privileges in the context of a discovery dispute. A patient and her surgeon filed several tort

586. *Lee*, 348 Ark. at 737, 743, 74 S.W.3d at 655, 659.

587. *Addington v. Wal-Mart Stores, Inc.*, 81 Ark. App. 441, 453–54, 105 S.W.3d 369, 378–79 (2003) (applying qualified privilege to affirm summary judgment on both false light and defamation claims). However, the court reversed and remanded the intrusion on seclusion claim, to which the qualified immunity defense did not apply. *See id.* at 457, 105 S.W.3d at 380 (holding that a fact question remained as to whether plaintiff's consent was voluntary).

588. One variation on qualified immunity as a defense is the requirement that a false light claim include proof of actual malice, at least when the challenged communication relates to public figures and matters of public concern. *See supra* note 539 and accompanying text. Because false light claims involving publicity raise First Amendment concerns, the qualified immunity defense raises the burden of proof as a prerequisite for a claim seeking damages for communications of the sort most likely to warrant First Amendment protection—those involving public figures and those pertaining to matters of public concern. Compare ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 407 (providing jury instruction for defamation claim by private figure plaintiff; requiring at minimum proof of negligence in failing to determine truth of statement before publication) with ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 408 (providing jury instruction for defamation claim by public figure plaintiff, requiring clear and convincing evidence that defendant published the defamatory fact "knowing it was false or with a high degree of awareness of its probable falsity").

589. *See supra* notes 484–85, 539 and accompanying text.

590. *See ELDER, supra* note 51, §§ 3:17, 4:2.

591. 96 F.R.D. 658, 662 (W.D. Ark. 1983).

claims against a news broadcaster and its reporter, including giving publicity to private facts, defamation, and false light invasion of privacy.⁵⁹² The defendants asserted the “reporters’ privilege” in an effort to avoid producing the “out-takes” of videotape footage used in producing a television program.⁵⁹³

The court observed that no reporter’s privilege was recognized at common law.⁵⁹⁴ The only reporter’s or newsman’s privilege ever recognized under Arkansas law was based on a statute precluding the required disclosure of a reporter’s sources except under limited circumstances.⁵⁹⁵ But the Arkansas courts have never adopted an expansive interpretation of the statutory privilege, and the federal court in *Williams* declined to do so, concluding that under Arkansas law, no reporter’s privilege applied to the film “out-takes.”⁵⁹⁶

Turning to the defendant’s argument asserting a constitutionally based privilege, the court cited a United States Supreme Court plurality opinion in acknowledging a limited constitutional basis for protecting newsmen against disclosure of editorial processes.⁵⁹⁷ Yet that limited privilege had to give way when “a member of the press is alleged to have circulated falsehood and is sued for injury to the plaintiff’s reputation,” and the plaintiff seeks evidence material to a “critical element” of the claim.⁵⁹⁸ The court reasoned that any other conclusion would render plaintiffs powerless to prove actual malice as required by *New York Times Co. v. Sullivan*,⁵⁹⁹ or to prove malice in order to recover punitive damages.⁶⁰⁰ The court concluded that the de-

592. *Id.* at 668–69. The false light and defamation claims were asserted by a surgeon who claimed that the defendants had falsely portrayed him as engaging in unnecessary medical procedures. *Id.* at 660. The other privacy claims were asserted by the patient, whose surgery was filmed by the defendants without her knowledge or consent. The claims were consolidated by the court because they arose from the same set of facts. *Id.* at 662.

593. *Id.* at 660.

594. *Id.* at 663.

595. *Id.* at 662–63 (quoting ARK. CODE ANN. § 43-917). The statutory privilege applies to both civil and criminal proceedings. *Williams*, 96 F.R.D. at 663 (citing *Saxton v. Ark. Gazette Co.*, 264 Ark. 133, 135, 569 S.W.2d 115, 116 (1978)).

596. *Id.* at 663, 665.

597. *Id.* at 668–69 (discussing *Herbert v. Lando*, 441 U.S. 153 (1979)). The federal district court for the Eastern District of Arkansas, in an unpublished opinion, recently suggested that more stringent pleading requirements may apply to defamation claims against distributors of newspapers and magazines, i.e., “specific allegations of facts demonstrating either actual knowledge of the tortious nature of the book or facts giving rise to a duty to investigate.” *Steinbuch v. Hachette Book Grp.*, No. 4:08CV00456 J LH, 2009 WL 963588, at *3 (E.D. Ark. Apr. 8, 2009) (citing *Lewis v. Time, Inc.*, 83 F.R.D. 455, 465 (E.D. Cal. 1979)). In the absence of such specific allegations, the court dismissed the plaintiff’s claim for public disclosure of private facts. *Id.* at *4.

598. *Williams*, 96 F.R.D. at 670.

599. 376 U.S. 254 (1964).

600. *Williams*, 96 F.R.D. at 670.

fendant's constitutional argument was inconsistent with the principle that "malicious libelous utterances are not constitutionally protected."⁶⁰¹ Thus, the plaintiff's motions to compel production were granted.⁶⁰²

No Arkansas court since has cited *Williams* or otherwise addressed whether a reporter or news organization has a qualified or absolute privilege in the context of a privacy claim. The case has been cited with approval on several occasions by other courts.

b. Fair report privilege

Arkansas defamation law recognizes a privilege for "fair reporting" of an official proceeding or public meeting.⁶⁰³ The privilege attaches with respect to the report of a proceeding or meeting, and a defendant is not liable unless the plaintiff establishes that the publication exceeds the scope of the privilege.⁶⁰⁴ The defendant exceeds the scope of the privilege if the published report does not accurately report the substance of the meeting or proceeding, and if the defendant fails to take steps reasonably necessary to insure the accuracy of the publication.⁶⁰⁵ The Arkansas courts have not addressed a privacy claim in which the defendants have asserted the fair report privilege. However, the privilege would certainly apply to an invasion of privacy claim for false light publicity to the same extent it applies to defamation.

c. Public records privilege⁶⁰⁶

The Arkansas Freedom of Information Act⁶⁰⁷ generally provides for public access to information contained in "public records," broadly defined as records "required by law to be kept" or "otherwise kept and which constitute a record of the performance" or nonperformance of "official func-

601. *Id.*

602. *Id.*

603. Arkansas Model Jury Instructions refer to the qualified privilege defense as the "fair report" privilege. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 410 & cmt. (Ark. Supreme Court Comm. on Jury Instructions 2013) (citing, *e.g.*, *Whiteside v. Russellville Newspaper, Inc.*, 2009 Ark. 135, at 6-7, 295 S.W.3d 798, 801-02).

604. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 410. The instruction is modeled after RESTATEMENT (SECOND) OF TORTS § 611 (1977).

605. ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 410; *see Whiteside*, 2009 Ark. at 6-7, 295 S.W.3d at 801 (citing RESTATEMENT (SECOND) OF TORTS § 611).

606. *See* ELDER, *supra* note 51, § 3:15 n.31.

607. ARK. CODE ANN. §§ 25-19-103 to -110 (Supp. 2011).

tions.”⁶⁰⁸ The Arkansas courts have repeatedly and consistently held that the statute is to be liberally interpreted in favor of disclosure.⁶⁰⁹

However, just because information is in a public record does not preclude a cause of action for invasion of privacy; nor does it bar assertion of a constitutional, statutory, or common law privacy interest in the information. For one thing, the Act includes a number of exceptions barring access to certain kinds of records.⁶¹⁰ Moreover, to the extent that an individual asserts a constitutional or other privacy interest in information contained in public records, the public’s interest in the records must be balanced against the individual privacy interests.⁶¹¹ As might be expected, an individual’s privacy interest in particular public records and the information they contain varies depending on a number of factors,⁶¹² including the government’s purpose in maintaining the records and the public’s interest in accessing them.⁶¹³

An individual’s criminal history records are almost always exempt from privacy claims, even information pertaining to arrestees who have not been convicted of any offense. The earliest Arkansas case was *Mabry v. Kettering*.⁶¹⁴ Arrestees sought to preclude federal law enforcement officials from publishing their photographs and distributing them nationwide.⁶¹⁵ Citing a number of cases from other jurisdictions, the court held that law enforcement officers may use photographs of those in custody who have been charged with a crime for the purpose of identifying the accused.⁶¹⁶ Even records pertaining to unsubstantiated and unfounded administrative reports

608. *Id.* § 25-19-103(1).

609. *E.g.*, *Bryant v. Weiss*, 335 Ark. 534, 538, 983 S.W.2d 902, 904 (1998).

[T]he intent of the Freedom of Information Act was to establish the right of the public to be fully apprised of the conduct of public business. As a rule, statutes enacted for the public benefit are to be interpreted most favorably to the public. The Freedom of Information Act was passed wholly in the public interest and is to be liberally interpreted to the end that its praiseworthy purposes may be achieved.

Id. (citing, *e.g.*, *City of Fayetteville v. Edmark*, 304 Ark. 179, 184–85, 801 S.W.2d 275, 278 (1990)).

610. ARK. CODE ANN. § 25-19-105(b).

611. *McCambridge v. City of Little Rock*, 298 Ark. 219, 231, 766 S.W.2d 909, 915 (1989) (citing *Nixon v. Adm’r. of Gen. Servs.*, 433 U.S. 425, 458 (1977)).

612. *See id.*, 766 S.W.2d at 915 (observing that the plaintiff’s privacy interest in nondisclosure varied among the items she sought to prevent defendants from releasing).

613. For example, the Arkansas Supreme Court has rejected an attorney’s argument that the attorney-client privilege provides a basis for an exception to disclosure of public records under the Arkansas Freedom of Information Act. *Id.* at 225–26, 766 S.W.2d at 912 (attorney-client privilege is a rule of evidence only and does not provide an exception to a substantive act requiring disclosure of public records).

614. 89 Ark. 551, 117 S.W. 746 (1909); *see also Mabry v. Kettering*, 92 Ark. 81, 122 S.W. 115 (1909) (second appeal).

615. *Mabry*, 89 Ark. at 551–52, 117 S.W. at 746.

616. *Id.* at 553, 117 S.W. at 747.

of possible child abuse may not be subject to an individual's privacy claim if a statute requires the information to be included in a public registry, and if sufficient statutory safeguards are in place to protect the individual's privacy interests.⁶¹⁷

While the accused may have only a limited privacy interest, if any, in criminal history records, family members of the accused may have a legitimate interest in preventing the release of criminal investigation records implicating matters personal to them. In *McCambridge v. City of Little Rock*, the court recognized that the plaintiff had a constitutional privacy interest in certain criminal investigation records relating to her son's murder-suicide.⁶¹⁸ But the court also emphasized that the public had a strong interest in having access to records relevant to solving crime.⁶¹⁹ In balancing those interests, the court concluded that the public's interest in the records outweighed the mother's constitutional privacy interests.⁶²⁰

The Arkansas courts have repeatedly held that exceptions to the Arkansas Freedom of Information Act must be narrowly construed.⁶²¹ The several exceptions to the Act include "[p]ersonnel records to the extent that disclosure would constitute a clearly unwarranted invasion of personal privacy[.]"⁶²² and "[m]edical records, adoption records, and education records as defined in the Family Educational Rights and Privacy Act of 1974 . . . unless their disclosure is consistent with the provisions of that [federal] act."⁶²³ Both exceptions protect against the disclosure of records that implicate important individual privacy concerns with respect to employment, medical care, family relationships, and educational matters. A full discussion of these exceptions is beyond the scope of this Article. However, each of these

617. See *Ark. Dep't of Human Servs. v. Heath*, 312 Ark. 206, 215, 848 S.W.2d 927, 932 (1993).

618. *McCambridge*, 298 Ark. at 230, 766 S.W.2d at 914.

619. *Id.* at 231, 766 S.W.2d at 915.

620. *Id.* at 232–32, 766 S.W.2d at 915; cf. *Young v. Rice*, 308 Ark. 593, 598, 826 S.W.2d 252, 255 (1992) (holding that personnel record exception in Arkansas Freedom of Information Act requires weighing public's right to knowledge of records against individual right to privacy).

621. *E.g.*, *Thomas v. Hall*, 2012 Ark. 66, at 13, 399 S.W.3d 387, 395. "[T]his court has consistently held that it interprets exceptions to the FOIA narrowly and in favor of disclosure. Ambiguous exemptions will be interpreted in a manner favoring disclosure." *Id.*, 399 S.W.3d at 395 (citation omitted). The party seeking to avoid disclosure has the burden of proof that the information is within the scope of an exception. See *Stilley v. McBride*, 332 Ark. 306, 313, 965 S.W.2d 125, 128 (1998).

622. ARK. CODE ANN. § 25-19-105(b)(12) (Supp. 2011); see 20 U.S.C. § 1232g (Supp. 2011).

623. ARK. CODE ANN. § 25-19-105(b)(2).

two exceptions has been the subject of litigation and considerable public debate.⁶²⁴

4. *Other Statutory Defenses*

Specific statutes may permit conduct that might otherwise support a claim for invasion of privacy, and therefore may be asserted in defense. For example, a party to a cordless or cell phone communication may record it, even without the knowledge of the other party to the call.⁶²⁵

V. UNRESOLVED ISSUES

Arkansas privacy law has evolved considerably since the Arkansas Supreme Court first recognized the common law right of privacy fifty years ago. The development of the state's right of privacy, grounded both in common law and the Arkansas Constitution, is largely attributable to the courts; the Arkansas General Assembly has taken a relatively low profile in the development of the civil right of privacy. This section identifies legal issues related to the right of privacy that Arkansas policymakers have not yet resolved.

A. Misappropriation of Name or Likeness

While the Arkansas Supreme Court upheld a judgment for misappropriation of name or likeness in *Olan Mills, Inc. of Texas v. Dodd*,⁶²⁶ no Arkansas appellate court, then or since, has had an opportunity to directly con-

624. *E.g.*, *Stilley*, 332 Ark. at 314, 965 S.W.2d at 128–29 (precluding disclosure under personnel records exception of police officers' home addresses; purpose of Act is to keep electors advised of performance of public officials and to enable them to learn and to report on public officials' activities); *Young*, 308 Ark. at 598, 826 S.W.2d at 255 (interpreting "clearly unwarranted invasion of personal privacy" to preclude disclosure of examination results of other candidates for promotion to police lieutenant); *see Ark. Gazette Co. v. So. State Coll.*, 273 Ark. 248, 251, 620 S.W.2d 258, 260 (1981) ("No one has a reasonable expectation of privacy concerning the amount of public funds dispersed [sic] to him [by a public educational institution] unless that person clearly comes within one of the exceptions [to the Arkansas FOIA] which by law are required to be closed to the public."); *cf. Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (interpreting analogous exceptions in federal act with respect to Vince Foster suicide). Exceptions to the Arkansas Freedom of Information Act have been the subject of a host of Arkansas Attorney General opinions. *E.g.*, Ark. Op. Att'y Gen. No. 2011-152 (personnel records); Ark. Op. Att'y Gen. No. 2012-083 (educational records).

625. ARK. CODE ANN. § 5-60-120(a) (Repl. 2005) (not unlawful for one party to record a conversation, with or without other party's consent); *see Alexander v. Pathfinder*, 189 F.3d 735, 743 (8th Cir. 1999).

626. 234 Ark. 495, 353 S.W.2d 22 (1962).

sider this privacy claim. In recognizing other privacy torts, the Arkansas Supreme Court has repeatedly relied on the applicable provisions of the Restatement (Second) of Torts that define the elements of each claim. Accordingly, the Arkansas Model Jury Instructions generally follow the Restatement definitions.⁶²⁷

Under the Restatement definition, a claim for misappropriation of name or likeness requires proof that the defendant used the plaintiff's name or likeness for the defendant's advantage. As in *Olan Mills*, in which the defendant used the plaintiff's studio photographs without authorization to advertise its photography services, the cause of action sometimes seeks a remedy for a defendant's commercial use of one's identity. Yet the Restatement explicitly provides that commercial use is not required.⁶²⁸ Some states, like New York, have enacted statutes restricting the cause of action to situations involving commercial use.⁶²⁹ The Arkansas right of privacy, however, is governed by common law alone, and the state courts have never undertaken to limit recovery to situations involving a defendant's commercial use.

In two cases, however, the federal courts have erroneously assumed that the cause of action *requires* the plaintiff to prove commercial use by the defendant.⁶³⁰ To the contrary, the Arkansas Model Jury Instructions adopt the broader definition of the claim as set forth in the Restatement.⁶³¹ The comment to the model jury instruction muddies the issue by observing that the federal district court "confirmed" that the tort requires commercial use.⁶³² But no Arkansas court has ever held that appropriation of name or likeness is actionable *only* if the defendant engages in commercial use of the plaintiff's identity. Nor has the Arkansas General Assembly enacted any statute so limiting the cause of action.

627. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 420–424 (Ark. Supreme Court Comm. on Jury Instructions 2013).

628. See RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. *Apart from statute, however, the rule stated is not limited to commercial appropriation.* It applies also when the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.

Id. (emphasis added).

629. See N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2009).

630. *LasikPlus Murphy, M.D., P.A. v. LCA-Vision, Inc.*, 776 F. Supp. 2d 886, 899 (E.D. Ark. 2011); *Stanley v. Gen. Media Commc'ns, Inc.*, 149 F. Supp. 2d 701, 706 (W.D. Ark. 2001).

631. See ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 421 & cmt.

632. *Id.* (citing *Stanley*, 149 F. Supp. 2d 701).

The claim for invasion of privacy by misappropriation of name or likeness is correctly defined in Arkansas Model Jury Instruction 421 to require use for the defendant's advantage, which need not be a commercial one.⁶³³

B. The Right of Publicity

In many states, the courts and legislatures have explicitly acknowledged considerable evolution in the common law right to damages for misappropriating one's name or likeness for the defendant's benefit. In the early years, only private individuals could pursue a common law action to redress emotional injury for invasion of privacy. Most courts considered public officials and public figures to have waived any right to privacy, or at least to have implicitly consented to invasions of privacy when they elected to join the public arena.

Beginning in the mid-twentieth century, however, many courts began to acknowledge the property interests of celebrities in protecting the economic value of their public personas.⁶³⁴ The traditional common law right to recover damages for invasion of "privacy" by misappropriation of one's identity thus evolved to what is now better known as the "right of publicity."⁶³⁵ A plaintiff seeking redress for violation of the right of publicity may recover for the economic loss associated with the defendant's use.

No court, state or federal, has addressed whether Arkansas recognizes the common law right of publicity.⁶³⁶ In other states, the right of publicity has become such a frequent matter of litigation that several legislatures have enacted specific statutes governing the right.⁶³⁷ Some states treat the right as an expansion of the privacy right against misappropriation of name or like-

633. Compare *id.* (requiring proof that the defendant's use of plaintiff's name or likeness was for defendant's "own purposes or benefit, commercial or otherwise") with RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (stating that the prohibited use "is not limited to commercial appropriation").

634. E.g., *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (applying Michigan law); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 491-92 (3d Cir. 1956) (interpreting Pennsylvania, Delaware, New Jersey, and New York law).

635. See generally Richard Ausness, *The Right of Publicity: A "Haystack in a Hurricane"*, 55 TEMP. L.Q. 977 (1982) (describing evolution of the right of publicity).

636. But see Jennifer E. Rothman, *Copyright and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 203 & n.9 (2002) (erroneously suggesting that Arkansas adopted the common law right of publicity in *Olan Mills*). *Olan Mills* did not assert the right of publicity. See *Olan Mills, Inc. of Tex. v. Dodd*, 234 Ark. 495, 496-97, 353 S.W.2d 22, 23 (1962). The plaintiff was neither a celebrity nor a public figure; she was a private person. *Id.* at 495, 353 S.W.2d at 22. Nor did she seek compensation for the economic value of her photograph as used by the defendant; rather, she sought damages for emotional injury. *Id.* at 496, 353 S.W.2d at 23. *Olan Mills* was simply a classic privacy claim seeking damages for mental anguish as a result of the defendant's misappropriation of her likeness.

637. E.g., CAL. CIV. CODE § 3344.1 (West Supp. 2013).

ness, but in fact it redresses a different kind of injury altogether.⁶³⁸ Many courts cite the Restatement (Third) of Unfair Competition⁶³⁹ as the basis for the common law right of publicity.⁶⁴⁰ Neither the Arkansas General Assembly nor the Arkansas courts have addressed the issue.

C. Descendibility

A related issue is whether a claim for violation of the right of privacy, or any of its variations, survives a plaintiff who dies before securing a judgment awarding damages. Most states recognize privacy as a right personal to the plaintiff.⁶⁴¹ Like other personal rights, in most states the right does not survive the plaintiff⁶⁴² and is not heritable unless a state statute preserves the right to the plaintiff's estate.⁶⁴³

The issue of descendibility has been litigated frequently over the last decade as the early generations of mass media celebrities pass away, leaving substantial economic value in their surviving public identities. For example, Elvis Presley and Marilyn Monroe have been the subjects of extensive litigation and even legislation addressing the descendibility of the economic value of their celebrity identities.⁶⁴⁴ The premature death of Michael Jackson is another illustration that issues involving descendibility of publicity rights are likely to multiply with future generations of celebrities.⁶⁴⁵

638. Alicia M. Hunt, Comment, *Everyone Wants to Be a Star: Extensive Publicity Rights for Noncelebrities Unduly Restrict Commercial Speech*, 95 NW. U. L. REV. 1605, 1606–07 (2001) (describing different interests protected by the two torts).

639. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

640. See, e.g., *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003).

641. ELDER, *supra* note 51, § 1:3.

642. See, e.g., *Schuyler v. Curtis*, 42 N.E. 22, 25 (N.Y. 1895). “Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that term; and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time.” *Id.*; see also *Clift v. Narrangansett Television LP*, 688 A.2d 805, 814 (R.I. 1996) (“[T]he right to privacy dies with the person.”); RESTATEMENT (SECOND) OF TORTS § 652I (1977).

643. RESTATEMENT (SECOND) OF TORTS § 652I cmt. b.

644. E.g., *Memphis Dev. Found. v. Factors Etc., Inc.*, 616 F.2d 956 (6th Cir. 1980) (likeness of Elvis Presley); *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007) (name, image, and voice of Marilyn Monroe).

645. See, e.g., Robert C. O’Brien & Bela G. Lugosi, *Update to the Commercial Value of Rights of Publicity: A Picture is Worth a Thousand Words . . . or Sometimes a Million Dollars*, 27 ENT. & SPORTS LAW. (No. 3, Fall 2009); see also Erin K. Mai, Comment, “‘Cause This is Thriller!’: The True Price of Fame and an Analysis of the Current System for Calculating Estate Taxes on the Post-Mortem Right of Publicity”, 3 EST. PLANNING & COMMUNITY PROP. L.J. 1, 1 (2010).

Several states have enacted legislation to address the descendibility issue.⁶⁴⁶ Those state statutes that allow the right of publicity to survive vary widely as to the length of time the right survives the decedent.⁶⁴⁷ Arkansas has yet to address whether claims for invasion of privacy by misappropriation of name or likeness survive the plaintiff.

In *Cannady v. St. Vincent Infirmary Medical Center*, the Arkansas Supreme Court followed the majority rule against survivability of a claim for intrusion on seclusion,⁶⁴⁸ even though the Arkansas survival statute generally provides that claims for personal injury survive the decedent.⁶⁴⁹ The *Cannady* court held that the right of privacy is generally personal to the plaintiff and therefore does not survive the plaintiff's death.⁶⁵⁰ However, in dicta the court observed that the Restatement makes an exception for privacy claims for misappropriation of name or likeness, at least to the extent that an invasion may implicate a property interest.⁶⁵¹ Thus the issue remains open with respect to other privacy torts, especially those that implicate economic interests. *Cannady* decided only that claims for intrusion on seclusion, which generally seek a remedy for mental anguish and emotional distress rather than economic loss, do not survive the plaintiff.⁶⁵²

D. Invasion of Privacy by Oral Communications Alone

In *Dunlap v. McCarty*,⁶⁵³ the plaintiffs claimed damages for intrusion on seclusion based on two telephone conversations between the parties. The appellate court reversed a judgment for the plaintiffs and an award of nominal damages on statute of limitations grounds, applying the one-year limitation period applicable to "actions for words spoken whereby special damag-

646. *E.g.*, CAL. CIV. CODE § 3344.1 (West Supp. 2013); NEB. REV. STAT. ANN. § 20-208 (LexisNexis 2008); OKLA. STAT. tit. 12, § 1448 (2010); TEX. PROP. CODE ANN. § 26.002 (West 2000); *cf.* KY. REV. STAT. ANN. § 391.170 (LexisNexis 2010) (although traditional right of privacy terminates upon death, the right of publicity, which protects one's personality from commercial exploitation, survives).

647. *Compare, e.g.*, CAL. CIV. CODE § 3344(g) (West 1997) (70 years) with 42 PA. CONS. STAT. ANN. § 8316(c) (West 2007) (30 years).

648. 2012 Ark. 369, ___ S.W.3d ___.

649. ARK. CODE ANN. § 16-62-101(a)(1) (Repl. 2005). Based on the plain language of the statute, the only exceptions are claims for slander and libel. *See id.* § 16-62-101(a)(2). Nevertheless, the Arkansas Supreme Court has interpreted "personal injury" claims strictly to preclude survival of personal injury claims not involving physical injury.

650. *Cannady*, 2012 Ark. at 8, ___ S.W.2d at ___.

651. *Id.*, ___ S.W.2d at ___ (distinguishing *Reid v. Pierce Cnty.*, 961 P.2d 333 (Wash. 1998)); *see* RESTATEMENT (SECOND) OF TORTS § 652I (1977).

652. *Cannady*, 2012 Ark. at 8, ___ S.W.2d at ___.

653. 284 Ark. 5, 6, 678 S.W.2d 361, 363-64 (1984).

es are sustained.”⁶⁵⁴ In passing, however, the court expressed skepticism about invasion of privacy claims based solely on oral communications, noting that other state courts were divided on the issue.⁶⁵⁵ The court specifically declined to address “whether mere oral communications can be the basis of a claim for invasion of privacy”⁶⁵⁶ because it was not necessary to reach the issue.

While the court has never revisited the issue, the “oral publication limitation” referenced by the *Dunlap* court, once recognized by a slim minority of early courts, has been rejected by the great majority as antiquated and lacking rational justification.⁶⁵⁷ The clear consensus of the decisions addressing the issue rejects any such distinction based on the means of communication. For example, several cases in other jurisdictions have considered debt collection practices often involving verbal telephone harassment.⁶⁵⁸ Nevertheless, the issue remains unresolved by the Arkansas courts.

E. False Light Publicity Claims by Private Plaintiffs Not Implicating Matters of Public Concern

Because privacy claims alleging publicity portraying the plaintiff in a false light may implicate First Amendment concerns, the United States Supreme Court has imposed additional requirements on public figures who seek to recover damages and on private persons who seek to recover for false light publicity involving matters of public concern.⁶⁵⁹ Specifically, the Court has held that to recover damages, a public figure must establish that

654. *Id.* at 10, 678 S.W.2d at 364 (citing ARK. STAT. ANN. § 37-201 (Supp. 1983) (current version ARK. CODE ANN. § 16-56-104(4) (Repl. 2005)). Read in context, this specific language suggests that the General Assembly sought to apply a one-year statute of limitations to slander *per quod*, which requires proof of special damages. A separate subsection 16-56-104(3) applies a one-year statute of limitations to “words spoken slandering the character of another,” *id.*, known at common law as slander *per se*, see *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 368–69, 961 S.W.2d 752, 755 (1998). The Arkansas Supreme Court abolished the distinction between defamation *per se* and defamation *per quod* in 1998, holding that reputational injury or “special damages” must be shown to recover an award of damages in any action for defamation. *Id.* at 370, 961 S.W.2d at 756.

655. *Dunlap*, 284 Ark. at 9–10, 678 S.W.2d at 364.

656. *Id.* at 10, 678 S.W.2d at 364.

657. ELDER, *supra* note 51, § 1:2.

658. See, e.g., *Dawson v. Assocs. Financial Servs. Co. of Kan., Inc.*, 529 P.2d 104, 111 (Kan. 1974) (finding that debt collection phone calls may amount to intrusion on seclusion and intentional infliction of emotional distress); see also RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977) (“[W]hen the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, . . . his privacy is invaded.”).

659. See *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (applying to false light privacy claim the standard announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1976), for defamation claims by public figures).

the defendant acted with actual malice.⁶⁶⁰ In addition, if the publicity involves a matter of legitimate public concern, the plaintiff must overcome constitutional concerns by meeting a higher burden of proof, although the extent of that burden has not been clearly delineated.⁶⁶¹

The issue not yet resolved by the federal courts is whether a *private* plaintiff must prove actual malice to recover damages for false light invasion of privacy pertaining to a matter *not* of legitimate public concern.⁶⁶² At least one scholar has predicted that First Amendment restrictions do not apply to private individuals who allege an invasion of privacy by false light publicity not involving a matter of public interest.⁶⁶³ However, the Eighth Circuit, applying Arkansas law, held in 1992 that even a private plaintiff must establish actual malice to recover damages for false light invasion of privacy, even though the publicity did not involve a matter of legitimate public concern.⁶⁶⁴ More recently, the Arkansas Supreme Court expressly left the question open in *Lee*, pointedly noting that neither party had objected to the jury instructions requiring the private plaintiff to prove actual malice.⁶⁶⁵

F. Scope of Familial and Relational Privacy Rights

Both state and federal courts have acknowledged that the right of privacy implicates familial and relational interests.⁶⁶⁶ For example, in

660. See *New York Times Co.*, 376 U.S. at 283.

661. See RESTATEMENT (SECOND) OF TORTS § 652E Caveat; ELDER, *supra* note 51, § 4:13.

662. See, e.g., *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 647–48 (Tenn. 2001) (adopting simple negligence standard for private plaintiff/private matter false light claims in light of United States Supreme Court’s “uncertain position . . . with respect to the constitutional standard for false light claims brought by private individuals about matters of private interest”); ELDER, *supra* note 51, § 4:13, at 4-155 (“In private person-non-public interest cases the law is undeveloped.”).

663. ELDER, *supra* note 51, § 4:13, at 4-156; see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (holding *Gertz* restrictions generally inapplicable to private plaintiffs alleging defamation not involving a matter of public interest).

664. See *Peoples Bank & Trust Co. of Mountain Home v. Globe Int’l Publ’g, Inc.*, 978 F.2d 1065, 1067–68 & n.2 (reasoning that proof of actual malice by clear and convincing evidence was required by Arkansas law).

665. *Walmart Stores, Inc. v. Lee*, 348 Ark. 707, 740, 74 S.W.3d 634, 657 (2002). “[T]he effect of the *Gertz* decision upon the Court’s holding in *Time, Inc. v. Hill* has been left in a state of uncertainty. For this reason, the American Law Institute added a caveat to section 652E leaving open the question of whether there may be liability based upon a showing of negligence as to truth or falsity.” *Lee*, 348 Ark. at 740, 74 S.W.3d at 657 (citations omitted).

666. E.g., *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 9–10, ___ S.W.3d ___, ___; *McCambridge v. City of Little Rock*, 298 Ark. 219, 230, 766 S.W.2d 909, 914 (1989); *Alexander v. Pathfinder*, 189 F.3d 735, 742–43 (8th Cir. 1999) (mother raised privacy interests of her disabled son when her conversations with him in his room were audiotaped); see also *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167–69 (2004) (observing that family of Vince Foster had legitimate interest in protecting photographs of

McCambridge,⁶⁶⁷ the Arkansas Supreme Court held that the mother of a murder-suicide victim had a constitutional privacy interest in restricting disclosure of certain documents, including a letter her son had written to her before he died.⁶⁶⁸ Similarly, in a federal Freedom of Information Act case, the United States Supreme Court acknowledged that the surviving family members of suicide victim Vince Foster could assert their own privacy interests in seeking to limit public disclosure of photographs of the deceased.⁶⁶⁹ The Court relied in part on the “well-established cultural tradition” acknowledging the family’s right to control the disposition of the remains and to limit the use of photographs of the body, which had “long been recognized at common law.”⁶⁷⁰ The Court also emphasized, however, that the privacy interests acknowledged by certain exceptions to the Freedom of Information Act go beyond the common law right of privacy.⁶⁷¹

The Arkansas Supreme Court has expressly and repeatedly acknowledged familial and relational privacy interests in recognizing a state constitutional right of privacy.⁶⁷² The constitutional right protects the privacy of sexual relationships between consenting adult partners,⁶⁷³ as well as eligibility to become foster parents regardless of marital status or sexual orientation.⁶⁷⁴ The constitutional privacy interest recently led a divided court to reverse a criminal conviction of a high school teacher for engaging in a consensual sexual relationship with an adult student.⁶⁷⁵ On the other hand, the Arkansas Supreme Court recently rejected a mother’s privacy claim asserting that her own right of privacy was violated when hospital employees violated federal criminal law by viewing photographs of her daughter, the vic-

suicide victim from public disclosure). *But see* *Boyd v. Thomson Newspaper Publ’g Co.*, 6 Media L. Rep. 1020, 1022 (W.D. Ark. 1980) (rejecting privacy interests asserted by parents for newspaper’s unauthorized publication of name of their deceased child).

667. 298 Ark. 219, 766 S.W.2d 909.

668. *Id.* at 230–32, 766 S.W.2d at 914–15.

669. *Favish*, 541 U.S. at 171 (“[P]ersonal privacy protected by [FOIA] Exemption 7(C) extends to family members who object to the disclosure of graphic details surrounding their relative’s death. . . .”).

670. *Id.* at 169 (citing, *e.g.*, *McCambridge*, 298 Ark. at 231–32, 766 S.W.2d at 915).

671. *Id.* at 170 (citations omitted).

672. *E.g.*, *Ark. Dep’t of Human Servs. v. Cole*, 2011 Ark. 145, at 15, 380 S.W.3d 429, 437 (acknowledging right of sexual cohabiters to engage in private, consensual, noncommercial acts of sexual intimacy in the privacy of their homes without prohibiting them from parenting by adoption or foster care); *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002) (recognizing “fundamental right to privacy implicit in [Arkansas] law protect[ing] all private, consensual, noncommercial acts of sexual intimacy between adults”).

673. *Jegley*, 349 Ark. at 632, 80 S.W.3d at 350.

674. *Cole*, 2011 Ark. at 21, 380 S.W.3d at 440.

675. *Paschal v. State*, 2012 Ark. 127, at 15, 388 S.W.3d 429, 438.

tim of a brutal rape, who later died of injuries inflicted by her assailant.⁶⁷⁶ The court refused to recognize a common law relational privacy interest, rejecting the reasoning of courts in a minority of other states that have allowed recovery in analogous circumstances.⁶⁷⁷

The Arkansas Supreme Court has been progressive in interpreting the state constitution to limit government invasions of relational and familial privacy interests. Yet the court has been much less inclined to recognize common law remedies against nongovernmental defendants for violation of familial and relational privacy interests. It remains to be seen whether the Arkansas Supreme Court will reconcile the two lines of cases, or whether the Arkansas General Assembly will enact legislation to address the issue.

G. Scope of the Arkansas Constitutional Right of Privacy

The most recent privacy law cases issued by the Arkansas Supreme Court illustrate a division among the justices concerning the scope of the fundamental right of privacy implicit in the Arkansas Constitution. In 2002, the court unanimously recognized in *Jegley v. Picado* that the constitutional right protects consensual sexual relationships between consenting adults, barring prosecution of gay and lesbian couples for violating the Arkansas criminal sodomy statute.⁶⁷⁸ Not long after, the court rejected an argument that mandatory DNA sampling for non-violent felons violated the state constitutional right of privacy.⁶⁷⁹ In dicta, the court distinguished *Jegley*, suggesting that the state constitutional right to privacy applied only to intimate sexual activity *in one's home*.⁶⁸⁰

In 2006, the court struck down a regulation of the Arkansas Child Welfare Agency Review Board declaring that no person who lives in a household with an adult homosexual may qualify as a foster parent.⁶⁸¹ The majority declined to reach the privacy issue, reasoning that the Board lacked statutory authority to adopt the regulation because it had not been shown to promote the health, safety, and welfare of children.⁶⁸² But Justice Brown concurred separately, noting that he would have reached the privacy issue. He

676. *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 10, ___ S.W.3d ___, ___. However, the court reinstated the mother's claim for intentional infliction of emotional distress. *Id.* at 10–11, ___ S.W.3d at ___.

677. *See, e.g., Catsouras v. Dep't of Cal. Hwy. Patrol*, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 4th Dist. 2010); *Sellers v. Henry*, 329 S.W.2d 214 (Ky. 1959); *Reid v. Pierce Cnty.*, 961 P.2d 333 (Wash. 1998).

678. *Jegley v. Picado*, 349 Ark. at 632, 80 S.W.3d at 350.

679. *Polston v. State*, 360 Ark. 317, 201 S.W.3d 406 (2005).

680. *Id.* at 332, 201 S.W.2d at 414 (dicta).

681. *Dep't of Human Servs. & Child Welfare Agency Review Bd. v. Howard*, 367 Ark. 55, 238 S.W.3d 1 (2006).

682. *Id.* at 65, 238 S.W.3d at 8.

reasoned that the regulation violated the constitutional privacy right of prospective foster parents “attending sexual conduct in the bedroom between two consenting adults.”⁶⁸³

In 2011, the court unanimously extended the scope of the constitutional right of privacy to protect the right of unmarried cohabiting sexual partners to decide whether to become foster parents.⁶⁸⁴ The unanimous court reasoned that cohabiting sexual partners, whether heterosexual or homosexual, should have the right to decide whether to become parents.⁶⁸⁵ The court struck down Act I because it automatically barred same-sex cohabiting couples from becoming foster parents as a matter of law, even if they otherwise met the qualifying criteria.⁶⁸⁶

The diverging perspectives on the Arkansas Supreme Court regarding the scope of the fundamental privacy right were revealed most clearly in 2012 in *Paschal v. State*,⁶⁸⁷ in which a slim majority reversed the conviction of a high school teacher for violating an Arkansas statute prohibiting a public schoolteacher from engaging in sexual contact with a student under age twenty-one. The conduct that led to the teacher’s prosecution was a consensual relationship with an eighteen-year-old student.⁶⁸⁸ The majority reversed the conviction, holding that the statute was unconstitutional as applied to Paschal.⁶⁸⁹ The three dissenting justices narrowly interpreted the right of privacy grounded in the Arkansas Constitution to protect only “a right to privacy . . . for consenting adults to have sexual relations *in the privacy of their homes*.”⁶⁹⁰ The dissenters would have upheld Paschal’s conviction, reasoning that his conduct indisputably violated the criminal statute and did not implicate the fundamental right of privacy.⁶⁹¹

In summary, the Arkansas Supreme Court unanimously embraces the principle that the Arkansas Constitution guarantees a fundamental right of privacy with respect to consensual adult sexual relationships. However, the parameters of that right remain unclear, undoubtedly inviting continued litigation.⁶⁹² It remains to be seen whether a majority of the Arkansas Supreme Court will continue to extend the right to any adult consensual sexual relationship, with a focus on personal autonomy to engage in consensual sexual

683. *Id.* at 70, 238 S.W.3d at 11 (Brown, J., concurring).

684. Ark. Dep’t of Human Servs. v. Cole, 2011 Ark. 145, at 26, 380 S.W.3d 429, 443.

685. *Id.* at 18–19, 380 S.W.3d at 439.

686. *Id.* at 24–25, 380 S.W.3d at 442.

687. 2012 Ark. 127, 388 S.W.3d 429.

688. *Id.* at 3, 388 S.W.3d at 432.

689. *Id.* at 11–12, 388 S.W.3d at 436.

690. *Id.* at 19, 388 S.W.3d at 440 (emphasis added) (Brown, J., joined by Gunter & Baker, JJ., dissenting in part and concurring in part).

691. *Id.* at 22–23, 388 S.W.3d at 441–42.

692. As the Eighth Circuit has observed, “[o]bscure” might best describe the [constitutional] right of privacy.” *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006).

relationships; or whether the court's policy focus is to protect the right of cohabiting partners and their families to make personal decisions, in the setting of the home, about how they conduct their daily lives.

H. Private Civil Claims for Invasion of Privacy Based on Violation of Criminal Statutes

Under the Arkansas crime victims civil liability statute,⁶⁹³ criminal conduct that would amount to a felony offense under Arkansas law may support a civil cause of action for damages by any person harmed by the defendant's conduct.⁶⁹⁴ If the person dies, the cause of action survives and may be filed on behalf of the estate.⁶⁹⁵ First enacted in 1997, the crime victims civil liability statute was amended in 2011 to exclude criminal abuse of adults⁶⁹⁶ and Medicaid fraud.⁶⁹⁷ Otherwise, conduct defined by Arkansas law as a felony may be the factual basis for a civil claim, whether or not the offender is prosecuted for the criminal offense. Only a preponderance of the evidence is required to prove each element of the claim, and a prevailing plaintiff may recover attorney fees and costs as well as damages.⁶⁹⁸

To date, no published decision has relied on the crime victims civil liability statute to support a civil claim redressing invasion of privacy. But the Arkansas General Assembly has recently enacted several criminal statutes addressing such privacy-related offenses as identity fraud, computer fraud, breach of privacy, and similar offenses. The elements of these novel criminal offenses may or may not squarely fit within the elements of the four traditional variations on the common law right of privacy. Therefore, the crime victims civil liability statute may offer an alternative basis for asserting a claim for invasion of privacy beyond the four privacy torts recognized by Arkansas common law and the Restatement (Second) of Torts. Moreover, the Arkansas Supreme Court recognizes that a statutory claim and a common law claim seeking damages for the same injury may be asserted in the same action.⁶⁹⁹

693. ARK. CODE ANN. § 16-118-107 (Supp. 2011).

694. *Id.* § 16-118-107(a)(1); *see* LasikPlus Murphy, M.D., P.A. v. LCA-Vision, Inc., 776 F. Supp. 2d 886, 903 & n.7 (E.D. Ark. 2011) (holding that plaintiff stated facially plausible claim for civil recovery under ARK. CODE ANN. § 16-118-107 alleging violation of Arkansas criminal forgery statute).

695. ARK. CODE ANN. § 16-118-107(a)(2)–(3).

696. *Id.* §§ 5-28-101 to -110 (Repl. 2005 & Supp. 2011).

697. *Id.* §§ 5-55-101 to -114 (Repl. 2005 & Supp. 2011).

698. *Id.* § 16-118-107(a)(2)–(3).

699. *See* Koch v. Northport Health Servs. of Ark., LLC, 361 Ark. 192, 202, 205 S.W.3d 754, 762 (2005) (holding that jury was entitled to reach conflicting results in relation to ordinary negligence claim and statutory claim, which were distinct).

Arkansas felony criminal offenses within the scope of the crime victims civil liability statute include voyeurism,⁷⁰⁰ video voyeurism,⁷⁰¹ financial identity fraud,⁷⁰² stalking,⁷⁰³ residential⁷⁰⁴ or commercial burglary,⁷⁰⁵ forgery,⁷⁰⁶ criminal impersonation,⁷⁰⁷ computer fraud,⁷⁰⁸ computer trespass,⁷⁰⁹ unlawful acts involving electronic mail,⁷¹⁰ and computer password disclosure,⁷¹¹ among others. Moreover, another Arkansas statute specifically authorizes a civil cause of action for damages, including loss of profits, by any person injured by the commission of certain computer-related crimes, whether or not classified as felony offenses.⁷¹²

Arkansas common law has long recognized that a violation of a statute or ordinance may be considered by the factfinder as evidence of negligence.⁷¹³ Because invasion of privacy generally has been considered an intentional tort, it is debatable whether this common law rule might be used in support of a claim for invasion of privacy.

A related issue is whether a violation of a *federal* criminal statute may support a civil claim for invasion of privacy under Arkansas law. For example, in *Cannady*, three of the hospital's employees pleaded guilty to a criminal violation of HIPAA for unlawfully viewing medical records and photographs of the plaintiff's decedent.⁷¹⁴ Thereafter, the decedent's mother, on her own behalf and on behalf of her daughter's estate, filed suit against the hospital for invasion of privacy and intentional infliction of emotional distress.⁷¹⁵ The Arkansas Supreme Court affirmed the trial court's dismissal of the privacy claims, reasoning that a claim for invasion of privacy does not survive the decedent, and the mother could not assert her own relational

700. ARK. CODE ANN. § 5-16-102(c)(2) (Supp. 2011) (class D felony).

701. *Id.* § 5-16-101(a) (Supp. 2011).

702. *Id.* § 5-37-227(a) (Supp. 2011) (class C felony; class B felony if victim is elderly or disabled).

703. *Id.* § 5-71-229(a) (Supp. 2011) (class B felony for first degree; class C felony for second degree).

704. *Id.* § 5-39-201(a)(1) (Repl. 2006) (class B felony).

705. *Id.* § 5-39-201(b)(1) (class C felony).

706. ARK. CODE ANN. § 5-37-201 (Supp. 2011) (class B or C felony).

707. *Id.* § 5-37-208 (Repl. 2006) (class D felony for first degree).

708. *Id.* § 5-41-103(a) (Repl. 2006) (class D felony).

709. *Id.* § 5-41-104(a) (Repl. 2006) (class D felony if violation causes loss or damage of \$2,500 or more).

710. *Id.* § 5-41-205(a) (Repl. 2006) (class D felony).

711. *Id.* § 5-41-206(a) (Repl. 2006) (class D felony if committed to devise or execute scheme to defraud or illegally obtain property).

712. ARK. CODE ANN. § 5-41-106(a) (Repl. 2006) (any computer-related crime in subchapter 1 of Chapter 41).

713. *See* ARKANSAS MODEL JURY INSTRUCTIONS CIVIL 601, 901 (Ark. Supreme Court Comm. on Jury Instructions 2013).

714. *Cannady v. St. Vincent Infirmary Med. Ctr.*, 2012 Ark. 369, at 2, ___ S.W.3d ___.

715. *Id.*, ___ S.W.3d at ___.

privacy claim based on the undeniable violation of the decedent's privacy interests.⁷¹⁶

Because the defendant hospital's employees pleaded guilty to a violation of HIPAA, that criminal conduct might have provided a basis for asserting a claim for invasion of privacy under the crime victims civil liability statute, or perhaps even under common law.⁷¹⁷ Arkansas courts have occasionally allowed a violation of a federal statute or regulation to be considered evidence of negligence.⁷¹⁸ While the Arkansas courts have been lenient in allowing fact finders to consider statutory violations as evidence of negligence, it is unclear whether they would do so in support of a claim for invasion of privacy.⁷¹⁹

Thus, aside from the Arkansas statutes expressly authorizing civil claims based upon conduct that would justify criminal prosecution, it remains an open question whether a defendant's violation of a federal or state statute may be considered in support of a tort claim for invasion of privacy.⁷²⁰

V. CONCLUSION

From its beginning in the early years of the twentieth century, privacy law has been shaped and influenced by societal norms. As developments in technology continue to enable widespread media publicity, electronic sur-

716. *Id.* at 8, ___ S.W.3d at ___.

717. *Cf.* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 38 (2012) ("When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.").

Both federal and state courts may rely on federal statutes or regulations to recognize an affirmative duty in tort law. When they do so, they are determining state law, as there is no general federal common law. The use of a federal enactment to find a state-law affirmative duty is permissible so long as the federal provision does not preempt state tort-law liability. The use of federal legislation as the basis for finding an affirmative duty is, in this respect, analogous to a court determining that violation of a federal provision constitutes negligence per se in a tort case governed by state law.

Id. cmt. b.

718. *See, e.g.,* Koch v. Northport Health Servs. of Ark., LLC, 361 Ark. 192, 207–08, 205 S.W.3d 754, 766 (2005) (dicta) (holding violations of federal nursing home regulations provided evidence of negligence, even if the regulations did not specifically govern the case (citing Dunn v. Brimer, 259 Ark. 855, 537 S.W.2d 164 (1976))); Franco v. Bunyard, 261 Ark. 144, 147, 547 S.W.2d 91, 93 (1977) (holding violation of federal gun control laws was sufficient evidence of negligence to preclude summary judgment).

719. A federal trial court has recently suggested rather cryptically that an alleged violation of a federal criminal statute does not apply to the Arkansas crime victims civil liability statute. *See* LasikPlus Murphy, M.D., P.A. v. LCA-Vision, Inc., 776 F. Supp. 2d 886, 903 & n.7 (E.D. Ark. 2011).

720. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 38.

veillance, and instant global telecommunications, privacy interests and their protections have claimed increasing public attention.

Arkansas was a relative latecomer to the field of privacy law, first acknowledging the state common law right of privacy in 1962. In the years since, Arkansas courts have generally interpreted the common law right consistent with the four distinct privacy torts identified and defined by the American Law Institute in the Restatement (Second) of Torts. Forty years after recognizing the common law right, Arkansas was among the first to interpret its state constitution to guarantee a fundamental right of privacy, at least with respect to decision making about intimate consensual adult relationships.

The Arkansas Supreme Court continues to clarify the scope of the state constitutional right, most recently interpreting it to ensure that households with cohabiting unmarried couples are not categorically barred from serving as foster parents.⁷²¹ Whether the fundamental right of privacy implicit in the Arkansas Constitution extends to informational privacy, procreational decision making, or other privacy interests remains to be seen.

While the Arkansas General Assembly has recently enacted several criminal statutes to address concerns related to informational and computer privacy, it is unclear whether the threat of criminal prosecution will sufficiently deter intrusive conduct. Arkansas statutes authorize civil claims to redress injuries caused by felony violations, but this alternative appears to be seldom used because no cases have reached the appellate courts.

The Arkansas Supreme Court has taken the lead in delineating the progressive state of privacy law in Arkansas. Yet challenging new issues are on the horizon. Recent enactments of the Arkansas General Assembly restricting abortion rights will no doubt test the limits of the state constitutional right of privacy. The United States Supreme Court's recent decision holding the federal statutory definition of marriage unconstitutional as a violation of the Fifth Amendment's Due Process Clause raises important privacy-related issues for Arkansas and other states with respect to defining the traditional institution of marriage. Finally, the new Restatement (Third) of Torts is well underway by the American Law Institute, which may suggest further opportunities for expanding the reach of privacy rights in Arkansas. Twenty years from now, the evolving state of privacy law in Arkansas will no doubt call for yet another update.

721. Ark. Dep't of Human Servs. v. Cole, 2011 Ark. 145, at 26, 380 S.W.3d 429, 443.