



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Spring 2023 Vol. 12, No. 3 Editor Emerita Lynne Liberato Editor-in-Chief Hon. John G. Browning

Columns

Message from the President

By Hon. Ken Wise

This issue features bigger than life characters who shaped the character of our state in very different ways. [Read more...](#)



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Using the law to examine history helps us better understand not just the legal system, but the society behind that system. [Read more...](#)



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By David J. Beck

Our acclaimed judicial civics and history books have been taught in schools since 2016. [Read more...](#)



David J. Beck

Editor-in-Chief's Column

By Hon. John G. Browning

I never thought of my passion for legal history as something that would take me all over the country, but it certainly has. [Read more...](#)



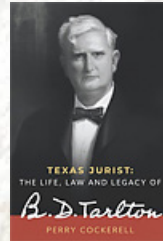
Hon. John G. Browning

Leads

Texas Jurist: The Life, Law and Legacy of B.D. Tarlton

By Perry Cockerell

It took over four years to research and write my biography of Benjamin Dudley Tarlton, who served as the first chief justice of the Second Court of Civil Appeals in Fort Worth from 1892 to 1898. [Read more...](#)



And Hell Came With Him: How a Notorious Old West Outlaw Escaped Texas Justice

By Chad Baruch

If you want to become an outlaw legend of the Old West, getting blasted into eternity by Wyatt Earp isn't the worst way to go about it. [Read more...](#)



Curly Bill Brocius

The History of the Common Law Right to Privacy in Texas, Part II

By John C. Domino

This part turns to the adoption by Texas courts of a constellation of common law tort doctrines and state constitutional provisions that constitute the right to privacy in its present form. [Read more...](#)



Justice Gray Denton, who ruled that the violation of the right to privacy is a tort.

Feature

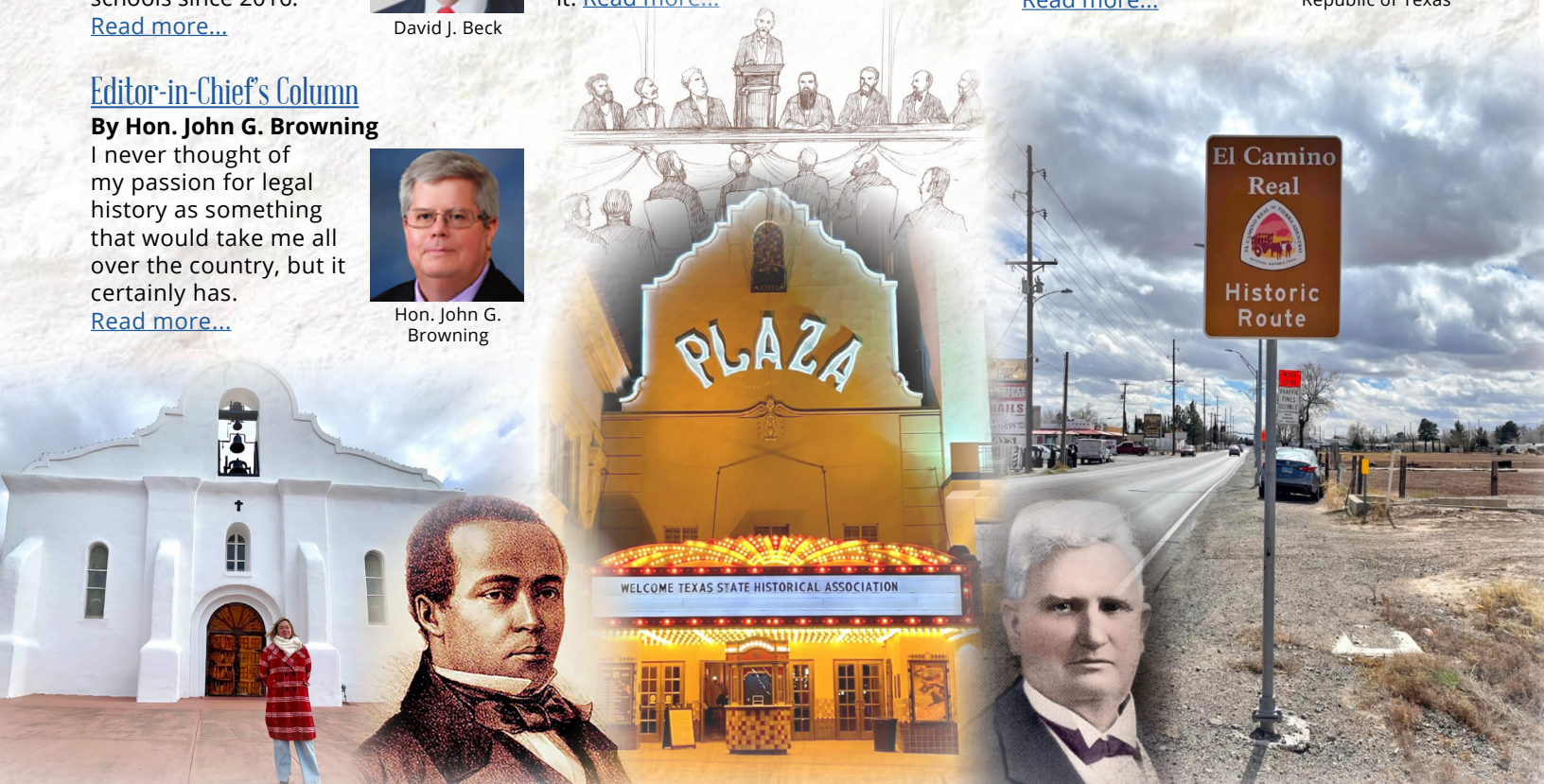
Historic Irony and Modern Perspective: Slavery and the Supreme Court of the Republic of Texas

By David Coale

During its short but prolific life, the Supreme Court of the Republic of Texas wrote three opinions in civil cases involving slavery. [Read more...](#)



Seal of the Republic of Texas



News & Announcements

Advancing the Rule of Law along Contested Frontiers: the 2023 TSHA Annual Meeting

Story and photos by David A. Furlow

Our society made its annual contribution to Texas history at the Texas State Historical Association's 127th Annual Meeting from March 3-4 in Old El Paso, [Read more...](#)



And the 2023 Larry McNeill Research Fellowship in Texas Legal History goes to... John Domino

Article and photos by David A. Furlow
Congratulations to John Domino, the winner of the Texas State Historical Association's 2023 Larry McNeill Fellowship in Legal Research. [Read more...](#)



John Domino

In Memoriam:

Colbert Nathaniel Coldwell, 1943-2023

By David A. Furlow

A long-time friend of this Society, El Paso attorney Colbert Nathaniel Coldwell, passed away on March 17, 2023. [Read more...](#)



Colbert Coldwell

Journal Editor-in-Chief Wins Posthumous Bar Admission For 1855

Black Dartmouth Grad

Securing posthumous bar admission for an aspiring lawyer of color who was denied entry to the legal profession on racial grounds has only happened six times in American legal history. [Read more...](#)



Dartmouth grad
Edward G. Draper

Journal's Production Manager

Takes to the Stage

Production photos by Suzanne Cordeiro

The Production Manager of our Journal, David Kroll, performed in a production of the play *ROE* in April. The play gives context to the landmark U.S. Supreme Court case *Roe v. Wade* and its aftermath. [Read more...](#)



Kroll as Justice
Harry Blackmun

Membership & More

Officers, Trustees & Court Liaison

2022-23 Membership Upgrades

2022-23 New Member List

Join the Society



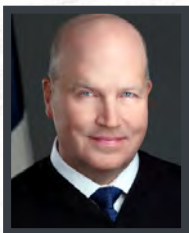
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FB: Texas Supreme Court Historical Society

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Hon. Ken Wise

Message from the *President*

Welcome to the Spring 2023 edition of the Journal. Thank you for your continued support of the Society and the wonderful legal history of Texas. This issue of the Journal is special because this is a special year. It's the bicentennial of the storied Texas Rangers. This issue of the Journal centers on law and order in frontier Texas. Two of our leads feature bigger than life characters who shaped the character of our state in very different ways.

Chad Baruch brings to life the outlaw legend of the Old West, Curly Bill Brocius in "And Hell Came with Him: How a Notorious Old West Outlaw Escaped Texas Justice." "Texas Jurist: The Life, Law and Legacy of B.D. Tarlton" by Perry Cockerell, explores the life of the first chief justice of the Second Court of Civil Appeals in Fort Worth from 1892 to 1898.

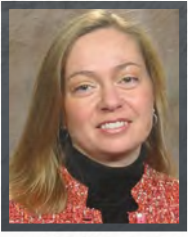
We also feature part two of Dr. John Domino's fascinating three-part series "The History of the Common Law Right to Privacy in Texas." "Historic Irony and Modern Perspective: Slavery and the Supreme Court of the Republic of Texas" by David Coale offers perceptive insight into the three opinions in civil cases involving slavery written by the Supreme Court of the Republic of Texas.

Editor Emeritus David Furlow gives us picture-rich coverage of the Society's panel "Advancing the Rule of Law along Contested Frontiers" at the 2023 TSHA Annual Meeting and also introduces us to this year's winner of the Larry McNeill Award.

Finally, I am excited to announce that the speaker for our upcoming John Hemphill Dinner will be Chief Jason Taylor of the Texas Rangers. The Texas Rangers celebrate their 200th anniversary this year and are without doubt one of the most storied law enforcement organizations in the world. They began as an organization of the Mexican government in pre-Republic Texas and have evolved into their present structure under the modern Texas Department of Public Safety. Our summer issue of the Journal will be titled "Holding the Reins of Justice: 200 Years of the Texas Rangers" and will feature the Rangers. You will not want to miss this unique opportunity to hear from the Chief of an organization that has played a significant and important role in the legal history of Texas...the Texas Rangers.

We hope you enjoy this issue!

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Sharon Sandle

Images of Our Past Selves:

Bringing History into Focus through a Legal Perspective

The laws people choose for themselves describe the society they live in.” Chief Justice Nathan Hecht uses that statement to begin his foreword for *Taming Texas: How Law and Order Came to the Lone Star State*. Like history, the law concerns itself with facts, and like history, the law must then interpret those facts and reach a conclusion about them. The Texas Supreme Court Historical Society is dedicated to preserving the history of the Texas judicial system, and this edition of the Journal illustrates how using the lens of the law to examine history helps us better understand not just the legal system, but the society behind that system. For example, in his article “Historic Irony and Modern Perspective: Slavery and the Supreme Court of the Republic of Texas,” David Coale uses the lens of the law to explore assumptions about slavery during the Republic of Texas and the irony that the opinions he examines each “[void] a slave-related conveyance as unfair, while never acknowledging the far greater unfairness of slavery itself.”

In his article “And Hell Came with Him: How A Notorious Old West Outlaw Escaped Texas Justice,” Chad Baruch contrasts the legends surrounding Curly Bill Brocius with the facts surrounding his arrest, prosecution, and conviction for robbery and attempted murder in El Paso as William Bresnaham. Curly Bill resisted confinement in life—he escaped from jail and fled to Mexico after his conviction and amid legal filings for a new trial. And Curly Bill’s story resists confinement to the legal documents that describe the trial that took place in El Paso. Even the link between William Bresnaham and Curly Bill comes not from the court records of Bresnaham’s case, but from newspaper articles recounting the story Curly Bill told Wyatt Earp during a lengthy wagon ride. But the court records are an important lens for the story. The court records verify what might otherwise simply be a tall tale. And the court records illuminate the struggle to tame what was an atmosphere of violence and lawlessness.

In his foreword, Justice Hecht goes on to say that “[o]ver the years, as people have changed . . . laws and courts have changed with them.” This truth is borne out by Society Journal Editor-in-Chief John G. Browning’s efforts to secure the posthumous bar admission of Edward Garrison Draper.

Draper, a free Black man and Dartmouth graduate, was denied admission to the Maryland bar despite demonstrating that he was “qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen” of the state. Thanks to Browning’s historical research, that injustice will be corrected by the Supreme Court of Maryland.

The Society is proud to be a part of the ongoing work of preserving legal history. This work is carried out not just in the Society’s Journal, but in its other activities and initiatives. This spring, the Society partnered with TexasBarCLE to put on the *Texas Supreme Court 2023: History & Current Practice* webcast. This program occurs biannually, and it has a rich tradition of including original historical research. This year was no exception, as the course began with an in-depth discussion of the history and development of Rule 76a, the record sealing rule. Speakers included lawyers and judges directly involved in that history, including Charles L. “Chip” Babcock IV, Society Immediate Past President and SMU Dedman School of Law professor Tom Leatherbury, Texas Supreme Court Justice (Ret.) Raul Gonzalez, and Chief Justice Nathan Hecht. The history of this important legal development lives within the memories of those who participated in it, and this CLE event was an important step in recording that history.

Current Society President and 14th Court of Appeals Justice Ken Wise contributed his own scholarship to the Society this year with a presentation on the first Supreme Court of Texas at the *Texas Supreme Court 2023* CLE event. And Justice Wise’s presentation at the Texas State Historical Association Annual Meeting used the lens of the legal system to illuminate the cultural differences at play between Native Americans and American settlers during the Plains Indian Wars.

Justice Hecht concludes his foreword saying “[a]s we look to the future, we must not forget the past that led us here.” Justice Hecht’s admonition to look at legal history to understand ourselves is directed at Texas’s students, but looking at the world through the lens of the law is important for all of us. We live in an era where competition for our attention comes from so many directions, each with a different agenda. The mission of the Texas Supreme Court Historical Society is to ensure that in that melee of voices, we don’t lose sight of our civic history.

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



Our acclaimed judicial civics and history books, *Taming Texas: How Law and Order Came to the Lone Star State*; *Law and the Texas Frontier*; and *The Chief Justices of Texas* have been taught in schools since 2016. The Houston Bar Association (HBA) is again using our *Taming Texas* materials this Spring to teach seventh graders in Houston-area schools. We appreciate the HBA and its President, Chris Popov, partnering with us on *Taming Texas* again this year. It will take over sixty lawyers and judges to reach the thousand-plus students we will teach this year, and we could not implement this vast program without the HBA's invaluable support.

In the past six years, *Taming Texas* has reached over 23,000 Houston-area students. This year, the HBA is visiting 5 schools and there will be 40 classes, which represents 80 in-person lessons. All classes will be in-person. "The *Taming Texas* program provides lawyers an opportunity to serve as role models for young people in our community, teach them about the rule of law and highlight the advancement of women and people of color in the legal profession in recent decades in Texas," said Richard Whiteley, HBA program co-chair.

Past co-chairs of the HBA program include Society Trustees Justice Brett Busby, Justice Ken Wise, and Judge Jennifer Walker Elrod. We appreciate their service as co-chairs and longtime supporters of the program. If you would like to participate in this important program, please contact the HBA.

We are pleased that the Austin bar will be joining us in implementing *Taming Texas* in Austin-area schools in the 2023-24 school year and we are working on an expansion in Dallas schools. We will provide more information on these programs in upcoming columns.

Our anticipated fourth book, entitled *Women in the Law*, has arrived from the printer. This new book features stories about some of the important women in Texas legal history. In addition to biographical information, the book covers associated legal and political issues. Some of the judges and lawyers featured include: Hon. Debra Lehrmann, Hon. Jane Bland, Hon. Rebeca Huddle, Hon. Eva Guzman, and many other judges, legislators, activists, and practicing attorneys. The book's back cover features favorable comments on the book by Society Fellows Justice Jane Bland, Justice Harriet O'Neill, and Lynne Liberato. Chief Justice Hecht has written the foreword for this book, as he has done for the prior three books. Jim Haley and Marilyn Duncan are the authors of all four

of the *Taming Texas* books. We appreciate the support for this important project given by Chief Justice Hecht and the entire Court.

Our exclusive event, the annual Fellows Dinner, is one of the benefits of being a Fellow. At the dinner each year, the Fellows gather with the Justices of the Texas Supreme Court for a wonderful evening of history, dinner, and conversation. We are already working on plans now for our next event at a unique Austin venue. Further details will be sent to all Fellows.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government, and the history of our Supreme Court. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work.

If you would like more information, or want to nominate someone as a Fellow, or want to join the Fellows, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck*
David E. Chamberlain

Joseph D. Jamail, Jr.*
(deceased)

Thomas S. Leatherbury
Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander
Marianne M. Auld
Robert A. Black
Hon. Jane Bland and Doug Bland
E. Leon Carter
Harry L. Gillam, Jr.
Marcy and Sam Greer
William Fred Hagans
Lauren and Warren Harris*
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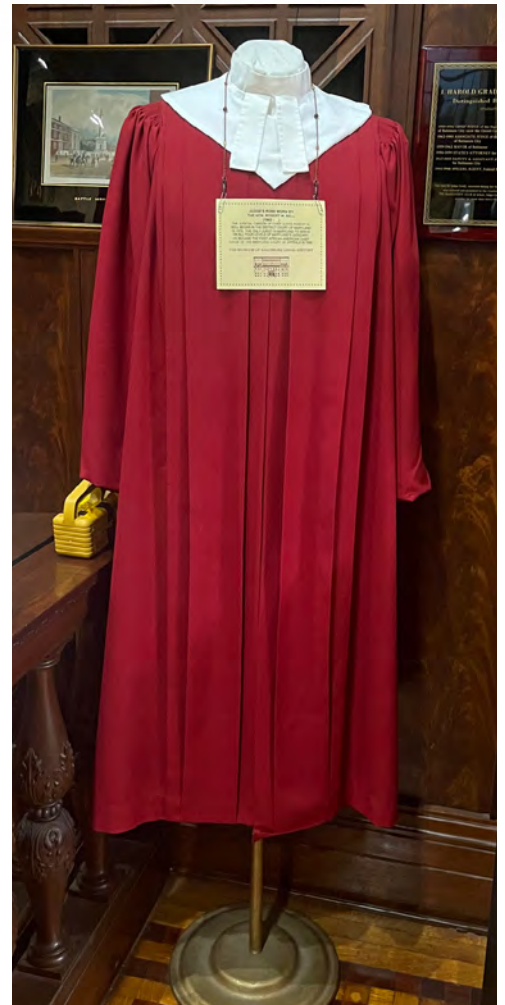
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Hon. John G.
Browning

Experiencing History, *All Over the United States*

I never thought of my passion for legal history as something that would take me all over the country, but it certainly has. Just the past several months have been remarkable. In early February, the Black Law Students Association held its Regional Symposium in Orlando, Florida, and invited me to speak about my forthcoming article in the *Southern Journal of Policy and Justice* about the history of posthumous bar admissions in America. Two weeks later, I found myself in Baltimore, Maryland to speak at a University of Baltimore Law School Symposium about the history behind the integration of the Maryland bar. The morning after my presentation, I visited the Museum of Baltimore Legal History in the historic Mitchell Courthouse downtown. The museum itself is a beautifully preserved courtroom from the turn of the century, now packed with exhibits like the original order admitting the first Black lawyer to practice and one of the distinctive red robes worn by Maryland appellate judges in Maryland (the one pictured here belonged to Chief Judge Robert Bell, the first African American chief judge of the Maryland Court of Appeals).



Baltimore is a city that loves its rich history, and the interest surrounding my talk led to two newspaper interviews and an appearance on NPR. But soon it was off to Washington, D.C. to record a presentation for the Supreme Court Historical Society about the earliest Black Supreme Court advocates. After that, it was back to work. But upon my return, my article in the *Georgia Bar Journal* about that state's first Black lawyers came out, and with it arrived an outpouring of calls and emails from Georgia attorneys thanking me for writing about an overlooked part of their history.



Exhibits in the Museum of Baltimore Legal History.

And since one of Georgia's first Black lawyers had gone on to a prominent career in Tennessee, my research led to a fortuitous crossing of paths with Tennessee lawyer Russell Fowler. The director of litigation and advocacy for Legal Aid of East Tennessee, Russell is an avid and knowledgeable legal historian who prolifically writes for the *Tennessee Bar Journal* on historical subjects. Some of his extensive research has a Texas connection, and I'm grateful for Russell's commitment to contribute to a future issue of our Journal.

You really do meet the nicest people working in legal history. In April, I was honored to speak at a symposium at Nova Southeastern University's Shepard Broad School of Law in South Florida. Although my topic—the impact of artificial intelligence on advocacy in the twenty-first century—was more about the future than the past, I was delighted to make the acquaintance of the school's dean, José Roberto (Beto) Juarez, Jr. Dean Juarez, it turns out, not only has Texas roots—he graduated from U.T. Law School, began his legal career in Galveston, and previously was a professor and dean at St. Mary's Law School—he is also a legal historian. One of his areas of scholarly interest is the impact of Spanish law in areas like marital property on the development of law in the early Texas republic and beyond.

I'm incredibly grateful for the doors that have opened and the friendships that I've formed thanks to a shared passion for legal history. From organizations like the California Supreme Court Historical Society to the Historical Society of the New York Courts, and from the Supreme Court Historical Society to the Alabama Bench & Bar Historical Society, I've been welcomed with open arms and generous offers of assistance on projects of mutual interest. I've been blessed to get to know independent scholars and historians in Kentucky, Pennsylvania, South Carolina, Maine, New York, and many other states. This shared love of history is a wonderful thing, indeed. I hope that our fascinating articles in this issue, ranging from John Domino's continued look at how Texas privacy law evolved to Perry Cockerell's biography of Chief Justice Benjamin Tarlton and Chad Baruch's look at notorious outlaw "Curly Bill" Brocius and his brush with Texas justice reinvigorate your love of history as well.

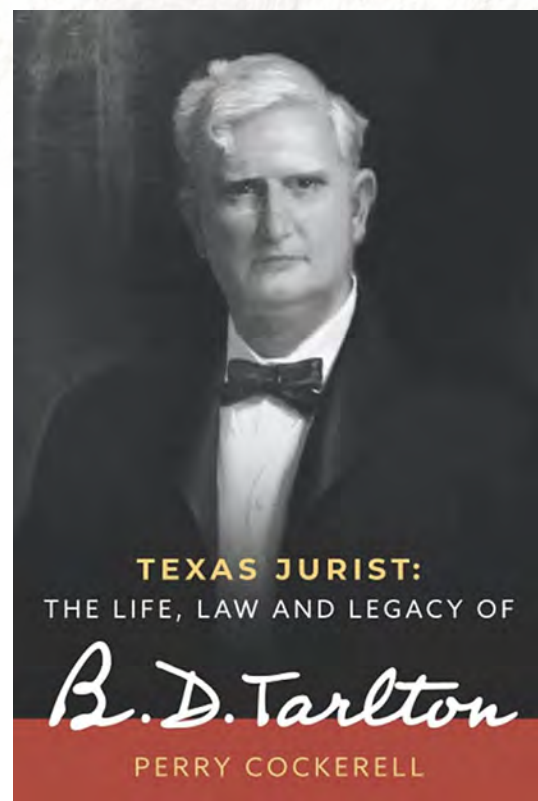
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Texas Jurist:

The Life, Law and Legacy of B.D. Tarlton

By Perry Cockerell

It took over four years to research and write my book, *"Texas Jurist: The Life, Law and Legacy of B.D. Tarlton,"* a 332-page biography of Benjamin Dudley Tarlton, who served as the first chief justice of the Second Court of Civil Appeals in Fort Worth from 1892 to 1898. Many attorneys might recognize his name and portrait prominently displayed at the entrance of the Tarlton law library at the University of Texas School of Law. They might be surprised to learn that my book is the only biography of him and that it was written with the cooperation and contributions from the descendents of B.D. Tarlton including interviews with Frances "Sissy" Farenthold, his granddaughter. Many leading appellate attorneys in Texas contributed to the book by analyzing some of the Tarlton decisions.¹ This article is a synopsis of the book.



The Tarltons

The Tarltons can be traced back to Liverpool, England in the thirteenth century. B. D. Tarlton's grandfather was Jeremiah Tarlton who married Mary Herbert Briscoe and settled in Scott County, Kentucky. The family had eight children. Two of their sons became medical doctors, John Tarlton, (B.D. Tarlton's father) and Llewellyn "Leo" Tarlton. B.D.'s father was educated at Transylvania University in Lexington, Kentucky. "It was the Harvard of the West," said Sissy Farenthold, the one-time Vice-Presidential nominee in 1972 and Texas state legislator.

The Tarltons lived in an era when yellow fever could be a deadly serious epidemic. Dr. Tarlton's dissertation at Transylvania University was on *Bilious Remitting Fever*. "Yellow fever took the lives of many people back then. I spoke at the university in 1990, and they gave me a copy of his thesis," Sissy Farenthold recalled.

¹ Stephen Alton, Jason Boatright, Jerry Bullard, William Chriss, Dylan Drummond, Steve Hayes, Allan Howeth, Roland Love, Chad Ruback, Scott Stolley, JoAnn Story.

After graduation, Dr. Tarlton moved to Sumter County, South Carolina and married Caroline Mary Belser Tarlton. The couple moved to Mobile, Alabama where Dr. Tarlton and his brother, Dr. Leo Tarlton established a medical practice together. The family had five children but only one, John Belser Tarlton lived into adulthood.

In 1837, Dr. Tarlton's wife died at age thirty-six leaving him with minor children. Before long, Dr. Tarlton became acquainted with Jane Toulmin Caller who was married, but her husband's health and financial condition were in doubt. Jane Caller had a twenty-two-year-old unmarried daughter, named Frances Caller. Jane Caller and Frances Caller needed security, and Dr. Tarlton needed a wife; his children needed a young mother.

"He courted the mother and married the daughter," said Sissy Farenthold, based on stories passed down after years of family gatherings.

In 1838 Dr. Tarlton and Frances Caller were married. They would have ten children: Emma Jane, Frances Celia, Theophilus Toulmin, Benjamin Dudley, Green Duke, Peter Richardson, Frank Ross, Helen Gaines, Richard Manning and Fanietta. Of these children, B.D. Tarlton, the second born son became the most influential descendent, being an attorney, a Texas state legislator, Justice on the Texas Commission of Appeals, Chief Justice of the Second Court of Civil Appeals in Fort Worth, and fifteen-year law professor at the University of Texas. The first-born son, Toulmin Tarlton followed his father's footsteps and became a medical doctor. The third son, G.D. Tarlton became an attorney and law partner with B.D. Tarlton in Hillsboro, Texas.

Looking back over 186 years, it could be argued that Jane Caller was a significant link to the history of the Second Court of Appeals in Fort Worth by arranging for her daughter to marry Dr. John Tarlton, the father of B.D. Tarlton.

The St. Mary Plantation

In 1846, Dr. Tarlton and his brother, Dr. Leo Tarlton closed their medical practice and moved their families to St. Mary's Parish in Louisiana to acquire sugar plantations.

"The sugar cane was like a gold rush," said Erin Shirley, Chair of the Morgan City Archives Commission in Morgan City, Louisiana. "The land was cheap; the labor was cheap."

Dr. John Tarlton's purchased property located along the Bayou Boeuf, a transit lane for steamboats to Franklin, Louisiana, an inland port and county seat of St. Mary's Parish.

In 1857, Dr. Tarlton purchased an adjoining tract of land from Elizabeth McWaters for \$75,000 and assumed the prior mortgages on the property. This transaction came with slaves. To close the transaction, Dr. Tarlton released his wife's dowry claim on the property. As time went on, each time Dr. Tarlton purchased real estate, he subsequently experienced litigation over the property which involved judgment lien creditors, boundary disputes or mortgagees foreclosing their liens.

When it was time to educate the young boys, Dr. Tarlton looked to St. Charles College, an elite Catholic college for boys run by the Jesuits located in Grand Coteau, Louisiana. Dr. Tarlton resumed his medical practice by joining with Dr. Edward Millard, the staff physician of St. Charles College. Next to the college was Sacred Heart Academy, an all-girls educational institution.

The Civil War

The Civil War broke out while the Tarlton boys were attending St. Charles College. *The Battle of Grand Coteau* occurred on November 3, 1863, when three thousand Union troops engaged four hundred Confederate soldiers who opened fire with cannons and muskets as the Union marched into the area announcing their arrival with drums and bugles. The nuns at the Sacred Heart Academy witnessed the battle from the academy and prayed for an end to the conflict. The Union suffered casualties of 26 killed, 124 wounded, and 566 captured or missing. The Confederates admitted a loss of 22 killed and 103 wounded.

In September 1864, Union soldiers entered the Tarlton plantation in St. Mary's Parish. The Tarltons were living in St. Landry's Parish on their second plantation. By that time St. Mary's Parish had been liberated by the Union and the state had adopted the Thirteenth Amendment. It is believed that Dr. Tarlton shut down his plantation operation during the war and could not pay the mortgages on the properties. It is not known how the slaves survived but they did not leave his plantation. The Union soldiers coming to the Tarlton plantation was recorded by a newspaper journalist who drew a photo of the event published in the *Frank Leslie's Illustrated Newspaper*. The photo shows slaves, indigenous Indians, Union soldiers and a steamboat in the background.



The Tarlton plantation in September 1864, prior to the end of the Civil War.

A Miracle in Grand Coteau

The miracle of Grand Coteau was the curing of the young novice, Mary Wilson who was in ill health and had come to Sacred Heart Academy from Canada for better conditions. She fell ill shortly after arriving at the academy in 1866. She could not drink water or hold any food down. She was slowly dying and nothing could be done, except for prayer. She was given her last rites. Dr. Edward Millard, who was Catholic, had attended to her for forty days.

The Jesuit priests at St. Charles College gave two novenas for her care in the name of John Berchmans, (1599 – 1621) a young Jesuit scholar from the area now known as Belgium. Berchmans

wanted to become a priest but died in 1621. After the second novena, Berchmans appeared to Wilson and was cured in her room during a short interval while mass was conducted. Dr. Millard was astonished by her recovery when he arrived in her room. He submitted an affidavit to the Vatican that he “was unable to explain the transition by any ordinary pastoral laws.” Berchmans appeared a second time to Wilson and informed her that she would die. Berchmans was declared Blessed in 1865 and was canonized as a saint in 1888.

The relevancy of the Miracle of Grand Coteau to the Tarlton family, is that the Tarlton family line claims that Dr. John Tarlton attended to the care of Mary Wilson and that he converted to Catholicism after the miracle event. This is possible and since he was Dr. Millard’s medical partner he should have known of her condition. This belief is based on newspaper accounts over a hundred years after the event that report that *Dr. Toulmin Tarlton*, B.D. Tarlton’s brother, attended to her care. This was a mistake because Toulmin Tarlton, the eldest Tarlton son was a student at St. Charles College along with his brothers, B.D. and G.D. Dr. Tarlton’s name is not mentioned in any of the affidavits submitted to the Vatican or in accounts of the miracle. But legend has a way of being passed down and in some cases verified.

The miracle might have affected Toulmin and B.D. who adopted the Catholic faith and were practicing Catholics their entire life. B.D. pondered a life in the priesthood but chose law instead. G.D. Tarlton remained an Episcopalian.

“The family were Episcopalian. B.D. was the convert. His Catholicism was genuine. It was only later that I got details of the miracle,” Sissy Farenthold said in January 2021.

After the Civil War B.D. graduated from St. Charles College in 1869 and began law school at the University of Louisiana (now Tulane University) where he graduated in 1872 with a Bachelor of Laws. In that same year, St. Charles College conferred an honorary LLD degree on him.

During law school the financial condition of his parents began to deteriorate as they could not pay the mortgages on their plantations in St. Mary’s and St. Landry’s parishes, and they had other debts that were unpaid while the Civil War was pending. After the Civil War the vendors began to pursue their mortgages through judicial foreclosure. Dr. Tarlton faced multiple lawsuits which he would defend in court for the next eight years. Two of the cases, *Allen v Tarlton*² and *Smith v McWalters*³ went to the Louisiana Supreme Court and were issued while B.D. was in his second year in law school.

The Tarltons lost their plantation in St. Landry’s Parish through judicial foreclosure. They moved back to their plantation in St. Mary’s Parish to protect their homestead claim and where they were facing ongoing litigation from Elizabeth McWalters to foreclose her lien on the property she sold to Dr. Tarlton in 1857 for \$75,000. In that sale, Dr. Tarlton released his wife’s dowry claim that went back to 1847.

The McWalters litigation became so intense that it appears that a legal strategy was crafted

² 22 La. Ann. 427 (1870).

³ 22 La. Ann. 431 (1870).

by attorneys in an effort to prime the McWalter's lien with the dowry claim of Mrs. John Tarlton that had been released in 1847. Using her maiden name, Frances Caller filed the case of *Francis Ann Caller vs John Tarlton* in St. Mary's Parish to invalidate the release of dowry claim by her husband. Upon obtaining a judgment, she countersued Elizabeth McWalter for damages of \$1,000 for the wrongful seizure of the Tarlton plantation. The skirmish resulted in the settlement in 1873 of the litigation with McWalters by conveying the tract back to her. The settlement allowed most of the Tarleton family to leave Louisiana and to settle in Texas for a new beginning.

John Belser Tarlton, the first-born son from Dr. Tarlton's first marriage, remained on the remaining St. Mary's plantation. Dr. Toulmin Tarlton, had obtained his medical degree in 1871 and moved to Waxahachie with his parents. G.D. Tarlton graduated in 1870 from Louisiana State University and moved to Austin, Texas. B.D. decided to remain in Louisiana to practice law and to run for the state legislature. B.D. lost the race which had twelve candidates. Ed Estillette won the election in November 1874 with 2,570 votes. B.D. came in sixth place with 1,811 votes. B.D.'s foray into Louisiana politics, taking on the establishment at a young age, ended. But B.D. was affected by his experiences watching his parents struggle for eight years of litigation after the Civil War. His primary interests in the law were real estate, marital law, trial and appellate litigation, particularly real estate litigation which mirrored what his parents had endured.

Waxahachie, Texas

Sissy Farenthold said that "Waxahachie and Hillsboro were the places that had political influence in those days. If you wanted to get a job with the government, that is where you went."

Dr. Tarlton purchased a home with ten acres in the downtown Waxahachie area from Mrs. Lacy. The property was owned by Dr. M. H. Oliver as an investment property. Prior to the sale, Oliver had George Vaughn, a contractor, work on the property, but he failed to pay him. Vaughn sued Oliver in the justice court and obtained a judgment against Oliver. Dr. Oliver sold the property to Dr. Tarlton without referencing the Vaughn lien in the deed. A month after the sale, Dr. Tarlton refused to pay the first installment payment because he wanted a credit on his debt for the cost of the unpaid judgment, which had not been paid. His position was not the way real estate disputes work in Texas. In Texas, the fact that the property is clouded with a judgment lien does not mean there is a loss of title. The loss occurs when the property is foreclosed and the owner is evicted. Dr. Tarlton's title was clouded, but the Vaughn judgment was not a final judgment and could be reversed on appeal. Dr. Tarlton had not experienced a loss in title.

Dr. Oliver assigned the note on the Tarlton property to Daniel Daily who held the superior mortgage on the property from his sale of the property to Mrs. Lacy. Daily filed suit to foreclose the Oliver mortgage on the Tarlton home. Dr. Tarlton lost the case because the judge ruled that the Vaughn judgment, which was not final, was not admissible in evidence. Tarlton appealed the case to the Texas Supreme Court and posted a bond in the amount of \$1,100 which stayed the case for the next seven years until it was decided by the Texas Commission of Appeals in 1881. The court in *Tarlton v Daily*,⁴ affirmed the judgment finding no allegations of fraud, failure of consideration or loss of title.

⁴ 55 Tex. 92 (1881).

Ironically, while the case was on appeal the Tarlton home was sold at an execution sale and Dr. Tarlton paid off the Vaughn mortgage at the foreclosure sale. Dr. Tarlton had proof that the warranty of title was breached, but those facts which occurred after the final judgment, could not be raised on appeal. The case was a minor litigation dispute that involved at most \$175 and was stayed in litigation for years. The case was proof that Texas needed courts of civil appeals across the state to handle the numerous cases that were being appealed from the courts across the state. B.D. Tarlton would eventually serve on the Texas Commission of Appeals.

Hillsboro, Texas

By 1875, B.D. joined Joseph Abbott in Hillsboro, Texas to form the firm of Abbott & Tarlton. Abbott was an able attorney who became the district judge and United States Congressman from Hill County. In 1876, Frances Caller Tarlton, B.D.'s mother, died from pneumonia. Two months later, Jane Toulmin died. Dr. Tarlton was alone, again.

On April 24, 1877, B.D. married Susan Littell in Grand Coteau. He brought his wife to a new home he purchased in Hillsboro, Texas. In February 1879, after Governor Oran Roberts appointed Joseph Abbott as Judge of the 28th Judicial District court. B.D. then teamed with John H. Bullock, a respected Hill County attorney, to form the firm of Bullock & Tarlton.

In 1880, B.D. was elected to the 17th Legislative Session representing the 56th District of Texas consisting of Hill County, the seat previously held by Joseph Abbott. Dr. Tarlton died on March 2, 1882, and was buried next to his wife and mother-in-law in the Waxahachie City Cemetery.

In 1884, B.D. ran unopposed and was re-elected to the 19th Legislative session for the 39th District. While serving in the Texas Legislature, Tarlton befriended Jim Hogg, who served as the Wood County Attorney from 1880 to 1884.

During his two terms in the legislature, Tarlton was known as a "splendid speaker, cool and liberal in his judgments, fearless in support of all just measures and a man well fitted to lead in legislative halls." Hogg took notice of Tarlton's abilities.

After the death of John Bullock, B.D. reached out to his brother G.D., to join with him in his firm. G.D. taught school and became superintendent of the Texas Institute of Learning for the Blind. In 1881, B.D. and G.D. were joined by George I. Jordan, becoming Tarlton, Jordan & Tarlton.

In 1887 Tarlton and his partners became embroiled in the case of *Tarlton v Kirkpatrick*,⁵ involving a title dispute between the Tarlton law partners and Kirkpatrick, Huff and Allen who claimed adverse possession to the same property in Hill County. The Tarlton firm lost the trial before District Judge J.M. Hall. The Tarlton firm appealed the case.

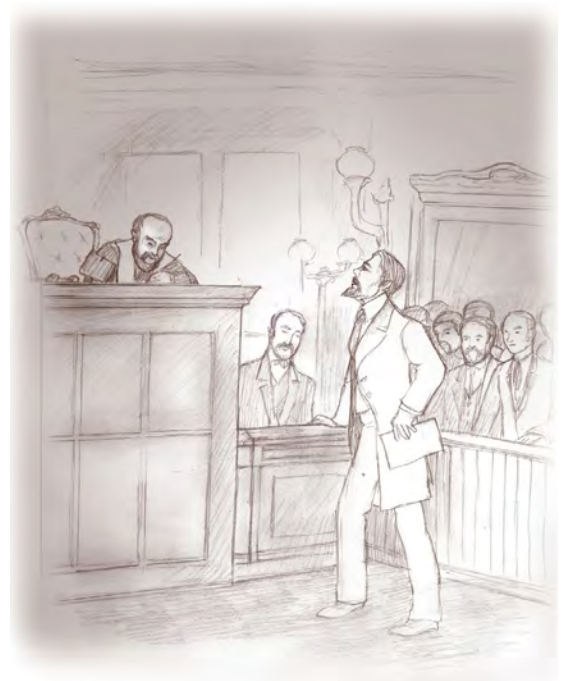
In 1888 Jordan left the firm. Wright Chalfont Morrow, who married B.D.'s sister, Fanietta Tarlton, joined the firm. The firm was now an entirely family-run law firm called Tarlton, Tarlton & Morrow.

⁵ 1 Tex. Civ. App. 107, 21 S.W. 405 (1892, no writ).

In 1888, B.D. decided to run against incumbent District Judge J.M. Hall for the Eighteenth Judicial District Court. B.D.'s influence could not defeat the incumbent Hall, who won the race with 2,657 votes to B.D.'s 2,162 votes. B.D. lost his second race for public office.

Judge Hall's court

For six years, from 1885 through 1891, B.D. appeared before Judge Hall as a trial attorney handling civil and criminal cases. In that period, Tarlton appealed Hall eleven times. The courts affirmed two decisions⁶ and reversed Hall nine⁷ times. The case of *Crumley v McKinney*⁸ shows where Judge Hall may have made life difficult for B.D. while trying cases in his court. In that case, Judge Hall engaged in ex parte contacts and excluded relevant evidence offered by Tarlton by bill of exception. The Supreme Court reversed finding that the evidence should have been admitted.



A young B.D. Tarlton tries a case in Judge Hall's court.

There was a reason for B.D.'s loss in his race against Judge Hall. Judge Hall's rulings turned B.D. into a skilled appellate attorney and gave him the credentials to serve as an appellate justice.

Texas Commission of Appeals

In May 1891, Governor Hogg, nominated Tarlton to Section B of the Texas Commission of Appeals. During his one year on the court, the three-judge panel pumped out over fifty opinions. One leading case is *Frost v. Erath Cattle Co.*,⁹ written by Associate Justice Tarlton and is still considered the bedrock instruction in how to interpret the powers in a power of attorney document that contains general and specific powers. The decision also defined the term "sale" in a real estate transaction as "an agreement by which one of two contracting parties, called the seller, gives the thing, and passes the title to it for a certain price in current money." Tarlton looked to Iowa law in the case of *Hampton v. Morhead*,¹⁰ to support the definition. The Texas Supreme Court adopted this opinion as Texas law.

Tarlton's term on the court, from May 1891 to September 1892, was short-lived because the

⁶ *Lyon v. Elser*, 72 Tex. 304, 306, 12 S.W. 177, 178 (1888); *Clark v. Dyer*, 81 Tex. 339, 345, 16 S.W. 1061, 1063 (1891).

⁷ *Blankenship & Blake Co. v. Willis*, 1 Tex. Civ. App. 657, 658, 20 S.W. 952 (Tex. Civ. App. – Fort Worth 1892, no writ); *Glasgow v. McKinnon*, 79 Tex. 116, 117, 14 S.W. 1050 (1890); *McKee v. Brooks*, 64 Tex. 255, 258 (1885); *Tarlton v. Kirkpatrick*, 1 Tex. Civ. App. 107, 21 S.W. 405 (Tex. Civ. App. – Fort Worth 1892, no writ); *Puckett v. Richardson Drug Co.*, 1 Tex. Civ. App. 634, 639, 20 S.W. 1127, 1129 (Tex. Civ. App. – Fort Worth 1892, no writ); *Horn v. State*, 17 S.W. 1094, 1096 (Tex. App. 1891, no pet.); *Farrar v. State*, 15 S.W. 719, 722 (Tex. App. 1890, no pet.); *Crumley v McKinney*, 9 S.W.157 (Tex. 1888); *Howard v. State*, 1885 WL 6828, at *3 (Tex. App. 1885, no pet.).

⁸ 9 S.W.157 (Tex. 1888).

⁹ 81 Tex. 505, 17 S.W. 52 (1891).

¹⁰ 62 Iowa, 93, 17 N.W. Rep. 20 (1883).

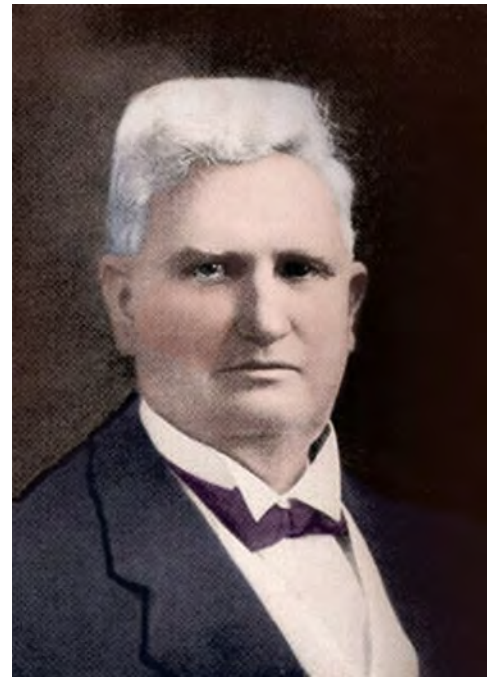
Texas Legislature ended the Texas Commission of Appeals in 1892 and established the First Court of Civil Appeals in Galveston, the Second Court of Civil Appeals in Fort Worth, and the Third Court of Civil Appeals in Austin.

The Judicial Convention in Dallas

In July 1892, the Democratic Convention, held in Dallas, nominated Tarlton as chief justice and Isaac W. Stephens and Henry O. Head as associate justices. Governor Hogg appointed all three to the court on September 1, 1892.

The Court Officially Opens

The Fort Worth Court of Civil Appeals began operation on October 3, 1892. During the first week in operation the court heard five cases. The court reversed and remanded two of the cases, *Sanger Bros, et al v. R. M. Henderson*¹¹ and *Roberts v Helms*.¹² The *Sanger* case was a civil conspiracy case against the sheriff and creditors for wrongful execution. The sheriff was found liable for conspiracy. The court reversed and rendered as to the claim against the sheriff but remanded the claims against the creditors. The court in an opinion written by Chief Justice Tarlton, reversed *Roberts v Helm*, a boundary dispute case based on an erroneous jury instruction.



Chief Justice B.D. Tarlton

A new sheriff was in Fort Worth and had sent a message to the lower courts during its first week in operation. Both cases that were reversed came from the court of District Judge Truman Conner of Eastland County.

In November 1882, Justices Tarlton, Head, and Stephens were elected to the Second Court of Civil Appeals in the general election. In 1893, five appeals from District Judge Conner's court were taken to the Second Court of Civil Appeals. The court reversed three¹³ and affirmed two¹⁴ of the decisions. However, one of the decisions, *Williams v Hardie*,¹⁵ was reversed by the Texas Supreme Court.

In 1894, the Second Court heard ten appeals from Judge Conner's court, reversing five¹⁶ and

¹¹ *Sanger v Henderson*, 1 Tex. Civ. App. 412, 21 S.W. 114 (Tex. Civ. App. -- Fort Worth 1892, writ denied).

¹² *Roberts v. Helms*, 1 Tex. Civ. App. 100, 102, 20 S.W. 1004 (Tex. Civ. App. -- Fort Worth 1892, no writ).

¹³ *Martin v Anderson*, 4 Tex. Civ. App. 111, 23 S.W. 290 (Tex. Civ. App. --Fort Worth 1893, no writ); *Strickland v Hardwicke*, 3 Tex. Civ. App. 326, 327, 22 S.W. 541 (Tex. Civ. App. -- Fort Worth 1893, no writ); *Savoy v. Brewton*, 3 Tex. Civ. App. 336, 339, 22 S.W. 585, 586 (Tex. Civ. App. -- Fort Worth 1893, no writ).

¹⁴ *Wilson v. Casey*, 3 Tex. Civ. App. 141, 142, 22 S.W. 118 (Tex. Civ. App --1893, no writ).

¹⁵ *Williams v. Hardie*, 21 S.W. 267 (Tex. Civ. App. -- Fort Worth 1892, rev'd 85 Tex. 499, 22 S.W. 399 (1893)).

¹⁶ *Tomlinson v. League*, 25 S.W. 313 (Tex. Civ. App. -- Fort Worth 1894, no writ); *Rushing v. Willis*, 28 S.W. 921 (Tex. Civ. App. -- Fort Worth 1894, no writ); *French v. Koenig*, 8 Tex. Civ. App. 341, 27 S.W. 1079 (Tex. Civ. App. -- Fort Worth 1894, writ ref'd); *Swink v. League*, 6 Tex. Civ. App. 309, 311, 25 S.W. 807 (Tex. Civ. App. -- Fort Worth 1894, no writ); *Watson v. Texas & P. Ry. Co.*, 8 Tex. Civ. App. 144, 27 S.W. 924 (Tex. Civ. App. -- Fort Worth 1894, no writ).

affirming five¹⁷ of the appeals. Chief Justice Tarlton wrote the opinions in *Watson v. Texas & P. Ry. Co.*¹⁸ and *Swink v. League*¹⁹ that were reversals of Judge Conner.

In 1895, eleven appeals from Judge Conner's court were appealed to the Second Court. The court affirmed six²⁰ and reversed five²¹ of the appeals. Chief Justice Tarlton wrote the opinions in *Brown v. Henderson*²² and *Reeves v. Texas & P. Ry. Co.*²³ that reversed Judge Conner.



Depiction of first oral arguments in the Fort Worth Court of Civil Appeals in October 1892.

In 1895, Justice Henry Head stepped down from the court and returned to private practice in Sherman, Texas. Judge Truman Conner pursued the appointment but Governor Charles Culberson chose Sam Hunter from Fort Worth for the seat. Judge Conner was disappointed.

On November 30, 1895, Justice Stephens wrote the opinion in the case of *State v. City of Cisco*,²⁴ reversing and remanding the case because Judge Conner was disqualified to hear it. After the case was tried, Judge Conner discovered that he owned unimproved real estate, of little value, within the corporate limits of Cisco, but he refused to disqualify himself. The Texas Supreme Court settled this issue in *Nalle v. City of Austin*,²⁵ where the court found that a judge of a court who owns taxable property in the city to be "interested" in an action against the city to cancel the bonds issued within the meaning of Tex. Const. art. V, § 11 that

¹⁷ *Yager v Heimer*, 28 S.W. 1026 (Tex. Civ. App. – Fort Worth 1894, no writ); *Martin-Brown Co v. Henderson*, 9 Tex. Civ. App. 130, 28 S.W. 695 (Tex. Civ. App. – Fort Worth 1894, writ ref'd); *Corrigan v. Nichols*, 6 Tex. Civ. App. 26, 24 S.W. 952 (Tex. Civ. App. – Fort Worth 1894, no writ); *Wortham v. Anderson*, 6 Tex. Civ. App. 18, 24 S.W. 847 (Tex. Civ. App. – Fort Worth 1894, no writ); *Yost v. Watertown Steam-Engine Co.*, 24 S.W. 657 (Tex. Civ. App. – Fort Worth 1894, no writ).

¹⁸ *Watson v. Texas & P. Ry. Co.*, 8 Tex. Civ. App. 144, 27 S.W. 924 (Tex. Civ. App. – Fort Worth 1894, no writ).

¹⁹ *Swink v. League*, 6 Tex. Civ. App. 309, 311, 25 S.W. 807 (Tex. Civ. App. – Fort Worth 1894, no writ).

²⁰ *Stanley v. Hamilton*, 33 S.W. 601, 602 (Tex. Civ. App. – Fort Worth 1895, writ ref'd); *Connellee v. Eastland County*, 31 S.W. 552, 553 (Tex. Civ. App. – Fort Worth 1895, no writ); *Standard Life & Acc. Ins. Co. v. Koen*, 11 Tex. Civ. App. 273, 279, 33 S.W. 133, 137 (Tex. Civ. App. – Fort Worth 1895, no writ); *Tex. & P. Ry. Co. v. Cornelius*, 10 Tex. Civ. App. 125, 130, 30 S.W. 720, 723 (Tex. Civ. App. – Fort Worth 1895, writ ref'd); *Tex. & P. Ry. Co. v. Neill*, 30 S.W. 369 (Tex. Civ. App. – Fort Worth 1895, writ ref'd); *Cunningham v. Holt*, 12 Tex. Civ. App. 150, 152, 33 S.W. 981 (Tex. Civ. App. – Fort Worth 1895, writ ref'd).

²¹ *State v. City of Cisco*, 33 S.W. 244 (Tex. Civ. App. – Fort Worth 1895, no pet.); *Am. Fire Ins. Co. v. Ctr.*, 33 S.W. 554, 556 (Tex. Civ. App. – Fort Worth 1895, no writ); *Jackson v. Steffens*, 32 S.W. 862, (Tex. Civ. App. – Fort Worth 1895, no writ); *Brown v Henderson*, 31 S.W. 315 (Tex. Civ. App. – Fort Worth 1895, no writ); *Reeves v. Tex. & P. Ry. Co.*, 11 Tex. Civ. App. 514, 32 S.W. 920 (Tex. Civ. App. – Fort Worth 1895, no writ).

²² *Brown v Henderson*, 31 S.W. 315 (Tex. Civ. App. – Fort Worth 1895, no writ).

²³ *Reeves v. Tex. & P. Ry. Co.*, 11 Tex. Civ. App. 514, 32 S.W. 920 (Tex. Civ. App. – Fort Worth 1895, no writ).

²⁴ *State v. City of Cisco*, 33 S.W. 244 (Tex. Civ. App. – Fort Worth 1895, no pet.).

²⁵ *Nalle v. City of Austin*, 85 Tex. 520, 22 S.W. 668 (1893).

prohibits judges from hearing cases where they may be interested. H.P. Brelsford with Scott & Brelsford in Eastland, Texas represented the City of Cisco in *State v City of Cisco*.

In 1896, the Second Court of Civil Appeals handled nine appeals from Judge Conner's court, affirming two²⁶ and reversing seven²⁷ of the decisions. However, *Texas & P. Ry. Co. v. Bigham*,²⁸ one of the decisions affirmed by Chief Justice Tarlton, was reversed by the Texas Supreme Court. In 1897, the court handled five appeals from Judge Conner's court, affirming three²⁹ and reversing two³⁰ of the appeals.

Tarlton was not perfect. In May 1897, Tarlton was mildly criticized by the Texas Supreme Court in the case of *Groesbeeck v. Crow*,³¹ where the court reversed his opinion after finding that he misapplied the statute of limitations.

On December 30, 1897, Tarlton announced his candidacy for re-election. To win, the justices had to be nominated by a majority of the Democratic delegates at the convention in San Antonio in July 1898. Conner's campaign strategy was to paint Fort Worth as the evil city who dictated to the governor who could serve on the court of appeals.

On January 29, 1898, H.P. Brelsford, who handled the case of *State v City of Cisco* traveled to Fort Worth to announce that Judge Conner would be a candidate for the position of Chief Justice. He wanted to send a signal in Tarlton's adopted hometown.

On February 5, 1898, at a meeting in Cisco, Texas, the bar associations of Taylor, Jones, Shackelford, Comanche, Stephens, Eastland, and Callahan endorsed Conner for the chief justice position. The endorsement was signed by twelve attorneys. In response, the Fort Worth Bar Association endorsed Tarlton by an endorsement signed by 135 attorneys.

In 1898, the Second Court heard six appeals from Judge Conner's court, affirming four³² and reversing three cases.³³

²⁶ *Page v. Conaway*, 34 S.W. 143 (Tex. Civ. App. – Fort Worth 1896, no writ); *Dewitt v. Chilton*, 35 S.W. 23 (Tex. Civ. App. – Fort Worth 1896, no writ).

²⁷ *Hall v Texas & P. Ry. Co.*, 35 S.W. 321 (Tex. Civ. App. -- Fort Worth 1896, no writ); *Cage v Tucker's Heir*, 14 Tex. Civ. App. 316, 317, 37 S.W. 180 (Tex. Civ. App. – Fort Worth 1896, no writ); *Gentry v. Gatlin*, 14 Tex. Civ. App. 419, 38 S.W. 223 (Tex. Civ. App. – Fort Worth 1896, no writ); *Moore v. Stone*, 36 S.W. 909 (Tex. Civ. App. – Fort Worth 1896, no writ); *Hall v. Tex. & P. Ry. Co.*, 35 S.W. 321 (Tex. Civ. App. – Fort Worth 1896, no writ); *Clack v. Wood*, 14 Tex. Civ. App. 400, 37 S.W. 188 (1896, no writ).

²⁸ *Texas & P. Ry. Co. v. Bigham*, 90 Tex. 223, 38 S.W. 162 (1896).

²⁹ *Texas & P. Ry. Co. v. Moore*, 43 S.W. 67, 68 (Tex. Civ. App. – Fort Worth 1897, writ ref'd); *Tex. & P.R. Co. v. Reeves*, 15 Tex. Civ. App. 157, 39 S.W. 135 (Tex. Civ. App. – Fort Worth 1897, no writ); *W. Union Tel. Co. v. Thompson*, (Tex. Civ. App. – Fort Worth 1897, no writ).

³⁰ *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S.W. 29, 30 (1897); *Cordill v. Moore*, 17 Tex. Civ. App. 217, 219, 43 S.W. 298, 300 (Tex. Civ. App. – Fort Worth 1897, no writ).

³¹ *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S.W. 29, 30 (1897); *Cordill v. Moore*, 17 Tex. Civ. App. 217, 219, 43 S.W. 298, 300 (Tex. Civ. App. – Fort Worth 1897, no writ).

³² *Bull v Jones*, 475 (Tex. Civ. App.- Fort Worth 1898, no writ); *Clack v Wood*, 46 S.W. 1132 (Tex. Civ. App. – Fort Worth 1898)(C.J. Tarlton not sitting); *Ross v. Strahorn-Hutton-Evans Comm'n Co.*, 18 Tex. Civ. App. 698, (1898, writ ref'd); *Ferguson v. Cochran*, 45 S.W. 30 (Tex. Civ. App. 1898, no writ).

The *Albany News* Endorsement of Conner

In May 1898, two months prior to the Democratic Convention, a stinging 1,734-word editorial endorsed Judge Conner for the chief justice position. The article alleged that the western and northern parts of the Second District as far as El Paso and the Panhandle were resentful of Fort Worth deciding who would serve on the Court of Civil Appeals. The article was titled “*Does Fort Worth Want the World?*”

The article claimed that:

Fort Worth ...is not only entitled to have, but is heir to every State office in the gift of the people, and in addition, she has those among her citizenship, who are in every way qualified to file every office in the United States, from constable to President. It is only surprising to a great many people, that some one of her gifted citizens, does not lay claim to the Throne of England. Surely there is some residing in that city, who is more competent than Sampson, to take charge of the fleet he now commands.

It described how Judge Tarlton came from Hill County and lived in Fort Worth; Judge Hunter was a citizen of Fort Worth; and Judge Stephens was from Parker County “within a stone’s throw” of Fort Worth and “you might say that he was almost a resident of the place before he was elected and moved there.”

The article went on:

“Here we have the three judges residing in Fort Worth, and the Fort Worth people trying to keep them there—not wanting the outside part of the district, composing the second Judicial District, to have any say at all in the selection of judges—not wanting them to have a representative on the bench. Is it fair? Is it just?”

The endorsement contended that if Fort Worth did not enter the fight, then:

Judge Conner would have carried off the prize. Oh no! Fort Worth would not for one moment remain neutral—would not consent to any other section getting the office, but she rose in her grandeur and dictatorial way, and demanded that one of her gifted citizens should be appointed.

The *Albany News* article was illogical: it meant that anyone moving to Fort Worth to work on the new court became part of the Fort Worth establishment and was ineligible to serve a second term.

By July 1898, the Conner campaign had quietly locked up sufficient commitments from Democrat delegates across the district to secure the nomination. Conner announced that he had 106½ instructed votes and 12 votes assured from uninstructed counties for a total of 118½ votes. The number to nominate was 99. Conner won the election before there was an election. Tarlton had 62 instructed votes. Facing a certain defeat at the convention, Tarlton withdrew from the race on July 30, 1898.

³³ *Mansur & Tebbetts Implement Co. v. Beeman-St. Clair Co.*, 45 S.W. 729, 731 (Tex. Civ. App. – Fort Worth 1898, no writ); *Davis v. Cuthbertson*, 45 S.W. 426 (Tex. Civ. App. – Fort Worth 1898, no writ).

The Tarlton Opinions

From 1892 to 1898, Chief Justice Tarlton wrote over four hundred opinions during his term on the Second Court. The opinions covered all areas of civil disputes. Here is a selection of opinions written by Tarlton.

In *Dycus v. Hart*,³⁴ a party named a document a “quitclaim,” but the court found that the deed conveyed title, and that having paid the purchase price and without notice of the claim, was protected as a bona fide purchaser.

In *Kalklosh v. Haney*,³⁵ the court held that a vendee (purchaser of real estate) is not required to make actual or tender payment of the entire balance due but is to plead and prove his willingness to pay the entire balance due; failing in this, his right should cease.

In *Miller v. Carlton*,³⁶ Tarlton recognized the concept of “constructive trust” theory where real property obtained by agreement that was not subsequently complied with would operate as a fraud if not enforced.

In *Hull v. Woods*,³⁷ the court found that in a trespass to try title suit based on the ten-year adverse possession statute, the party seeking possession cannot acquire property beyond what was in their actual possession.

In *Texas Loan Agency v. Gray*,³⁸ the trustee sold property in Denton County when the property was located in Navarro County. The next month, the trustee sold the same property in Navarro County. The court held that the sale in Navarro County vested title in the plaintiff. The sale in Denton County was void, but it did not divest the trustee of the power to sell the property.

In *Johnson v James*,³⁹ Tarlton ruled that a person filing a lawsuit is not required to specifically allege the evidence he is relying on. Tarlton found the exclusion of evidence to be “manifestly erroneous.” Tarlton wrote that “A pleader is not required to plead his evidence.”

In *Western Industrial Co. v. Chandler*,⁴⁰ and *Moore v. Powell*,⁴¹ the court held that authority on the part of an alleged agent cannot be established by showing that the alleged agent claims to have the powers which he assumes to exercise.

The case of *Sills v. Ft Worth & D.C. Ry. Co.*⁴² involved the derailment of a train due to the

³⁴ 2 Tex.Civ.App. 354, 21 S.W. 299 (Tex. Civ. App. – Fort Worth 1893, no writ).

³⁵ 4 Tex. Civ. App. 118, (Tex. Civ. App. – Fort Worth 1893, no writ).

³⁶ 2 Tex. Civ. App. 619, 21 S.W. 697 (Tex. Civ. App. – Fort Worth 1893, no writ).

³⁷ 14 Tex. Civ. App. 590, 38 S.W. 256 (Tex. Civ. App. – Fort Worth 1896, writ ref'd).

³⁸ 12 Tex. Civ. App. 430, 34 S.W. 650 (Tex. Civ. App. – Fort Worth 1896, writ ref'd).

³⁹ 21 S.W. 372 (Tex. Civ. App. – Fort Worth 1893, no writ).

⁴⁰ 31 S.W. 314 (Tex. Civ. App. – Fort Worth 1895, no writ).

⁴¹ 6 Tex. Civ. App. 43, 25 S.W. 472 (Tex. Civ. App. – Fort Worth 1894, writ ref'd).

⁴² 28 S.W. 908 (Tex. Civ. App. – Fort Worth 1894, no writ).

accumulation of sand on the tracks. At trial the plaintiff offered evidence that the sandy condition was permitted to occur after the accident, of which evidence was excluded. The court held it was error to admit testimony of subsequent acts to establish negligence.

Manifest error

Justice Tarlton believed in the concept of *manifest error* and that appeals courts could reverse cases based on error not alleged by the parties. He publicly debated this concept with his colleagues.

An example is the case of *Clements v. Clements*,⁴³ a trespass to try title claim involving separate property. The plaintiff's failure to prove title did not mean that the defendant established title to the property. The court found the error "to have resulted from *manifest error*, and to be in its effects too grossly inequitable to receive the sanction and approval of a court of justice."

Private Practice

After leaving the court, Tarlton set up the firm of Tarlton & Ayers in Fort Worth. Tarlton began appearing in legal cases across Texas. One report says that he set up an office in Beaumont. One case was *Clark v. Finley*,⁴⁴ that involved the constitutionality of a law that reduced the fees of sheriffs, constables, and district attorneys in certain counties, including Tarrant County.

Tarlton appeared in a writ of mandamus in *Reed v. Rogan*.⁴⁵ against the General Land Office to cancel a lease. He also handled the case of *Ex Parte Snodgrass*⁴⁶ in the Texas Court of Criminal Appeals where he obtained the reversal of a contempt finding against an attorney who was arguing his case to the jury that one of the witnesses in the case were mistaken or one of them had lied. Upon hearing the arguments, the witness struck the attorney during the trial. The trial court held the attorney in contempt and fined him fifty dollars. The high court reversed the contempt holding finding that the trial court did not have subject matter jurisdiction, the power or legal authority to contempt the attorney because "it would destroy the relator's right to argue the cause of his client in the courts of justice." Trial courts routinely reign in attorneys during closing arguments, but they cannot find an attorney in contempt when they are making valid arguments.



A witness slaps attorney Frank Snodgrass who questioned his testimony during the trial and was held in contempt. Tarlton handled the appeal of Snodgrass obtaining a reversal of the contempt holding.

⁴³ 18 Tex. Civ. App. 617, 46 S.W. 61 (Tex. Civ. App. – Fort Worth 1898, writ dism'd).

⁴⁴ 93 Tex. 171, 54 S.W. 343 (1899).

⁴⁵ 94 Tex. 177, 59 S.W. 255 (1900).

⁴⁶ 43 Tex. Crim. 359, 65 S.W. 1061 (1901).



Associate Justice Stephens presides over the banquet for B.D. Tarlton.

In April 1903, Tarlton & Ayers and others established *The Guaranty Abstract Title Company* in Tarrant County. In 1904, Tarlton became the first president of the Tarrant County Bar Association, which consisted of 150 attorneys.

In June 1904, Tarlton spoke in favor of New Yorker Alton B. Parker running against Theodore Roosevelt at the Democratic Convention in San Antonio. Tarlton told the Tarrant County delegates to vote for Parker and for Chief Justice Truman Conner. Prior to departing for Austin, the Fort Worth Bar Association gave a banquet for Tarlton that included many toasts and speeches from judges and attorneys.

Law School Professor

In June 1904, Tarlton accepted an appointment as Professor of Law at the University of Texas School of Law. Tarlton's students had high regard for him, and he was said to be one of the most tolerant persons they ever knew. His relationship with his law students was legendary. Students often reported anecdotes of Professor Tarlton expanding on his knowledge of vast subjects which he connected to his teachings and brought the class back to the subject matter by saying: "I must now tend to my sheep."

Tarlton gave two grades on each paper. One was the grade they deserved, and the other was

the grade that he wanted to give, encouraging one-on-one instruction and mentoring. Tarlton's activities throughout the years, either personal or professional in nature, would frequently make headlines across the state.

In 1905 he spoke to the Twenty-Fourth Annual Meeting of the Texas Bar Association in Sherman, Texas. His speech was on "The Texas Homestead Exemption."

In August 1908, Tarlton was seriously injured while hitching a horse at his residence in Austin.

On October 12, 1911, Tarlton was the orator of the day at the Columbus Day Celebration at the state capitol.

In February 1913, Tarlton was a speaker at the Alumni Banquet at Texas Christian University. His speech was "Yesterday and Tomorrow."

In March 1916, Tarlton was the principal speaker at a banquet for alumni and friends held in Fort Worth at the Westbrook Hotel. Tarlton's talk was the only serious speech of the evening. Tarlton told the group that women should be able to practice law and appear in court. "I have heard it said," he continued, "that women are capable of taking dictation and briefs and arguments. I wouldn't be surprised if many of them would make doughty adversaries in the courthouse. If all women were mothers and had households, there would be some pith in the objection that 'a woman's place is in the home,' but that is not the case."

"I have seen women working in store-houses, standing on their feet ten and eleven hours a day and receiving a mere pittance for their labor. They can and are permitted to perform other characters of labor that are hard and arduous, but let them aspire to a profession, and society holds up its hands in holy horror. Hypocritical society!"

The Hurricane

On Sunday morning, September 14, 1919, to their amazement and horror, Judge Tarlton and his family found themselves in the middle of the hurricane in Corpus Christi, Texas. Tarlton and his wife were visiting his son, B.D. Tarlton, Jr. who lived in Corpus Christi and daughter who lived in Beeville, Texas. Nuns assisted with the Catholic relief effort. Tarlton left the hotel and began to help rescue victims swept into the bay by taking a rowboat to assist with the recovery effort. Genevieve Tarlton recalled that Tarlton "exhausted himself swimming a distance in the bay and repeatedly rescuing and returning women and children to safer shores."

On September 16, 1919, the Tarltons left Corpus Christi by train for Beeville, where they took safety at the home of his daughter and son-in-law, Genevieve and James Daugherty.

By Saturday, September 20, Tarlton appeared fine and went into the town of Beeville to chat around the town and with numerous friends. Later that day he was busy dictating examination questions for his work at the University of Texas School of Law for the 1919-20 term.

The Death of Tarlton

Things changed on Sunday morning, September 21, when B.D. could not get out of bed. A severe chill seized his entire body. He had contracted double-pneumonia or flu-pneumonia. Tarlton looked at his son-in-law, James Daugherty, and in a lucid moment said: *"They all seemed to like me."* Tarlton passed away. His body was brought to Fort Worth by train and taken to St. Patrick's Cathedral in downtown. Officiating at the funeral was Dean Robert M. Nolan, who extolled Tarlton's life achievements. B.D. Tarlton was buried in the Catholic section of Oakwood Cemetery in west Fort Worth next to his daughter Mary Eleanor, who died in 1897.

The death of Professor Tarlton shocked the law school students, faculty, and the legal community across the state. A memorial for Professor Tarlton was held on November 3, 1919. In the same month, *The Alcalde*, the newsletter for the law school included tributes to him. One tribute was that "the world is better, much better, for his having lived. He will ever be an example to the youth of Texas, and the child that is unborn shall bless the beauty of his life." Another student wrote that "his influence could not be defined. In classroom and in council his wisdom and fine personality was missed." Another wrote that "we shall not look upon his like again."

In 1920, the 39th Session of the Texas Bar Association honored him in El Paso, noting that the judge's nature was reflected most admirably in his physique. He was a living example of the old maxim, "Laugh and grow fat... his twinkling blue eyes and rosy cheeks seem to belie the hoary mark which time has laid so gently upon his heavy thatch of hair. He may grow old, but his nature will ever remain young. He belongs to that particular race of men known as optimists."

On January 11, 1928, Mrs. B.D. Tarlton died at the age of seventy-three. Suzanne Marie Littell Tarlton was buried next to her husband in the Oakwood Cemetery in Fort Worth.

Legacy

In 1951, the University of Texas School of Law named the Tarlton Library after B.D. Tarlton. In April 1965, a memorial scholarship was established by the James R. Daugherty Foundation to honor Tarlton.

B.D. Tarlton's son, B.D. Tarlton Jr. had a distinguished career as a criminal law attorney in Corpus Christi, handling defense of death penalty cases and fighting against the Ku Klux Klan. B.D. Tarlton, Jr. greatly influenced Sissy Farenthold, especially in how he fought for inequality.

In 1998 at a ceremony at the Second Court of Appeals where B.D. Tarlton's photograph and the other chief justices of the court were being presented, B.D. Tarlton III, grandson of B.D. Tarlton, attended the event and spoke of his grandfather.

B.D. Tarlton IV is an attorney and is the Vice-President of Environmental and Safety for TransMontaigne Partners in Denver, Colorado.

B.D. Tarlton V is a senior policy analyst with the United Nations in Geneva, Switzerland. B.D.

Tarlton V and his wife have two daughters and represents the end of the line for the B.D. Tarlton name.

In 2004, the University of Texas School of Law celebrated the *Centennial Celebration* honoring B.D. Tarlton becoming a faculty member in 1904.

Sissy Farenthold was proud that her grandfather pushed for the rights of women. "He pushed for women's equality before there was women's suffrage," she said. "He was revered and had a following and this makes me so sad because everyone has died off. I remember hearing about him as a child. There was this reverence for him in the family."

Sissy Farenthold passed away on September 26, 2021, in Houston, Texas at the age of 94. Before passing she said that she struggles with the fact that in 2021 there is still a lot to do in terms of racial equality. She is proud that her family passed down for generations a legacy that fought for equality and against racial injustice and injustice for over 100 years.

"I thought that we could have the law and it would be enough, but it is not. We have a lot to do," she said.

Why Did Conner Run Against Tarlton?

What prompted District Judge Truman Conner to want to oust Chief Justice Tarlton from the court? The newspapers reported that the race was not personal. Conner wanted to replace the first chief justice to serve on the new court. He took him on in a public way within his own party that made headlines across Texas. To win, Conner had to make it appear that the race was not personal. There have been several reasons offered.

The Railroads

One possible reason offered was that Tarlton was targeted by the railroad companies. According to Corpus Christi attorney and historian William Chriss: "In those days, if he wasn't in the railroads' pocket, that would be enough to justify trying to get rid of him." The railroads were easy targets for personal injury lawsuits across the state. The railroads tried to limit their contractual liability on freight claims and personal injury damages, by shortening the time period to make a claim or to minimize their damages. Then they would send into the local towns the most skilled trial attorneys in the state to handle the most difficult and serious damage claims.

Tarlton wrote over sixty opinions involving claims against the railroads. Ten of his opinions affirmed the property damage and contract disputes against the railroads. He affirmed over twenty personal injury judgments against the railroads. Only when the trial court improperly instructed the jury on the measure of damages were the personal injury cases reversed, and Tarlton did so. Tarlton was calling balls and strikes in the railroad cases.

But there are three interesting railroad cases that happened to come from Judge Conner's

court that were reversed by the Second Court of Appeals. In *Watson v. Texas & P. Ry. Co.*,⁴⁷ Judge Conner denied recovery to the plaintiff for not bringing his personal injury claim in the same suit as the claim for damages to his property, being the horses damaged in shipment. Tarlton reversed the judgment, finding that damages to goods was a distinct cause of action to damages to the person.

In *Reeves v. Texas & P. Ry. Co.*⁴⁸ Tarlton reversed Judge Conner in a negligence suit arising from damages to cattle during shipment across state lines. The railroad had a limitation of liability clause in its contract which the Texas Legislature had voided if the limitation was less than two years. Judge Conner found the limitation to be valid. Tarlton found that the statute was not an attempt to regulate interstate commerce.

In 1896, Justice Hunter reversed and remanded the case of *Hall v. Tex. & P. Ry. Co.*,⁴⁹ where Judge Conner gave an erroneous instruction to the jury in a railroad decision.

Thus, it appears that Judge Conner favored the railroads, and the Second Court stepped in to reverse his rulings. The railroad theory makes for interesting discussion, but even if true, there is no footprint that Conner's race was prompted or promoted by the railroad industry.

Catholicism

In March 2020, I interviewed Sissy Farenthold and asked if she knew why District Judge Conner ran against her grandfather. "Conner won because Tarlton was Catholic and the Democrat delegates were prejudiced against Catholics," she said.

The newspaper accounts of the election make no mention of religion being raised in the race. No doubt prejudice existed against Catholicism, but whether this was the reason for Conner's race and Tarlton's loss in 1898 is not easy to determine. Yet, this is the *only* explanation offered by Sissy Farenthold, an attorney, who carried this belief to her grave. The belief has been passed down for years in the Tarlton family.

Did Conner win because of a whisper campaign by merely dropping the word "Catholic" across the Second District resulted in the delegates fleeing to commit to Conner? No doubt prejudice against Catholics existed at that time. Mark Twain, in his novel, *A Connecticut Yankee in King Arthur's Court*, released in 1889, admitted that he had "...been educated to enmity toward everything that is Catholic." If that happened, there is no footprint of such an effort in writing.

Ironically, B.D. Tarlton and J. Frank Norris, the anti-Catholic who rose to fame in the 1920s in Fort Worth lived in Hill County at the same time as Tarlton, but their paths probably never crossed. Norris was a teenager living in Hubbard City while Tarlton was in his thirties, reaching his prime in his legal career in Hillsboro as a practicing attorney. Tarlton left Hillsboro and moved his family to Fort Worth in 1892. In 1898, Norris was living in Waco, Texas.

⁴⁷ 8 Tex. Civ. App. 144, 27 S.W. 924 (Tex. Civ. App. – Fort Worth 1894, no writ).

⁴⁸ 11 Tex. Civ. App. 514, 32 S.W. 920 (Tex. Civ. App. – Fort Worth 1895, no writ).

⁴⁹ 35 S.W. 321 (Tex. Civ. App. – Fort Worth 1896, no writ).

That Sissy Farenthold maintained that religious prejudice was the cause of Tarlton's loss must be considered as one reason. Logic dictates it: there were likely more Protestant voters than Catholic voters, but there is no paper trail that shows that the Conner campaign used Tarlton's Catholic religion against him.

What was the motivation to run against Tarlton?

What motivated Conner to run against Tarlton? Was there another reason besides lack of representation from the western counties on the court?

The reversal of two decisions from Judge Conner's court in 1892 during the first week the Second Court was in operation could have set the stage for a race in Conner's mind.

The selection of Sam Hunter to replace Justice Henry Head in 1895 was another reason. Then the reversal of Conner in the *State v City of Cisco*, a case handled by H.P. Brelsford shortly after the appointment of Justice Hunter, added fuel to fire. The court's decision in Cisco was correct and Conner was certainly wrong in his ruling. But now Conner had the help of Brelsford who would reach out to many attorneys across the district.

The newspaper journalists in that era had no clue as to what was really going on at that time or what motivated Conner to take on Tarlton. There is no way that they could have understood this story unless they examined the appeals that were being taken to the Second Court of Appeals from Judge Conner's court. When the appeals are examined, these facts emerge:

The first two reversals by the new appeals court during its first week in operation in October 1892 were appeals from Judge Conner's court.

During the first six-year term of the court, there were fifty-two reported appeals from Judge Conner's decisions. The court reversed Judge Conner *twenty-five times*. Two cases where the court affirmed Judge Conner were reversed by the Texas Supreme Court. One of those reversals was an opinion written by Chief Justice Tarlton.

Judge Conner should have been reversed twenty-seven times out of the fifty-two reported appeals.

Nine of the twenty-five decisions reversing Judge Conner were written by Chief Justice Tarlton.

It is my opinion that Judge Truman Conner ran against Chief Justice Tarlton because he did not approve of the new court of civil appeals reversing most of the judgments from his court.

Who was the author of the Albany News endorsement?

Who penned the stinging editorial from the *Albany News* in May 1898 that endorsed Conner for chief justice? Edgar Rye was a well-known writer, journalist, and political cartoonist. He was also an attorney who served as a justice of the peace and county attorney for Shackelford County. In 1889–90 Rye operated *The Albany Weekly News*. In 1891 Rye and S.F. Cook were the

editors and publishers of the *Albany News*.

Molly Sauder, a historian of Texas history for many years, investigated the May 1898 *Albany News* editorial and commented: "I'll admit that my first impression of this letter, given its length and well written endorsement, was that it was probably a form letter sent to the newspapers of many surrounding communities from Conner's headquarters in Eastland." She suggested Edgar Rye as a possible author.

"He [Rye] was quite the renaissance man and moved around a lot, and according to this entry in the Texas Handbook, he was in Wichita Falls writing for the *Herald* at the time of the election. I'm not sure that he would have taken the time to write back to the *Albany News* about such an election, but he certainly had the writing chops for it if he wished," said Sauder.

Only the *Albany News* printed it. Why? Possibly because Rye, the former editor and publisher could simply deliver it to Cook, the publisher of the *Albany News*, to print it.

The endorsement followed the exact argument of the Conner campaign: that the western districts had no representation on the court. Rye, the attorney, journalist and satirist was most likely Conner's pipeline into the press working behind the scenes to promote Conner's career.

But was Rye the only author?

There are some interesting phrases in the *Albany News* article:

But to read the many claims for office of the Fort Worth people, one would think that she has become so imbued with her own importance, that she thinks that *all that is necessary* for her to do, is, to simply come out and announce for office, and it is theirs—that the whole State should bow down and worship the said candidate for office, regardless of his qualifications.

Thanks to modern day computerized research, with the ability to search phrases, we can establish that the phrase "*all that is necessary*" appears in four opinions written by Chief Justice Conner from 1912 to 1931.⁵⁰

Then look at this phrase:

Oh no! Fort Worth would not for one moment remain neutral—*would not consent* to any other section getting the office, but she rose in her grandeur and dictatorial way, and demanded that one of her gifted citizens should be appointed.

The phrase "*would not consent*" appears in two cases from the Fort Worth Court of Civil

⁵⁰ *Gamer Co. v. Gamage*, 147 S.W. 721, 724 (Tex. Civ. App. – Fort Worth 1912, no writ); *Zurn v. Mitchell*, 196 S.W. 544, 546 (Tex. Civ. App. – Fort Worth 1917, rev'd, *Mitchell v. Zurn*, 221 S.W. 954 (Tex. 1920); *S. Sur. Co. v. Davidson*, 280 S.W. 336 (Tex. Civ. App. – Fort Worth 1926, no writ); *Holt v. Wichita Cnty. Water Improvement Dist. No. 2*, 48 S.W.2d 527, 530 (Tex. Civ. App. – Fort Worth 1931, rev'd, *Holt v. Wichita County Water Improvement Dist. No. 2*, 63 S.W. 2d 369 (Tex. Comm'n App. 1933).

Appeals: *Burnett v. Gibbs*,⁵¹ and *U.S. Fid. & Guar. Co. v. Rochester*.⁵² Both opinions were written by Chief Justice Conner.

Was Conner the author? If you are unconvinced, then read this sentence:

Judge Tarlton, the present Chief Justice, is an able lawyer and judge, and the writer has nothing to say against him, and this article is not aimed at him as a man or his ability as a judge, but he is the opponent of one whom the people of this section desire to succeed him, *hence it becomes necessary* to refer to him *in connection with the discussion ...*

The phrase “*hence it becomes necessary*” appears in the case of *Logan v. Ludwick*.⁵³ Who wrote the opinion? Chief Justice Conner.

The phrase “*in connection with the discussion*” is similar to the phrase, “in connection with *our* discussion” in the case of *Richmond v Hog Creek Oil Co.*⁵⁴ The writer? Chief Justice Conner. While all the above phrases are commonly used terms by attorneys and appellate justices, it is very possible that the mysterious writer or a contributor to the *Albany News* endorsement in May 1898 was indeed District Judge Truman Conner.

Epilogue

B.D. Tarlton was a unique character who brought his intellect and Catholic heritage to Texas. Tarlton’s rise in Texas politics and the law was based on his intellectual brilliance and his likeable personality. He lost his first two races for political office because he ran against established incumbents. In Louisiana he lost against an older and more experienced politician, E.D. Estillette, who went on to become the Louisiana Speaker of the House. He lost against District Judge J.M. Hall in Texas, a Civil War veteran, who had paved his way to win after losing against Tarlton’s mentor, Jo Abbott. Hall was most likely one tough, hard driving, and difficult trial judge who constantly challenged Tarlton in court. Tarlton’s entanglement with Judge Hall turned him into an appellate attorney and appellate justice. Tarlton learned the importance of seeking out influential colleagues and associating with them at the right time. His success in Texas politics was from following the influence of Jo Abbott and being promoted two times by Governor Jim Hogg.

Dr. John Tarlton spawned a legacy quite different than his own. Like B.D. Tarlton who believed in women’s rights before there was women’s suffrage, the Tarlton children and grandchildren fought for individual civil rights and against the Ku Klux Klan, and continued to push for equality for over one hundred years to this day.

In January 2021, I asked Sissy Farenthold whether she still believed that Tarlton lost his race to Conner because of his Catholic faith. She confirmed again that “he lost over the Catholic

⁵¹ 196 S.W. 725 (Tex. Civ. App. – Fort Worth 1917, no writ).

⁵² 281 S.W. 306, 307 (Tex. Civ. App. – Fort Worth 1926, no writ).

⁵³ 283 S.W. 548 (Tex. Civ. App. – Fort Worth 1926, no writ).

⁵⁴ 229 S.W. 563, 564 (Tex. Civ. App. – Fort Worth 1920, no writ).

issue. It wasn't said that way. It was understood." Possibly all the above reasons suggested earlier came together in one perfect storm that ended Tarlton's judicial career and foretold what would lie ahead for him. Legends are passed down; legends become verified; and eventually legends become truth.



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And Hell Came With Him:

How a Notorious Old West Outlaw Escaped Texas Justice

By Chad Baruch

Introduction

If you want to become an outlaw legend of the Old West, getting blasted into eternity by Wyatt Earp isn't the worst way to go about it. Just ask Curly Bill Brocius—who entered American mythology during the famed Vendetta Ride courtesy of Earp's shotgun.

Curly Bill—notorious leader of the Arizona Cowboys—played a key role in events leading to the Gunfight at the O.K. Corral, then lost his life in the violent aftermath. His time in Arizona is exhaustively documented (and dramatized in films like *Tombstone*). But for many years, an earlier episode of Curly Bill's life remained unknown even to most historians. And it concerned a criminal prosecution in Texas.

In the 1870s, shortly before his appearance in Arizona, Curly Bill—using the name William Bresnaham—was arrested and convicted of robbery and attempted murder in El Paso County. But he escaped and fled Texas before being sent to the penitentiary.

Over the years, historians doubted whether William Bresnaham really was Curly Bill. But more recently, Steve Gatto—Curly Bill's preeminent biographer—has unearthed convincing evidence (discussed later in this article) of Curly Bill's conviction in El Paso.¹

But a question lingers: Did Curly Bill file an appeal? Some sources refer to an appeal while others mention only proceedings in the trial court. This article describes the entire episode and seeks to answer one question definitively:

Did Curly Bill Brocius—one of the most dangerous and notorious outlaws in American history—appear in the Texas appellate system?

Prelude to Prosecution: The El Paso County Salt War²

In 1870, El Paso County remained a frontier community. Bordered to the west by New

¹ The author gratefully acknowledges Gatto's exhaustive research on Curly Bill (and assistance in locating sources for this article). Everyone examining Curly Bill's life benefits from Gatto's exceptionally thorough research. So, anyone interested in learning more about Curly Bill should begin with Gatto's biography: Steve Gatto, *Curly Bill: Tombstone's Most Famous Outlaw* (2003).

² This narrative of the Salt War and ambulance holdup is drawn from a combination of the following five sources unless otherwise indicated: John Boessenecker, *Ride the Devil's Herd: Wyatt Earp's Epic Battle Against the West's Biggest Outlaw Gang*, 26–36 (2020); Doug J. Swanson, *Cult of Glory: The Bold and Brutal History of the Texas Rangers*, 203–13 (2020); Paul Cool, *Salt Warriors: Insurgency on the Rio Grande*, (2008); Samuel K. Dolan, *Hell Paso: Life and Death in the Old West's Most Dangerous Town*, 11–13 (2021); Gatto, *Curly Bill: Tombstone's Most Famous Outlaw*, 11–23.

Mexico and to the south by Mexico, its total population hovered around 4,000.³ Just twenty years later, in 1890, that population had swelled to more than 15,000—with the City of El Paso (known then as Franklin) exploding from a few hundred residents to more than 10,000 during the same period.⁴

El Paso County in the 1870s was—as it remains today—overwhelmingly Tejano. But while Anglos accounted for less than five percent of the regional population, they exercised most of the political and financial power. And while American law governed legal proceedings in El Paso County, those proceedings usually were conducted in Spanish.⁵

For decades, the area's Tejano and Mexican families got free salt by digging it out of enormous dry salt lakes around a hundred miles east of El Paso.⁶ This salt was important not just for households but also to extract silver from ore in the region's many mines. So, salt from the lakes was critical to Tejanos and Mexicans who relied on it for food, barter, and mining.

In 1877, Austin financier Major George B. Zimpelman (the rank being a reference to his Confederate service) joined forces with his son-in-law, El Paso lawyer, politician, and former judge Charles Howard (another ex-Confederate), and filed property claims on the salt lakes—then relied on those claims to demand payment from anyone seeking to remove salt from the lakes. This prompted outrage on both sides of the border.

Louis Cardis—a powerful Italian American merchant and former state legislator in El Paso—led the mounting opposition to the would-be salt barons (even though Cardis had attempted to seize control of the lakes for himself some years earlier).

In September 1877, Howard obtained the arrests of two Mexicans for collecting salt from the lakes without paying for it. An angry mob kidnapped Howard and held him for several days. To secure his release, Howard pledged to release his claim on the salt beds and leave Texas.

And leave he did—for a while. But Howard soon reneged on his pledge and returned to El Paso County. On October 10, 1877, he walked into a local store with a double-barreled shotgun and blasted Cardis into the next world.

Thus began the El Paso Salt War.

Almost anywhere else, Howard's brazen act would have resulted in arrest, a denial of bail, and a swift trial. But El Paso County Sheriff Charles Kerber was a close friend who considered Cardis "a tyrannical, unscrupulous scoundrel." Indeed, Kerber's alliance with Howard even led him to write Texas Governor Richard Coke in 1875, expressing concern over the Cardis's influence over

³ Allison Brownell Tirres, "Lawyers and Legal Borderlands," 50 *Am. J. Leg. History* 157, 158 (2008–2010) (citation omitted).

⁴ *Ibid.* (citation omitted).

⁵ *Ibid.*

⁶ The Treaty of Guadalupe Hidalgo—signed at the conclusion of the US-Mexican War in 1848—included a guarantee of all existing property rights to Mexican Americans living north of the border. *Ibid.*, 169 (citation omitted).

the local Tejano population.⁷ So, Kerber stood down as Howard fled to New Mexico.⁸

The area's Tejanos and Mexicans reacted angrily to the Cardis murder. With El Paso now a veritable tinder box, authorities appointed local businessman and Canadian expatriate John Tays as a lieutenant of the Texas Rangers and charged him with recruiting a twenty-man company. Taking pretty much anyone he could get, Tays raised a company that included several questionable characters (and more than a few complete incompetents).

In December, just two months after the shooting of Cardis raised the stakes, a wagon train of Mexicans headed for the salt lakes. Howard—staying in nearby San Elizario, where he further inflamed the situation by harassing and using racial epithets toward local Tejanos—responded by filing charges.

On the night of December 12, 1877, Hispanic insurgents met in a San Elizario home to plot their next move. Former sheriff Charles Ellis volunteered to investigate. But as he questioned some insurgents, another man rode up behind him, lassoed him, and then took off at a gallop—dragging the former sheriff to death. The insurgents dumped Ellis's body outside town after cutting his throat from ear to ear and stabbing him twice in the heart.

Around four hundred insurgents then surrounded Howard and the Ranger company in their barracks and an adjacent building. After a four-day siege—which saw the insurgents kill at least one Ranger and wound several others—Howard volunteered to give himself up, knowing they all soon would be overrun and killed otherwise.

The Rangers surrendered, believing it would prevent the mob from harming Howard. But a Mexican firing squad executed Howard and two other men (including one Ranger). The mob used machetes to hack Howard's body to pieces, then disarmed the Rangers and sent them away in disgrace. Tays's surrender remains the only one in Ranger history; it tarnished his reputation for the rest of his life.⁹

The nearby *Mesilla Valley Independent* published a breathless account of the insurgency—before the Rangers' surrender—in its edition of December 15, 1877. The story put the mob at between three hundred and four hundred members, and speculated that as many as four Rangers already had been killed. It noted the governor's instruction to Sheriff Kerber to raise a force of up to a hundred men and put down the insurgency "at all hazards."¹⁰

El Paso's newly installed telegraph line spread news of the siege and surrender across the

⁷ The letter is housed in the Texas State Archives in Box 2014/123-2 of the Governor Richard Coke Records.

⁸ A later Congressional inquiry noted that Howard should have been arrested and held without bail. *H. Comm. on Foreign Affairs, 45th Cong., Report on El Paso Troubles in Texas 17 (1878)*. The report is housed in the Texas Archives Library under call number Y1.1/2:Serial1809 (H. Ex. Doc. 45-93).

⁹ Tays took the blame for the surrender even though he never actually ordered it. While Tays walked to insurgent headquarters with Howard, local merchant John Atkinson falsely told the Ranger garrison that Tays had ordered the surrender as part of an agreement with the insurgents. Swanson, *Cult of Glory*, 208–09.

¹⁰ "Riot at San Elezario!," *Mesilla Valley Independent*, Dec. 15, 1877, 4 (available through the University of New Mexico Library at: https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1017&context=mvi_news).



The building believed to be the insurgent's headquarters still stands in San Elizario.

The home of Charles Ellis, former sheriff murdered by the insurgents, is being renovated in San Elizario.



This corner in San Elizario is believed to be the site of Howard's execution (All photos from author's collection, taken by author on October 20, 2022).

country. The federal government sent in troops from New Mexico. But they had strict instructions to police only violations of the law by Mexican citizens who had crossed the border. As a result, the soldiers did little to stem the local violence.

Meanwhile, in retaliation for the insurgency at San Elizario, Sheriff Kerber sent a telegram to John Kinney—a notorious cattle rustler who ran a ranch (and well-known haven for outlaws) just outside nearby Mesilla, New Mexico—asking him to assemble a group of volunteers and bring them to El Paso.¹¹ Kinney quickly raised between twenty and thirty men and dubbed them the Silver City Volunteers. The group included several members of his cattle-rustling gang. Perhaps the most dangerous outlaw, Bob Martin—one of “New Mexico’s foremost desperados”¹²—was under indictment for stealing cattle. Kinney’s new volunteers also included a young cowboy named William Bresnaham—the future Curly Bill Brocius.

Martin joined up with Kinney just after participating in a horse raid in the Burro Mountains. That raid is noteworthy not so much for its success (the outlaws stole three horses) but for one of the participants: a young hand named Henry Antrim, who soon would gain notoriety as Billy the Kid.¹³

Kinney and his collection of hardened criminals quickly traversed the 150 miles to El Paso County. By December 22, they had joined Sheriff Kerber, Tays, and the Rangers in a drive to San Elizario.

Upon their arrival, Kinney’s volunteers—assisted by the Rangers—unleashed a terrifying wave of violence. One group entered the house of a Mexican American woman, shot her dog, and raped her. Other volunteers shot a pair of insurgents they were holding in custody, justifying the shooting with a dubious story of attempted escape. A group of volunteers and Rangers broke into the home of a married couple and murdered the husband. The Rangers also hunted down and executed at least three men they believed participated in Howard’s execution.

¹¹ Robert Utley, *Billy the Kid: A Short and Violent Life*, 23 (1989).

¹² *Ibid.*, 21.

¹³ *Ibid.*, 21–22.

Interlude: Billy the Kid in San Elizario

Billy the Kid had his own connection to San Elizario. According to local legend, Melquiades Segura—a close friend of Billy’s—came to San Elizario to visit his parents in 1876 or 1877. His association with Billy being known around town, the local authorities arrested Segura—who got word to Billy in Mesilla. Billy quickly rode to San Elizario. Posing as a Texas Ranger, he got the jailer to let him in. Billy then forced the jail guards to surrender at gunpoint, freed Segura, and the two of them fled across the Rio Grande into Mexico. The jail remains standing and is the site of an annual Billy the Kid festival in San Elizario.

No one knows for certain if the legend is true. But local historian H.W. “Skip” Clark explored the story in detail as part of his master’s thesis in history at UTEP and concluded that it likely is true. See H.W. Clark, “The History, Archaeology, and Oral Traditions of the San Elizario Jail: An Interdisciplinary Study,” (2002) (unpublished M.A. thesis, University of Texas at El Paso) (on file with the UTEP Library General Collection).



Exterior and interior of the San Elizario jail that Billy the Kid broke into to free his friend. (Author's collection, taken by author on October 20, 2022).

By the time federal troops finally arrived to take control of the situation, many Mexican American residents had fled to safety across the border. To forestall future violence, federal authorities established a permanent military garrison at nearby Fort Bliss.

By January 10, 1878—with the Army now ensconced at Fort Bliss—the violence of the Salt War had subsided and the Silver City volunteers disbanded. Most of Kinney's volunteers rode on to New Mexico. But Kinney stayed in El Paso, opening a saloon and becoming a deputy to Sheriff Kerber. Bob Martin and Curly Bill also remained in El Paso.

Highway Robbery and Arrest

Five months later, on May 21, 1878, a U.S. Army ambulance left El Paso bound for Las Cruces, New Mexico. Three men accompanied the ambulance: driver George Shakespear, trooper Charles Johnson, and Lieutenant Ben Israel Butler, the son of renowned Civil War General Benjamin Butler. For Butler, the short trip was the beginning of a longer journey home to Boston.

Unbeknownst to Butler, bandits were hot on his trail. About ten miles outside El Paso, two men on horseback rode past the ambulance; several men in the ambulance recognized them as Martin and Curly Bill.

As the ambulance turned at a bend in the road a couple of miles further north, two men jumped out brandishing weapons. When Shakespear could not halt his mules quickly enough, the two men opened fire. One sprayed Johnson with buckshot. The other shot Shakespear in the shoulder with a pistol ball.

Butler reacted quickly and heroically, leaping down from the wagon bed, seizing a carbine, and turning it on the outlaws. But before he could fire, Martin and Curly Bill thundered away into the brush.

Turning the ambulance back toward El Paso, Butler ran headlong into a group of Texas Rangers hunting for Apache raiders. Upon hearing Butler's story, the Rangers set out in pursuit of Martin and Curly Bill, who fled across the border to Paso del Norte (now Juarez).

The *Mesilla Valley Independent* published an account of the raid under the heading "The Reign of Lawlessness." The story identified "the notorious Bob Martin" as one of the bandits and said he was accompanied by another masked man. The paper noted that upon its return to town, the ambulance was "riddled with bullets and stained with the blood of the wounded men."¹⁴

The Rangers followed Martin and Curly Bill across the border. Mexican police promptly arrested the fugitives. Upon their extradition to El Paso, Martin and Curly Bill were held in a military prison. When Sheriff Kerber took custody of the outlaws, he transferred them to the Rangers—who lacked a jail but held the men in their quarters at Ysleta.

With Martin and Curly Bill in custody, Kinney and his remaining volunteers left El Paso for

¹⁴ "The Reign of Lawlessness!," *Mesilla Valley Independent*, May 25, 1878, 4 (available through the University of New Mexico Library at: https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1034&context=mvi_news).

New Mexico. In short order, they would play a leading role in the famed Lincoln County War—even participating in the siege of Alexander McSween’s home involving Billy the Kid.¹⁵

Trial and Sentencing¹⁶

Two months later, on September 2, Sheriff Kerber and a Texas Ranger escorted Curly Bill and Martin to their court appearances. According to the *Mesilla Valley Independent*, the court docket for that setting was “very small” with the trial of “Martin and Curly Bill for highway robbery and attempt to kill Lt. Butler and escort” as one of the more important cases.¹⁷

On September 6, the grand jury returned its indictment against Martin and Curly Bill. The indictment said nothing about Lieutenant Butler but accused Martin and Curly Bill of assault against Shakespeare and Johnston with “malice aforethought to kill and murder against the peace and dignity of the State.”¹⁸

The trial occurred just over a week after the indictment, on September 12. After Martin and Curly Bill pleaded not guilty, a jury heard the case and found both men guilty: “We the jury in the aforesaid cases find the parties guilty & assess the punishment at five years penitentiary.” To give the outlaws credit for time served awaiting trial, the district attorney appended a statement to the jury’s verdict saying: “The State prays that the above entry be made minus pro time & the record stands as so amended.”¹⁹

Two days after sentencing, on September 14, Martin and Curly Bill filed a motion for new trial raising four issues in support of the request for a new trial:

1st Because a material witness of the Defts was prevented from attending the Court of trial of Defts by threats.

2nd Because the verdict is contrary to the laws & the evidence and not in accordance with the charge of the court.

3rd Because the verdict does not decide the issue between the parties or assess any punishment prescribed by the laws of Texas.

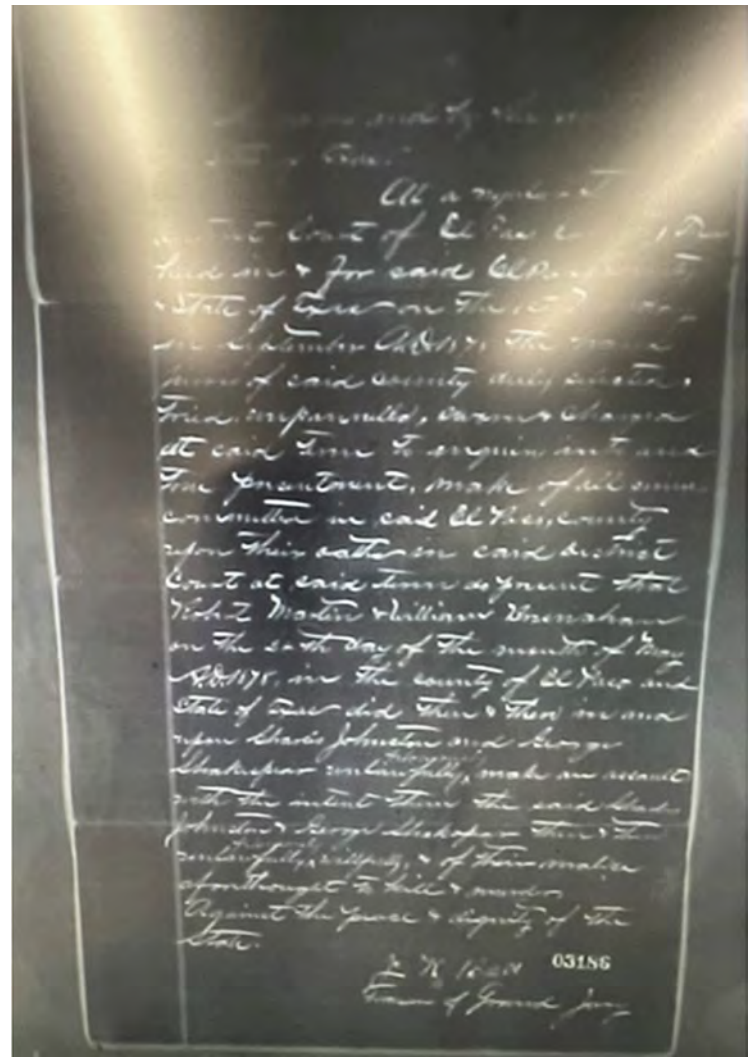
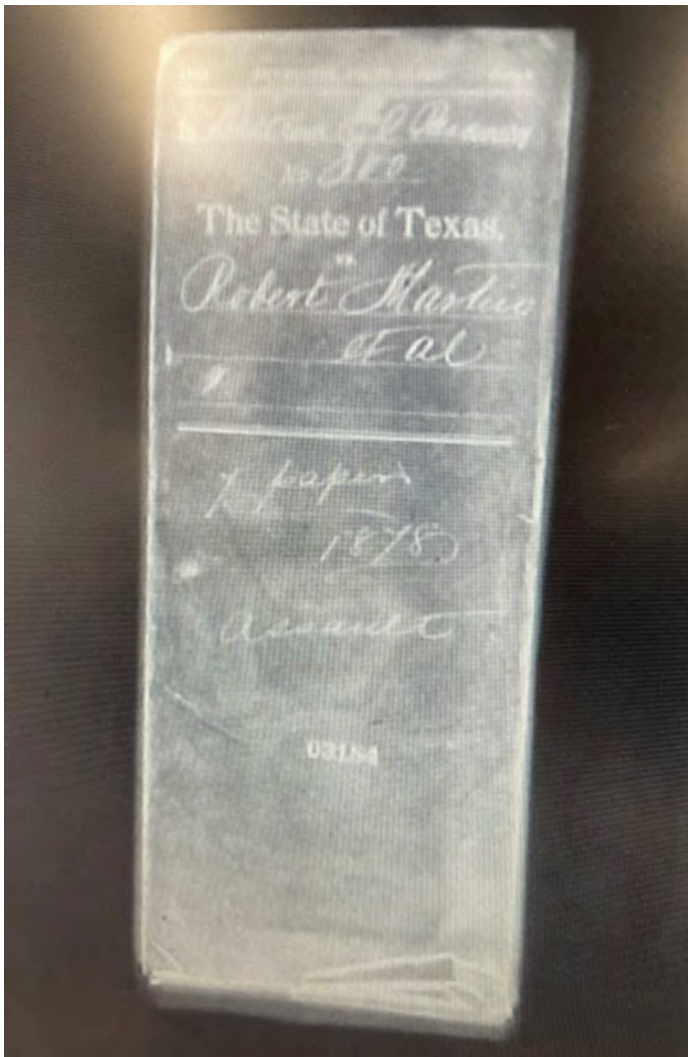
¹⁵ Boessenecker, *Ride the Devil’s Herd*, 35; Uteley, *Billy the Kid*, 91.

¹⁶ The facts concerning the court case are drawn principally from the clerk’s file and Steve Gatto’s thorough recounting of the case. See Gatto, *Curly Bill*, 16–23, 135–38. When Gatto researched his book twenty years ago, he viewed the original records in the paper “docket book” maintained by the El Paso County District Clerk. When I attempted to do so in 2022, the clerk’s office informed me those records were lost. So, it appears the only surviving copies are those on microfilm at the UTEP Library. Those records are located in the basement, under the library’s index number MF 524. Once you locate MF 524, the court records are in sequential order by case number. The case against Martin and Curly Bill is No. 300, with the records beginning at page 03184. For the remainder of this article, the records are referenced as “Court File at” with the relevant microfilm page number.

¹⁷ “Correspondence from Franklin,” *Mesilla Valley Independent*, Sept. 7, 1878, 4 (available through the University of New Mexico Library at: https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1048&context=mvi_news).

¹⁸ Court File at 03186.

¹⁹ Court File at 03205–06.



Left: Outer cover for court file of Bresnaham's criminal case. Right: The indictment against Martin and Bresnaham (Both images from author's collection, taken by author on October 20, 2022).

4th Because the verdict is too vague uncertain and indefinite to support a judgment of sentence.²⁰

To support their allegation about the missing witness, the lawyers attached a sworn affidavit from a Texas Ranger testifying that he had traveled to Mexico to secure the attendance of a witness named Joseph Jerald. But, said the Ranger, Jerald was too frightened to testify:

Affiant saw the said Joseph Jerald and stated the object of his visit and the said Jerald expressed a willingness to attend at the trial of said cause as such witness but was afraid to do so because he had been threatened & notified by the Jeffe-politica and other Mexican authorities of El Paso Mexico that if he the said Jerald did attend said trial as such witness that he would have to leave the Country because Joseph Jerald was only taking the part of the said defendants because they are Americans.

²⁰ Court File at 3201.

According to the Ranger, Jerald had been prepared to testify that on the day the ambulance was attacked, he saw Bob Martin in front of a store on the Mexican side of the border outside El Paso. This would have provided Martin with an alibi.²¹

Martin and Curly Bill were represented in the motion for new trial by a law firm that listed itself as James & Alexander. The definitive work on El Paso's legal history lists a lawyer named J.P. Carpenter as one of the preeminent lawyers in the El Paso area during this period.²² It does not mention the firm of James & Alexander nor any lawyer with the surname of James.

It does not appear that Carpenter was a resident of the city of El Paso, as he is not listed among registered voters in Franklin as of 1878.²³ And, at that time, only six lawyers actually resided in El Paso County.²⁴ So, the likelihood is that Carpenter practiced regularly in El Paso but resided either in a different part of the county or even in another nearby county.

On November 2, 1878, Martin and Curly Bill used tools smuggled into the prison by the son of a Mexican prisoner to hack through their shackles. Later that evening, they—along with three Mexican prisoners—broke through the adobe wall and escaped.²⁵

²¹ Court File at 3190-91.

²² J. Morgan Broadus Jr., *The Legal Heritage of El Paso* 151 (1963).

²³ *Ibid.*, 130.

²⁴ *Ibid.*

²⁵ Boessenecker, *Ride the Devil's Herd*, 79.

The State of Texas vs. Robert Martin & John Brenabau. In the jury in aforesaid case find the parties guilty, assess the punishment at four years penitentiary. The Judge ordered the State pay that the above entry be made true for time & that the record stands as so amended. J. A. Fabry Dist. Atty. for time

03206

The State of Texas vs. Robert Martin & John Brenabau. In the jury in aforesaid case find the parties guilty, assess the punishment at four years penitentiary. The Judge ordered the State pay that the above entry be made true for time & that the record stands as so amended. J. A. Fabry Dist. Atty. for time

03205

The final judgment (Author's collection, taken by author on October 20, 2022).

No one knows for certain whether Martin and Curly Bill had inside assistance in their escape, but one member of the Ranger company guarding them was Sherman McMaster. He later would join forces with Curly Bill in Arizona, then switch sides and ride with Wyatt Earp.²⁶

The escape occurred just three days before a local election in which Sheriff Kerber faced stiff opposition from former Ysleta mayor Benito Gonzales, who also had served as a Texas Ranger. Despite the concerted efforts by Kerber partisans at election fraud—most of which were prevented by the watchful eye of Tays and his Rangers—citizens elected Gonzales as their next sheriff by a large margin.²⁷

Meanwhile, Martin and Curly Bill fled across the border to Mexico.

Was William Bresnaham Really Curly Bill Brocius?

Over the years, many historians disputed that William Bresnaham and Curly Bill were one and the same. But convincing evidence—much of it unearthed by Steve Gatto—now establishes pretty conclusively that Curly Bill Brocius was the William Bresnaham arrested in El Paso.

Initially, Curly Bill himself later admitted his conviction to Wyatt Earp. According to a *Tombstone Epitaph* article recounting Earp's 1880 arrest of Brocius in Arizona, the detained outlaw described the whole affair during a lengthy wagon ride. Curly Bill even remembered the name of one of the lawyers responsible for his prosecution in El Paso. After arriving back in Tombstone, Earp recounted the conversation to a local reporter.²⁸

Doc Holliday also knew about the conviction. In 1882, Doc told a reporter for the *Denver Republican* about Curly Bill's arrest and conviction in connection with the attack on Butler outside El Paso.²⁹

Contemporary newspaper accounts referred to Martin's accomplice as "a man known as Curley."³⁰ And while Martin and Curly Bill were in Ranger custody, Tays wrote a letter referring to Bresnaham as "Curly Bill."³¹

Finally, of course, Martin and Curly Bill turned up together in Arizona shortly after the El Paso proceedings involving Martin and someone called "Curly Bill." It strains credulity to think that Martin would have had such a close relationship—and criminal partnership—with two men having the same nickname in such a short span of time. "Since both Bob Martin and Curly Bill became known as leaders of the rustlers in Arizona Territory, they are considered to be the same

²⁶ See Boessenecker, *Ride the Devil's Herd*, 35.

²⁷ Cool, *Salt Warriors*, 269–73.

²⁸ Gatto, *Curly Bill*, 9.

²⁹ *Ibid.*, 17.

³⁰ "Attempted Murderers of Lt. Butler and Party Captured," *Mesilla Valley Independent*, May 25, 1878, 3 (available through the University of New Mexico Library at: https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1034&context=mvi_news).

³¹ Gatto, *Curly Bill*, 14.

outlaws who committed the Texas crime.”³²

So, yes, William Bresnaham really was Curly Bill Brocius.

Did They File Any Appeal?

The genesis for this article was the enthralling description of events in El Paso contained in *Ride the Devil's Herd*, John Boessenecker's recent book about the Vendetta Ride.³³ In the book, Boessenecker details the convictions of Martin and Curly Bill and says: “Their lawyers promptly filed an appeal.”³⁴

This piqued my interest. Were the authors simply referring to the motion for new trial as an “appellate” instrument. Or—as might happen in modern practice—did the lawyers representing Martin and Curly Bill file a notice of appeal alongside or shortly after the motion for new trial?

The surviving file from the proceedings in El Paso County contains no reference to an appeal. But confirming that fact required a visit to the Texas State Archives—specifically, records from the court known in the 1870s as the Texas Court of Appeals.

The present Texas Constitution, ratified in 1876, provided for two appellate courts: the Texas Supreme Court (with jurisdiction over civil cases), and the Texas Court of Appeals (with jurisdiction over all criminal cases and some civil cases). In 1891, the creation of intermediate civil appellate courts resulted in the Texas Court of



RECORD	NUMBER	APPELLANT	APPELLEE	COUNTY	HOW DISPOSED OF	GRANTED BY	RECORD	NUMBER
24	217	Doc Holliday	State of Texas	El Paso			256	
25	218	Curly Bill	State of Texas	El Paso			257	
26	219	Curly Bill	State of Texas	El Paso			258	
27	220	Curly Bill	State of Texas	El Paso			259	
28	221	Curly Bill	State of Texas	El Paso			260	
29	222	Curly Bill	State of Texas	El Paso			261	
30	223	Curly Bill	State of Texas	El Paso			262	
31	224	Curly Bill	State of Texas	El Paso			263	
32	225	Curly Bill	State of Texas	El Paso			264	
33	226	Curly Bill	State of Texas	El Paso			265	
34	227	Curly Bill	State of Texas	El Paso			266	
35	228	Curly Bill	State of Texas	El Paso			267	
36	229	Curly Bill	State of Texas	El Paso			268	
37	230	Curly Bill	State of Texas	El Paso			269	
38	231	Curly Bill	State of Texas	El Paso			270	
39	232	Curly Bill	State of Texas	El Paso			271	
40	233	Curly Bill	State of Texas	El Paso			272	
41	234	Curly Bill	State of Texas	El Paso			273	
42	235	Curly Bill	State of Texas	El Paso			274	
43	236	Curly Bill	State of Texas	El Paso			275	
44	237	Curly Bill	State of Texas	El Paso			276	
45	238	Curly Bill	State of Texas	El Paso			277	
46	239	Curly Bill	State of Texas	El Paso			278	
47	240	Curly Bill	State of Texas	El Paso			279	
48	241	Curly Bill	State of Texas	El Paso			280	
49	242	Curly Bill	State of Texas	El Paso			281	
50	243	Curly Bill	State of Texas	El Paso			282	
51	244	Curly Bill	State of Texas	El Paso			283	
52	245	Curly Bill	State of Texas	El Paso			284	
53	246	Curly Bill	State of Texas	El Paso			285	
54	247	Curly Bill	State of Texas	El Paso			286	
55	248	Curly Bill	State of Texas	El Paso			287	
56	249	Curly Bill	State of Texas	El Paso			288	
57	250	Curly Bill	State of Texas	El Paso			289	
58	251	Curly Bill	State of Texas	El Paso			290	
59	252	Curly Bill	State of Texas	El Paso			291	
60	253	Curly Bill	State of Texas	El Paso			292	
61	254	Curly Bill	State of Texas	El Paso			293	
62	255	Curly Bill	State of Texas	El Paso			294	
63	256	Curly Bill	State of Texas	El Paso			295	
64	257	Curly Bill	State of Texas	El Paso			296	
65	258	Curly Bill	State of Texas	El Paso			297	
66	259	Curly Bill	State of Texas	El Paso			298	
67	260	Curly Bill	State of Texas	El Paso			299	
68	261	Curly Bill	State of Texas	El Paso			300	
69	262	Curly Bill	State of Texas	El Paso			301	
70	263	Curly Bill	State of Texas	El Paso			302	
71	264	Curly Bill	State of Texas	El Paso			303	
72	265	Curly Bill	State of Texas	El Paso			304	
73	266	Curly Bill	State of Texas	El Paso			305	
74	267	Curly Bill	State of Texas	El Paso			306	
75	268	Curly Bill	State of Texas	El Paso			307	
76	269	Curly Bill	State of Texas	El Paso			308	
77	270	Curly Bill	State of Texas	El Paso			309	
78	271	Curly Bill	State of Texas	El Paso			310	
79	272	Curly Bill	State of Texas	El Paso			311	
80	273	Curly Bill	State of Texas	El Paso			312	
81	274	Curly Bill	State of Texas	El Paso			313	
82	275	Curly Bill	State of Texas	El Paso			314	
83	276	Curly Bill	State of Texas	El Paso			315	
84	277	Curly Bill	State of Texas	El Paso			316	
85	278	Curly Bill	State of Texas	El Paso			317	
86	279	Curly Bill	State of Texas	El Paso			318	
87	280	Curly Bill	State of Texas	El Paso			319	
88	281	Curly Bill	State of Texas	El Paso			320	
89	282	Curly Bill	State of Texas	El Paso			321	
90	283	Curly Bill	State of Texas	El Paso			322	
91	284	Curly Bill	State of Texas	El Paso			323	
92	285	Curly Bill	State of Texas	El Paso			324	
93	286	Curly Bill	State of Texas	El Paso			325	
94	287	Curly Bill	State of Texas	El Paso			326	
95	288	Curly Bill	State of Texas	El Paso			327	
96	289	Curly Bill	State of Texas	El Paso			328	
97	290	Curly Bill	State of Texas	El Paso			329	
98	291	Curly Bill	State of Texas	El Paso			330	
99	292	Curly Bill	State of Texas	El Paso			331	
100	293	Curly Bill	State of Texas	El Paso			332	
101	294	Curly Bill	State of Texas	El Paso			333	
102	295	Curly Bill	State of Texas	El Paso			334	
103	296	Curly Bill	State of Texas	El Paso			335	
104	297	Curly Bill	State of Texas	El Paso			336	
105	298	Curly Bill	State of Texas	El Paso			337	
106	299	Curly Bill	State of Texas	El Paso			338	
107	300	Curly Bill	State of Texas	El Paso			339	
108	301	Curly Bill	State of Texas	El Paso			340	
109	302	Curly Bill	State of Texas	El Paso			341	
110	303	Curly Bill	State of Texas	El Paso			342	
111	304	Curly Bill	State of Texas	El Paso			343	
112	305	Curly Bill	State of Texas	El Paso			344	
113	306	Curly Bill	State of Texas	El Paso			345	
114	307	Curly Bill	State of Texas	El Paso			346	
115	308	Curly Bill	State of Texas	El Paso			347	
116	309	Curly Bill	State of Texas	El Paso			348	
117	310	Curly Bill	State of Texas	El Paso			349	
118	311	Curly Bill	State of Texas	El Paso			350	
119	312	Curly Bill	State of Texas	El Paso			351	
120	313	Curly Bill	State of Texas	El Paso			352	
121	314	Curly Bill	State of Texas	El Paso			353	
122	315	Curly Bill	State of Texas	El Paso			354	
123	316	Curly Bill	State of Texas	El Paso			355	
124	317	Curly Bill	State of Texas	El Paso			356	
125	318	Curly Bill	State of Texas	El Paso			357	
126	319	Curly Bill	State of Texas	El Paso			358	
127	320	Curly Bill	State of Texas	El Paso			359	
128	321	Curly Bill	State of Texas	El Paso			360	
129	322	Curly Bill	State of Texas	El Paso			361	
130	323	Curly Bill	State of Texas	El Paso			362	
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133	326	Curly Bill	State of Texas	El Paso			365	
134	327	Curly Bill	State of Texas	El Paso			366	
135	328	Curly Bill	State of Texas	El Paso			367	
136	329	Curly Bill	State of Texas	El Paso			368	
137	330	Curly Bill	State of Texas	El Paso			369	
138	331	Curly Bill	State of Texas	El Paso			370	
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148	341	Curly Bill	State of Texas	El Paso			380	
149	342	Curly Bill	State of Texas	El Paso			381	
150	343	Curly Bill	State of Texas	El Paso			382	
151	344	Curly Bill	State of Texas	El Paso			383	
152	345	Curly Bill	State of Texas	El Paso			384	
153	346	Curly Bill	State of Texas	El Paso			385	
154	347	Curly Bill	State of Texas	El Paso			386	
155	348	Curly Bill	State of Texas	El Paso			387	
156	349	Curly Bill	State of Texas	El Paso			388	
157	350	Curly Bill	State of Texas	El Paso			389	
158	351	Curly Bill	State of Texas	El Paso			390	
159	352	Curly Bill	State of Texas	El Paso			391	
160	353	Curly Bill	State of Texas	El Paso			392	
161	354	Curly Bill	State of Texas	El Paso			393	
162	355	Curly Bill	State of Texas	El Paso			394	
163	356	Curly Bill	State of Texas	El Paso			395	
164	357	Curly Bill	State of Texas	El Paso			396	
165	358	Curly Bill	State of Texas	El Paso			397	
166	359	Curly Bill	State of Texas	El Paso			398	
167	360	Curly Bill	State of Texas	El Paso			399	
168	361	Curly Bill	State of Texas	El Paso			400	
169	362	Curly Bill	State of Texas	El Paso			401	
170	363	Curly Bill	State of Texas	El Paso			402	
171	364	Curly Bill	State of Texas	El Paso			403	
172	365	Curly Bill	State of Texas	El Paso			404	
173	366	Curly Bill	State of Texas	El Paso			405	
174	367	Curly Bill	State of Texas	El Paso			406	
175	368	Curly Bill	State of Texas	El Paso			407	
176	369	Curly Bill	State of Texas	El Paso			408	
177	370	Curly Bill	State of Texas	El Paso			409	
178	371	Curly Bill	State of Texas	El Paso			410	
179	372	Curly Bill	State of Texas	El Paso			411	
180	373	Curly Bill	State of Texas	El Paso			412	
181	374	Curly Bill	State of Texas	El Paso			413	
182	375	Curly Bill	State of Texas	El Paso			414	
183	376	Curly Bill	State of Texas	El Paso			415	
184	377	Curly Bill	State of Texas	El Paso			416	
185	378	Curly Bill	State of Texas	El Paso			417	
186	379	Curly Bill	State of Texas	El Paso			418	
187	380	Curly Bill	State of Texas	El Paso			419	
188	381	Curly Bill	State of Texas	El Paso			420	
189	382	Curly Bill	State of Texas	El Paso			421	
190	383	Curly Bill	State of Texas	El Paso			422	
191	384	Curly Bill	State of Texas	El Paso			423	
192	385	Curly Bill	State of Texas	El Paso			424	
193	386	Curly Bill	State of Texas	El Paso			425	
194	387	Curly Bill	State of Texas	El Paso			426	
195	388	Curly Bill	State of Texas	El Paso			427	
196	389	Curly Bill	State of Texas	El Paso			428	
197	390	Curly Bill	State of Texas	El Paso			429	
198	391	Curly Bill	State of Texas	El Paso			430	
199	392	Curly Bill	State of Texas	El Paso			431	
200	393	Curly Bill	State of Texas	El Paso			432	
201	394	Curly Bill	State of Texas	El Paso			433	
202	395	Curly Bill	State of Texas	El Paso			434	
203	396	Curly Bill	State of Texas	El Paso			435	
204	397	Curly Bill	State of Texas	El Paso			436	
205	398	Curly Bill	State of Texas	El Paso			437	
206	399	Curly Bill	State of Texas	El Paso			438	
207	400	Curly Bill	State of Texas	El Paso			439	
208	401	Curly Bill	State of Texas	El Paso			440	
209	402	Curly Bill	State of Texas	El Paso			441	
210	403	Curly Bill	State of Texas	El Paso			442	
211	404	Curly Bill	State of Texas	El Paso			443	
212	405	Curly Bill	State of Texas	El Paso			444	
213	406	Curly Bill	State of Texas	El Paso			445	
214	407	Curly Bill	State of Texas	El Paso			446	
215	408	Curly Bill	State of Texas	El Paso			447	
216	409	Curly Bill	State of Texas					

Appeals changing its name to the Texas Court of Criminal Appeals.

The archives house records from the Texas Court of Appeals in the late 1870s. These records include few case files. But they contain indexes and docket entries from the period. And that is where I conducted my search for any trace of Bob Martin and William Bresnaham. I reviewed the original indexes and docket records from the Texas Court of Appeals for 1878 and 1879. But neither the indexes nor the docket records contain any reference to Bob Martin or William Bresnaham.³⁵

So, the records in El Paso County contain no reference to an appeal; none of the newspaper articles mentions any appeal; and the appellate records themselves—though perhaps incomplete—similarly lack any mention of an appeal by the famed outlaws. And, of course, Martin and Curly Bill escaped custody shortly after filing their motion for a new trial, thus obviating any need for an appeal in Texas.

Cumulatively, then, the evidence indicates that Curly Bill never filed any appeal in Texas. The authors' mention of appellate proceedings refers to the motion for new trial likely filed as a predicate for an appeal that became unnecessary when Martin and Curly Bill escaped Ranger custody and fled Texas.

Tombstone and the Earps³⁶

Martin and Curly Bill fled across the border to Mexico and quickly resumed their rustling operation. Within a month, they had stolen sixty-eight cattle from various rancheros in northern Chihuahua and sold them in New Mexico.

Over the next two years, Martin and Curly Bill found themselves at the center of a growing gang of outlaws and fugitives operating on both sides of the border. They were known on the American side simply as “the Cowboys.” The Cowboys eventually numbered more than two hundred, making them the Old West’s largest criminal gang.

Martin and Curly Bill—and their merry band of thieves and killers—gravitated toward Arizona, where they joined forces with another cattle-rustling gang centered around ten miles outside of Tombstone and overseen by Newman “Old Man” Clanton and his three sons: Ike, Phineas, and Billy.

In their migration from Texas to Arizona, Martin and Curly Bill were hardly unique. The rise of the Texas Rangers—both in fact and in legend—had the desired effect of encouraging an entire generation of criminals and ne’er-do-wells to seek their fortunes in places like New Mexico and Arizona.³⁷

³⁵ The records are available in the Texas State Archives at call number 211-025.

³⁶ This narrative of the Cowboys in Arizona, the Gunfight at the O.K. Corral, and the Vendetta Ride is drawn from a combination of the following sources unless otherwise indicated: Boessenecker, *Ride the Devil's Herd* 244–402; Gatto, *Curly Bill*, 95–134; Clavin, *Tombstone*, 254–350; Guinn, *The Last Gunfight*, 197–294;

³⁷ See Clavin, *Tombstone*, 132.

Martin got married and acquired a ranch near Cloverdale Springs in New Mexico. But he and the Cowboys continued their marauding across New Mexico, Arizona, and northern Chihuahua. They also spent a good deal of time in Tombstone—which offered ample liquor, gambling, and women.

Martin and Curly Bill weren't the only newcomers seeking their fortunes in Arizona. Around the same time, Wyatt Earp reunited in Tombstone with brothers Virgil and Morgan (two other brothers, James and Warren, also joined them in Tombstone at various times). Wyatt's close friend, Doc Holliday—dentist, gambler, and unremorseful killer—also joined him in Tombstone. Holliday had his own connection to Texas, having operated a dental practice in Dallas just a block from the present location of the George Allen Courthouse.³⁸

The Earps came to Tombstone seeking their fortunes in prospecting and business. But, having little luck in these endeavors, they soon returned to what they knew best: policing. Though none of them yet knew it, the Cowboys and the Earps were on a collision course.

But well before his famous encounter with Wyatt, Curly Bill ran headlong into another Tombstone lawman: City Marshall Fred White. Responding to gunfire outside a saloon, Marshall White encountered Curly Bill and demanded that he handed over his pistol. Curly Bill took the Colt .45 from his holster and began handing it to Marshall White. As he did so, Wyatt came up behind Curly Bill and grabbed him. As Marshall White attempted to snatch the pistol from Curly Bill, it discharged and shot him in the abdomen. Wyatt quickly "buffaloed" Curly Bill (a term that referred to Wyatt's preferred approach of incapacitating arrestees by slamming the barrel of his gun over their heads) and took him off to jail. Marshall White lingered for two days before dying.

Wyatt then transported Curly Bill to Tucson, where he would stand trial for murder. It was during the ride from Tombstone to Tucson that Curly Bill disclosed to Wyatt his arrest and conviction in El Paso.

While Curly Bill awaited trial in Tucson, Bob Martin continued his cattle-rustling ways. But on November 26, 1880, Martin's criminal career came to an abrupt end. A dispute over (what else?) stolen horses led a group of Martin's fellow cowboys to ambush him at a place called Granite Gap. As Martin and another cowboy rode into the gap, a barrage of gunfire killed their horses. When Martin scrambled out of the saddle, a bullet struck him in the head and killed him instantly.

With Martin's demise, Curly Bill—even as he sat in a Tucson jail cell—became the *de facto* leader of the Cowboys.

When Curly Bill stood trial on December 27, 1880, Wyatt and Morgan both testified on his behalf and said the shooting had been accidental. Even Marshall White had provided a deathbed statement to be read into the record—and he too confirmed (with remarkable candor) that the shooting was accidental. Based on this evidence, the judge ordered Curly Bill released. Curly Bill quickly resumed his successful cattle-rustling operation.

³⁸ Pat Jahns, *The Frontier World of Doc Holliday* (1957), 43; Gary L. Roberts, *Doc Holliday: The Life and Legend* (2006), 67–70.

Meanwhile, tensions between the Cowboys—particularly the Clantons and their close allies—and the Earps continued to escalate in Tombstone throughout 1881.

Finally, on October 26, 1881, the escalating tensions between the Earps and the Cowboys exploded into the famous Gunfight at the O.K. Corral. In a fifteen-foot-wide vacant lot in downtown Tombstone Virgil, Wyatt, Morgan, and Doc Holliday faced off against Ike and Billy Clanton, Tom and Frank McLaury, Billy Claiborne, and Wesley Fuller.

As Holliday pulled up his shotgun and Frank McLaury went for his revolver, Virgil raised his arms and yelled: “Hold on! I don’t want that!” But by now, Billy Clanton had leveled his pistol at Wyatt. The time for talking was over.

Knowing that the best shooter in the outlaw group was Frank McLaury, Wyatt took aim at him rather than Billy Clanton. Wyatt and Billy shot at the same time. Billy’s shot sailed harmlessly past Wyatt. But Wyatt’s tore into Frank McLaury’s stomach. Despite being gut-shot, Frank managed to get off his own round and hit Virgil in the right calf. As Virgil collapsed, Ike ran up and took hold of Wyatt—who put his six-gun into Ike’s body and screamed: “The fight has commenced! Go to fighting or get away.” True to form, Ike turned and ran into a nearby building. Billy Claiborne followed Ike to shelter.

Meanwhile, Morgan Earp shot Billy Clanton in the chest, piercing his left lung. Virgil somehow struggled to his feet and got off several shots. One of the Cowboys shot Morgan; the bullet entered one shoulder, went across the back, and exited the other shoulder. Morgan collapsed to the ground.

Doc Holliday got a clear shot at Tom McLaury with the shotgun, putting a dozen buckshot into his side and arm. Doc threw the shotgun aside, snatched out a pistol, and began firing at Billy Clanton—who continued to fight despite his wound. Morgan also got to his feet and now all three of the Earps fired on young Clanton.

With the Earps focused on Billy Clanton, Frank McLaury attempted to escape by using his horse as a shield. But the animal spooked and bolted. McLaury took careful aim at Doc Holliday with a six-gun and fired; the bullet grazed Holliday’s hip. Holliday returned fire, striking McLaury right in the chest. At the same time, Morgan shot McLaury in the right ear, killing him instantly.

The gunfight was over. Three Cowboys lay dead. Virgil, Morgan, and Doc Holliday all sustained wounds but survived. Wyatt walked away unscathed.

Despite his prominence among the Cowboys, Curly Bill played no part in the famous gunfight. On October 22, he and a group of Cowboys had stolen a head of cattle from a ranch outside Tombstone. When a grand jury indicted them, Curly Bill fled to New Mexico—where he remained during the gunfight.

Through the lens of history, the gunfight at the OK Corral presents a simple morality tale:

Bad guys provoke good guys;

Bad guys push good guys into a fight;

Good guys kill bad guys.

But opinions in Tombstone were more nuanced. To be sure, the Earps had their share of supporters both among the public and in the media. But a sizeable portion of the local population—and not more than a few reporters—considered their actions cold-blooded murder. And, of course, the Cowboys vowed revenge for their fallen comrades.

Initially, the Cowboys sought to exact their vengeance through the court system by seeking prosecution of the Earps for murder. And for a while, it appeared that approach might prove successful. But, in the end, the Earps were acquitted—forcing the Cowboys to seek revenge through more violent means.³⁹

Two months after the shootout, on December 28, 1881, Virgil was walking home from the Oriental Saloon. A group of three men ambushed him, opening up with shotguns. One buckshot shattered the bone in his upper left arm, another grazed his spine. Virgil survived, but he would be without the use of his left arm for the remainder of his life.

Morgan Earp was not even that fortunate; Three months later, while shooting pool with Wyatt in a local hall, Morgan was shot through the window and died with Wyatt by his side. The round intended for Wyatt sailed harmlessly over his head and lodged in a wall.

Now, it was a grief-stricken Wyatt Earp's turn for vengeance. No one was arrested for either shooting. But the rumor-mill in Tombstone held that Virgil's assailants had been Ike Clanton, Curly Bill, and Will McLaury (a Fort Worth lawyer and brother of the men who died at the OK Corral). At least with respect to McLaury, that can't be true—he left Tombstone for Fort Worth two days before Virgil's shooting. But whether true or not, Wyatt held Curly Bill responsible for the shooting.⁴⁰

When it came to Morgan's murder, Wyatt made no bones about who he blamed, telling people that: "The men who murdered my brother were Curly Bill, Ringo, Stilwell, Hank Swilling, and the Mexican Florentine."⁴¹

The Vendetta Ride: Curly Bill's Final Chapter

After forming a small posse of men he could trust—including the ever faithful Doc Holliday—Wyatt put Virgil on a train to safety in California. He and the posse then embarked on what has become known as the Vendetta Ride—Wyatt's relentless search for the men who wounded Virgil and murdered Morgan.

³⁹ Anyone interested in the trial itself should read the excellent account by Northwestern law professor Steven Lubet. Steven Lubet, *Murder in Tombstone: The Forgotten Trial of Wyatt Earp* (2004).

⁴⁰ See Boessenecker, *Ride the Devil's Herd*, 301.

⁴¹ *Ibid.*, 332 (citation omitted). Curly Bill's biographer, Steve Gatto, does not believe that Curly Bill actually participated in either shooting. And certainly no evidence ever linked him to the crimes. See Gatto, *Curly Bill*, 100, 104.

The details of the Vendetta Ride are the subject of much debate. Here is what cannot be disputed: Wyatt had no interest in bringing any of these Cowboys to justice; he intended to kill every one of them that he could find. And in that, he largely succeeded.

The Vendetta Ride started quickly and successfully—Wyatt and his posse gunned down Frank Stilwell near the Tucson train depot as he and Ike Clanton lay in wait to ambush Virgil on his journey to California.

Not long afterward, Wyatt and the group caught up with “the Mexican Florentine” (Florentino Sais) and put him in the ground too. With that shooting, Wyatt had dispatched two of the five men he blamed for Morgan’s murder.

Soon, though, as Wyatt hunted the Cowboys, they hunted him. On the morning of March 24, 1882, a group of riders—Curly Bill, John Ringo, and Phin Clanton among them—rode out looking for Wyatt and his posse. After stopping in Contention, they rode on for about fifteen miles to the east before stopping to water their horses at Cottonwood Spring.

Meanwhile, Wyatt and his posse ate breakfast just a few miles outside of Contention the same morning. They too arrived at Cottonwood Spring with the idea of resting and watering their horses. Wyatt rode at the head of the posse, with a sawed-off shotgun and Winchester at the ready.

As Wyatt and his group approached, Curly Bill and a group of Cowboys suddenly reared up from one bank of the spring and opened fire. According to Earp, he jumped out of the saddle to return fire. Holding desperately to his frightened horse, Wyatt managed to shoulder the shotgun, aim at Curly Bill, and fire. As Wyatt described it: “I fired both barrels of my gun into him, blowing him all to pieces. His chest was torn open by the big charge of buckshot. He yelled like a demon as we went down.”⁴²

As Wyatt shot Curly Bill, Holliday and the others—recognizing they were outnumbered—beat a hasty retreat. Wyatt managed to regain the saddle and take off after them. Earp’s entire group made it to safety. Meanwhile, the surviving Cowboys “quickly took away Curly Bill’s body and buried it, probably at the nearby Patterson ranch.”⁴³

News of the shootout and Curly Bill’s death quickly spread, with reports appearing in newspapers not just in Tombstone but across the country. The two newspapers in Tombstone differed over little except Curly Bill’s fate. The pro-Earp *Epitaph* touted Curly Bill’s death. But with no body found, the pro-Cowboy *Nugget* declared it a hoax. In response, the *Epitaph* offered a 2,000 dollar contribution to the charity of Curly Bill’s choice if he appeared to dispel the *Nugget*’s claim.

Whatever the truth, Curly Bill was never seen again in Cochise County—or, for that matter, anywhere else (though, like Billy the Kid, he would be the subject of rumors all over the West and in Mexico for decades).

⁴² Boessenecker, *Ride the Devil’s Herd*, 356.

⁴³ Casey Tefertiller, *Wyatt Earp: The Life Behind the Legend* (1997), 240.

With Curly Bill's death, the public lost patience with the mounting violence. Reading the tea leaves, Wyatt disbanded his posse and headed west to New Mexico and then Colorado. Efforts by the Cowboys to have Colorado extradite Wyatt and Doc to Arizona fell flat. The war between Wyatt Earp and the Cowboys was over.

One final word about Curly Bill's death. His principal biographer, Steve Gatto, believes Wyatt Earp fabricated the story about killing Curly Bill. Gatto argues that Curly Bill left Tombstone well in advance of the Gunfight at the O.K. Corral and stayed away throughout the Vendetta Ride. Gatto contends that Curly Bill most likely lived out his life in Colorado, Montana, or Mexico.⁴⁴

But even those historians examining the matter after Gatto's thorough research reject this argument. All three of the recent books reexamining the events in Tombstone endorse Wyatt's account of Curly Bill's death, as does an earlier Earp biography. As Northwestern law professor Steve Lubet says in his book on the Earps' trial, "historians generally accept the broad outline" of Curly Bill's death in the encounter with Wyatt's posse, "if not the precise details."⁴⁵

The theory of Curly Bill's survival no doubt would have thrilled the Cowboys. Immediately upon Curly Bill's death, his friends "began a campaign of misinformation that denied the outlaw's death. This could have been done to prevent the Earp band from collecting a rumored \$1,000 bounty placed on Curly Bill's head by Henry Clay Hooker ... or to prevent Wyatt Earp from receiving public acclaim"⁴⁶ But at least one of the Cowboys in the know, Johnny Barnes, confirmed Curly Bill's death at Wyatt's hand.⁴⁷

As one author explains, Curly Bill's "wild and violent, even sociopathic" nature undercuts rumors of his "marrying and living a quiet life in Mexico"—and "given his wild colorful and reckless character, he never would have allowed Wyatt to claim his scalp if he could so easily disprove the story."⁴⁸ Another concludes: "That the attention-loving, rampaging Curly Bill was never heard from again anywhere leads to only one conclusion."⁴⁹ Says yet another: "For the outlaw to disappear and leave Earp claiming the kill simply does not make sense."⁵⁰

Conclusion

For more than a century, events surrounding the Gunfight at the O.K. Corral and Wyatt Earp's Vendetta Ride have captivated the American public, spawning best-selling books and Hollywood blockbusters. Curly Bill's prominence as a Cowboy leader—and his dramatic and violent death at Wyatt's hand—have long been part of Old West mythology. But now, thanks to the groundbreaking

⁴⁴ Gatto, *Curly Bill*, 109–34.

⁴⁵ Lubet, *Murder in Tombstone*, 216.

⁴⁶ Tefertiller, *Wyatt Earp*, 240.

⁴⁷ *Ibid.*

⁴⁸ Boessenecker, *Ride the Devil's Herd*, 360.

⁴⁹ Clavin, *Tombstone*, 335; see also Guinn, *The Last Gunfight*, 284–85 (noting Curly Bill's "near-insatiable desire for attention" makes it unlikely that he lived out a quiet life in anonymity); Lubet, *Murder in Tombstone*, 216 ("historians generally accept the broad outline" of this version of Curly Bill's death).

⁵⁰ Tefertiller, *Wyatt Earp*, 240.

research of Steve Gatto and others, we know of the earlier episode in Curly Bill's outlaw career.

The attempted holdup of Butler and the army ambulance by Martin and Curly Bill was a fairly pedestrian—and spectacularly unsuccessful—bit of banditry. But the events that brought Martin and Curly Bill to El Paso County—from Howard's attempted takeover of the salt lakes, to the murder of Cardis, the insurgency in San Elizario, and the rampage by Kinney and the Rangers—form one of the most fascinating episodes in Texas history. And standing right in the middle of it all: Curly Bill Brocius.

For his role, Curly Bill should have spent the five years following the El Paso Salt War in Huntsville. Indeed, had it not been for his escape, Curly Bill would have remained safely ensconced in a Texas jail cell throughout the Gunfight at the O.K. Corral, the Vendetta Ride, and Wyatt Earp's shootout with the Cowboys at Cottonwood Spring. Instead, Curly Bill escaped Texas justice, made his way to Arizona, and entered American history.



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The History of the Common Law Right to Privacy in Texas

• Part II •

By John C. Domino

In the Winter issue, Part I of this article was a foundational discussion of the common law origins of the major doctrines adopted by the courts of other states in the nation as early as 1900, over seventy years before Texas recognized privacy as an independent right. The next two issues of the Journal turn to the primary focus: the adoption by Texas courts of a constellation of common law tort doctrines¹ and state constitutional provisions that constitute the right to privacy in its present form.

Adoption of Privacy Doctrines in Texas

Although privacy did not become an actionable legal claim in Texas until the 1973 landmark case of *Billings v. Atkinson* (discussed in depth below) privacy claims were heard in the state's courts in earlier cases. Pre-*Billings* privacy cases reveal that many Texas judges were cognizant of other states' adoption of privacy doctrines, and cited many of these cases in their opinions, but they also often agonized over whether to recognize that privacy is distinctive in itself—not incidental to some other right or tort—and whether it is an actionable legal claim in the state. A prominent pre-*Billings* case, *U.S. Life Insurance Co. v. Hamilton*² in 1951 refused to recognize the right to privacy as a cause of action in a case alleging that a plaintiff's name and signature was appropriated by the defendant in the promotion of his business. The insurance company produced a form letter promoting a health insurance plan that bore a facsimile of the signature of a former employee, E.B. Hamilton. While employed, similar letters bearing his signature were mailed to prospective customers, but the mailings continued after he had been terminated from the company. Hamilton claimed that he suffered emotional distress because the letters bearing his signature were still being mailed after it was common knowledge that he had been terminated from his position. The Texas Court of Civil Appeals (Waco) clearly acknowledged that in *other* states invasion of privacy for the appropriation of ones' signature was a cause of action but ruled that in Texas the unauthorized use of a signature was a violation of a property right, not an intrusion upon one's privacy. Justice Hale wrote:

"The right to privacy as an independent and distinctive legal concept stems from the publication of a law review article written by Warren and Brandeis (later Justice Brandeis)...Its development affords a striking illustration of the healthy manner in which the great body of American law grows in meeting the demands of new conditions as they arise in the expanding social order. While we know of no case in which any court

¹ William L. Prosser's original four tort doctrines. See William Prosser's seminal "Privacy," *California Law Review* 48 (1960).

² 238 S.W. 2d 289 (Tex. Civ. App. – Waco 1951, writ ref'd n.r.e.).

has directly passed upon the question as to whether or not an action for damages on account of injury resulting from a wrongful invasion of the right to privacy is cognizable in the courts of Texas, we are inclined to view that the courts of this State should and would, under appropriate circumstances, recognize damages as a proper remedy for the wrongful invasion of that right.”³

Notwithstanding Justice Hale’s foray into the realm of sociological jurisprudence or legal realism, he concluded that although the courts of the state “should and would,” under the right circumstances, recognize the right to privacy, the action for damages brought by Hamilton was not based upon an invasion of privacy as this concept is understood in other states (as the right to be let alone), but upon a right of property in one’s signature which in Hamilton’s case was appropriated for business purposes by his former employer. Although the court stated that the appropriation of Hamilton’s signature was a privacy action recognized in other states, in Texas the unauthorized appropriation of a person’s signature is a violation of a property right—one’s ownership of an expression of identity which is recognized as distinct to each person. Whether a person makes a simple “X” or pens an artistic flourish, a signature is proof of one’s identity or agreement or intent. *Hamilton* should not be regarded as a ruling that rejected privacy or the appropriation doctrine, but as laying the foundation for the modern right of privacy.

In 1952, a year after *Hamilton* in *Milner v. Red River Valley Publishing Co.*,⁴ the Texas Court of Civil Appeals (Dallas) again refused to adopt the right to privacy in a case involving a newspaper’s publication of a story about the death of a Sherman, Texas man.⁵ In reporting the death of Ben Milner in a traffic accident, the newspaper added context to the story by explaining that Milner had been indicted in a theft case the year before. Milner’s family argued that even though the story was true, its publication that disclosed this fact was an invasion of their right to privacy in the form of an intrusion into their right to mourn their beloved husband, father, and son “unmolested by such inexcusable and offensive publicity...while they were in the depths of their great mourning and profound grief...”⁶ In sum, they argued that the publication was an actionable invasion of the right to be let alone. The newspaper countered that news article referring to Milner’s indictment was public record and a common practice by newspapers was to identify the deceased by reference to his past history. The court agreed with the newspaper and ruled that Milner’s family could not recover damages on a theory of a right of privacy.⁷

Writing for the majority, Justice Cramer acknowledged that since the publication of Warren and Brandeis article the right of privacy had been “recognized by a few of the States but denied by many other States...”⁸ However, demonstrating judicial restraint Cramer crafted an interesting argument. He refused to adopt the right to privacy because “Texas courts are limited to the

³ 238 S.W. 2d 289 (Tex. Civ. App. – Waco 1951, writ ref’d n.r.e.).

⁴ 249 S.W. 2d 277 (Tex. Civ. App. – Dallas 1952, no writ).

⁵ *Milner v. Red River Publishing*, 249 S.W.2d 227,229 (Tex. Civ. App. 1952).

⁶ *Ibid.*

⁷ *Ibid.*, 228.

⁸ *Ibid.*, 229.

enforcement of rights under the common law as it existed on January 20, 1840.”⁹ The right to privacy was not a common law right, Cramer explained, and since Texas’s common law is a fixed body of law that can only be changed by the legislature, no recovery for invasion of privacy is possible in Texas.¹⁰ The court noted that the Milners could have brought a libel action for the publication of statements made about them but the fact that Milner’s history was of public record would likely preclude recovery for damages. *Milner* reaffirmed the Texas judiciary’s refusal to adopt invasion of privacy as a common law doctrine. Two decades would pass before the courts adopted invasion of privacy as an actionable claim.

A. Invasion of Privacy Doctrine

The first Texas case to adopt the right to privacy as a distinct tort that constitutes a legal injury is *Billings v. Atkinson* in 1973.¹¹ This milestone case originated when Lloyd Billings heard several days of “popping noises” on his phone. Billings soon discovered that a telephone repairman for Southwestern Bell Telephone Company named Norman Atkinson had attached a wiretap device to his home phone line. The device transmitted private and intimate conversations taking place in Billing’s home over a standard FM radio transmitter. Mr. Atkinson was fired after Billings reported him to the telephone company. A trial court jury found that Atkinson intentionally violated Billings’ right to privacy, causing mental anguish. The Court of Civil Appeals¹² (Dallas) reversed the jury verdict citing *Milner*, holding that according to precedent no common law right to privacy existed under Texas law.¹³ Notwithstanding the lack of precedent, however, the Texas Supreme Court reversed the appeals court and ruled that a right to privacy is an independent right, distinctive in itself, and not incidental to some other right or tort or doctrine that extends to wiretapping.¹⁴ The violation of the right to privacy is a tort, Justice Gray Denton pointed out. While no Texas court expressly granted relief for an injury resulting directly from the “invasion of privacy,” he wrote, the right to be let alone could be found emanating from three sources: the tort of defamation, an invasion of a property right, and a person’s breach of another’s confidence.¹⁵ The term right of privacy, Justice Denton continued, was not introduced into the legal lexicon until the 1890 publication of Warren and Brandeis’s *Harvard Law Review* article.¹⁶ It was there that the authors concluded that a distinct common law right to privacy exists



Justice Gray Denton

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Billings v. Atkinson*, 489 S.W. 2d 858, 861 (Tex. 1973).

¹² As the Court of Appeals was then known.

¹³ *Ibid.*, (citing *Milner v. Red River Publishing Company*, 249 S.W. 2d 227 (Tex. Civ. App. – Dallas 1952, no writ)).

¹⁴ *Ibid.*, 860–61.

¹⁵ *Ibid.*, 859–60.

¹⁶ Samuel D. Warren & Louis D. Brandeis, “The Right to Privacy,” 4 *Harvard Law Review* 193 (1890). The Warren and Brandeis article is arguably the most well-known and oft-cited law review article in American legal history. The article can be found by searching most law-content or social science databases; or see Samuel D. Warren, and Louis D. Brandeis, *The Right to Privacy*, with a forward by Steven Alan Childress (New Orleans: Quid Pro Books), *Legal Legends Series* (2010).

independently of the common law rights of property, contracts, protection of one's reputation and physical integrity.¹⁷ Although Denton argued that the state did not recognize invasion of privacy cause of action in *Milner*, it did recognize that some of the protections or interests contained in the right to privacy have been expressed under the doctrines of libel and slander, wrongful search and seizure, eavesdropping and wiretapping, as well as other intrusions into the private business and personal affairs of a person.¹⁸ Justice Denton further opined that eavesdropping was an offense at common law in the nineteenth century, defined as those persons who "...listen under walls or windows or eaves of houses to harken after the disclosure and thereupon proclaim slanderous and mischievous tales."¹⁹ The argument in *Milner* that no right to privacy exists because it was not found in the common law before 1840 failed to recognize not only just how much society has changed but how because of technology our private lives and affairs have been threatened and exploited. By eavesdropping on Billings' conversation, the telephone company invaded the right to privacy; and henceforth, "an unwarranted invasion of the right to privacy constitutes a legal injury for which a remedy will be granted."²⁰ Denton's adoption and definition of privacy is not only the first but the most expansive in Texas jurisprudence up to this day. He wrote:

"[T]he right to be free from the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."²¹

The definition of privacy adopted in *Billings* is exceptionally capacious, seemingly encompassing three tort doctrines: (1) intrusion (eavesdropping on Billings), (2) public disclosure of personal information, and (3) what Denton calls the "unwarranted appropriation or exploitation of one's personality." Another perspective on the ruling is that Denton is interpreting the intrusion doctrine in a manner that includes (to borrow a phrase from *Griswold v. Connecticut*) penumbral privacy interests. No Texas court would again define privacy as broadly as Denton did in *Billings*. In fact, post-*Billings*, most Texas judges, and justices seemed to go out of their way to reign in Denton's privacy definition as if the ruling had left them with a bitter taste of judicial activism.

From a state constitutional law standpoint, the most the most influential invasion of privacy case is *Texas State Employees Union (TSEU) v. Texas Department of Mental Health & Mental Retardation*²² in 1987 in which the Texas Supreme Court ruled that the right to privacy contained in the Texas constitution offered broader protections than the right to privacy under the U.S. Constitution and federal caselaw. The Employee's Union challenged the Department's polygraph policy that required employees to submit to a polygraph test during any investigation of suspected patient abuse, theft, or other criminal activity that posed a threat to the health or safety of patients or

¹⁷ *Billings*, 489 S.W.2d at 860.

¹⁸ *Ibid.*, 860.

¹⁹ *Ibid.*, 860.

²⁰ *Ibid.*

²¹ *Ibid.*, 859.

²² 746 S.W.2d 203 (1987).

employees.²³ The Texas Supreme Court held that although the Texas Constitution does not contain an express guarantee of a right to privacy, the state's constitution *does* contain the following five provisions from which the right to privacy is derived. Justice Hill wrote:²⁴

1. Section 19 of the Texas Bill of Rights protects against arbitrary deprivation of life and liberty.²⁵
2. Section 8 provides the freedom to speak, write or publish.²⁶
3. Section 10 protects a person's privilege against self-incrimination.²⁷
4. Sections 9 and 25 guarantee the right to be free from intrusions into the sanctity of the home and person against intrusion.²⁸
5. Section 6 protects an individual's right to freedom of conscience and religion.²⁹

"This right to privacy should yield only when the government can demonstrate that an intrusion is reasonably warranted for the achievement of a compelling government objective that can be achieved by no less intrusive, more reasonable means."³⁰

Did the polygraph testing policy achieve a compelling governmental objective? Hill concluded that although the Department is entitled to require employees to answer questions that are related to their job duties, the use of lie detectors constitutes an unnecessary intrusion that violates the employee's right to privacy.³¹ When the state acts as an employer it may not without compelling justification condition a person's employment on the waiver of their constitutional rights.

Following *TSEU*, protection against invasion of privacy would rest upon two pillars: common law and constitutional. *Billings v. Atkinson* in 1973³² adopted the right to privacy as a distinct tort that constitutes a legal injury; and TSEU recognizes an implied state constitutional right. In many subsequent privacy cases the courts seem to rely on either or both.

An unusual privacy case with potential to expand privacy protection was *Colquette v. Forbes*³³ in 1984. The question at bar was: can the terms of an allegedly unfair consensual agreement made between two adults implicate or violate the right to privacy? If so, which privacy doctrine or analysis might apply? In 1984, the Court of Appeals (Austin) addressed these questions. The case originated when Nancy Colquette claimed that the terms of the property settlement of her divorce decree

²³ *Ibid.*, 204.

²⁴ 381 U.S. 479, 484 (1965).

²⁵ Texas Constitution, article 1, section 19.

²⁶ Texas Constitution, article 1, section 8.

²⁷ Texas Constitution, article 1, section 10.

²⁸ Texas Constitution, article 1, sections 9 and 25.

²⁹ Texas Constitution, article 6.

³⁰ *Industrial Foundation*, 540 S.W.2d at 205.

³¹ *Ibid.*, 206.

³² *Billings v. Atkinson*, 489 S.W. 2d 858, 861 (Tex. 1973).

³³ *Colquette v. Forbes*, 680 S.W.2d. 536 (Tex. App.—Austin 1984, no writ).

violated her constitutional right to privacy.³⁴ As part of a divorce property settlement, Thomas Forbes agreed to convey his interest in the marital home to Nancy Colquette if she signed a promissory note that would come due in five years, “with immediate acceleration of maturity upon Colquette’s remarriage or . . . cohabitation with an unrelated adult male” at the home.³⁵ Ms. Colquette was faced with a decision: if she remarried or entered into a relationship that involved any form of “cohabitation,” the balance of the note would be due immediately. If she didn’t have the money to pay the note in full, she would need to stay single or not cohabit with a man in the home.

Mr. Forbes brought suit to collect on the note, claiming that the note had matured early since Colquette had been cohabitating with an adult male for weeks.³⁶ The trial court ruled that the note was due, agreed that Forbes could place a lien on the house, and ordered foreclosure if the note was not paid in full.³⁷ Ms. Colquette appealed and argued that the acceleration of the note and the placing of the lien, merely because of her personal decision to cohabit with an adult male, violated her right to privacy as autonomy as defined in *Griswold v. Connecticut*³⁸ and her rights under the common law of Texas. In that landmark case, the U.S. Supreme Court invalidated a Connecticut law prohibiting the use of contraceptives. The state made it a criminal offense to use or counsel the use of any drug or instrument for the purpose of preventing conception, but the Court overturned the law, arguing that the law directly and adversely affected the intimacy of the marital relationship and represented an unwarranted governmental intrusion into the sphere of private matters.



Justice Bob Gammage

Ms. Colquette’s lawyers argued that any contract or policy supporting the terms of such a contract is void if it intrudes upon one’s right to enter into a relationship with another person.³⁹ The court of appeals dismissed the application of *Griswold* to a private contractual agreement and ruled for Forbes.⁴⁰ Writing for the majority of the court Justice Bob Gammage,⁴¹ who forged a strong record on the right to privacy while on the court of appeals and later on the Texas Supreme Court, argued that Colquette had willingly agreed to the terms of the contract so that she could keep her house.⁴² However, would a contract be void if it violated the privacy interest in living with one’s lover or partner? Can it be assumed that merely because Colquette was cohabitating with a boyfriend or new husband, that she now had the ability to pay the note in full? The so-called acceleration clause appeared to

³⁴ *Ibid.*, 537–38.

³⁵ *Ibid.*, 537.

³⁶ *Ibid.*, 537–38.

³⁷ *Ibid.*, 538.

³⁸ *Ibid.*, 538–39 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

³⁹ See *ibid.*, 539.

⁴⁰ *Ibid.*

⁴¹ See John C. Domino, *Texas Supreme Court Justice Bob Gammage: A Jurisprudence of Rights and Liberties* (Lexington Press 2019).

⁴² *Ibid.*

be an intrusion upon Colquette's personal and intimate decisions. Yet, Gammage reasoned that the acceleration clause was a part of a mutual agreement between two individuals; it was *not* public policy promulgated by the government.⁴³ If it had been public policy then Colquette could assert her privacy rights against the intrusion of the State; but the only involvement of the State in this case, was the "judicial enforcement of private contractual obligations."⁴⁴ Though she may not have known it when she signed the divorce decree, Colquette consented to the intrusion into her privacy and relationship choices when she signed the promissory note.⁴⁵

But doesn't "judicial enforcement" constitute state action? As an aside, this is the main question surrounding Texas highly restrictive abortion bill Senate Bill 8 passed in 2021.⁴⁶ That law leaves its enforcement in the hands of private citizens who are empowered to bring suits in civil courts against abortion providers. Without state action or state enforcement of a law does the law become immunized against judicial review? The majority rejected Colquette's contention that the judicial enforcement of the cohabitation clause of the promissory note was contrary to public policy and in violation of *Shelley v. Kramer*.⁴⁷ In *Shelley*, the U.S. Supreme Court struck down judicially enforced racially-restrictive covenants.⁴⁸ If the State by law had *required* the cohabitation clause, then it might have been possible to challenge the law under *Shelley*—asserting that a state action had violated the Constitution.⁴⁹ Justice Gammage concluded:

"It is apparent to us that the justifications for the *Shelley* rule are not present in this case. Here, the affected parties consented to the intrusion (of privacy)—if acceleration of maturity of the debt and the particular conditions giving rise thereto can be construed as such—by their mutual acceptance of the terms of the note. . . . We hold that, under the facts of this case, judicial approval of the property settlement agreement and subsequent enforcement of the obligations created therein are, in nature and degree, not the type of government involvement restrained by a constitutional right of privacy."⁵⁰

Colquette v. Forbes brings up an intriguing privacy claim. Family and real estate law in Texas provides the legal language, but in no way requires such a property settlement agreement between private parties. Forbes was no doubt anxious to receive payment for his interest in the house but agreed, per the promissory note, to wait a period of five years to be paid by Colquette.⁵¹ Colquette agreed to these conditions to give her time to save money.⁵² The likely presumption made was that if Colquette remarried or cohabitated with an unrelated adult male at the home,

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ <https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00008F.HTM>

⁴⁷ *Ibid.*, (discussing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

⁴⁸ *Shelley*, 334 U.S. at 23.

⁴⁹ See generally *Colquette*, 680 S.W.2d at 539.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 537.

⁵² *Ibid.*, 539.

money would be available to help the ex-wife pay the note in full. Could Forbes have insisted to conditions that the note be accelerated if she merely dated a man who regularly spent the night? What if she had a female lover as opposed to male as stipulated in the agreement? Suppose further that a tenant agrees not to have premarital sex as a mutually agreed upon condition of a lease agreement. Can the tenant ultimately bring a cause of action for a tort invasion of privacy if the landlord has grounds for terminating the lease?⁵³ Such agreements seem very intrusive into a person's private intimate affairs, but it is all academic since the obligations created by the note were consensual and did not constitute the type of government involvement that would infringe on a constitutional right to privacy. Thus, Colquette's privacy argument was summarily rejected by the court; the case exists today only as a scattering of footnotes and citation in four cases. Yet even though the privacy claim was rejected, the decision is one of several cases in which the Texas courts stated that although the Texas Constitution does not contain an express guarantee of a right to privacy,⁵⁴ it does contain provisions and protections that parallel those provisions in the United States Constitution that taken together imply protected zones of privacy.

The problem of competing rights in Texas privacy jurisprudence – pitting the invasion of privacy against freedom of expression - has often been at its most intractable when a tension exists between a woman's right to have an abortion and the anti-abortion activist's freedom of expression to protest the exercise of that right. As of this writing a woman's right to an abortion requires that no "undue burden" be placed on that right, and that she has access to a physician and facility where the abortion is to be performed.⁵⁵ Anti-abortion activists have long exercised their First Amendment rights in locations far removed from the traditional public forums of courthouses and state capitol buildings. Groups have demonstrated near medical facilities where abortions are performed, in front of the private residences of the physicians who perform abortions, and even in front of schools attended by the children of those physicians.⁵⁶ The courts find themselves not only in the middle of two competing rights, when protestors from across the political spectrum push the limits of freedom of expression and in doing so violate the privacy rights of individuals. It is in this context that, in 1993, the Texas Supreme Court heard the case of *Valenzuela v. Aquino* in 1990.⁵⁷

The case originated when a physician, Dr. Eduardo Aquino, sued Eliseo Valenzuela, Jr., and other anti-abortion protestors for negligent infliction of emotional distress and breach of privacy caused by incessant protesting outside of his home.⁵⁸ Aquino had an obstetrics and gynecological practice, a small part of which provided abortions. In 1982, a group called South Texans for Life began picketing at Aquino's offices. Even after the group threatened his personal safety, Aquino

⁵³ See generally *Billings v. Atkinson*, 489 S.W. 2d 858, 859 (Tex. 1973) (recognizing that an invasion of privacy is a legal injury).

⁵⁴ *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996); *Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation*, 746 S.W.2d 203 (Tex. 1987); *In re H.E.B. Grocery Co., L.P.*, 2014 WL 700749 (Tex. App. Corpus Christi 2014).

⁵⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992) (plurality opinion).

⁵⁶ See Elizabeth J. Hall, "Protecting California's Abortion Clinic Workers from Harassment and Violence," 36 *McGeorge Law Review* 797, 797, 800, 802 (2005); see also *Valenzuela*, 853 S.W.2d at 521.

⁵⁷ *Valenzuela*, 853 S.W.2d at 512.

⁵⁸ *Ibid.*, 513.

never attempted to stop them.⁵⁹ However, in 1988, the demonstrators began picketing the Aquinos' family home, often beginning their protest activities shortly after the Aquino children returned from school but before Dr. Aquino came home from work.⁶⁰ The group held signs bearing messages such as "Nice House Dr. Eduardo, How Many Babies Paid the Price," "Beware Abortionist in Your Block," and "God Gives Life, Aquino Takes Away."⁶¹ Police cars were regularly parked on the street and Aquino's neighbors lined the streets to watch the demonstrations.⁶² Protestors photographed the Aquino home, and on one occasion, a protestor followed Ms. Aquino as she attempted to leave for the grocery store.⁶³ There was little doubt that this "circus-like" environment traumatized the family. Ultimately, Ms. Aquino was diagnosed with post-traumatic stress disorder and prescribed antidepressants.⁶⁴ The children were traumatized and suffered signs of emotional distress, and the oldest son was placed in a psychiatric hospital.⁶⁵

At last, a temporary injunction was granted by the trial court prohibiting the protestors from conducting a wide range of activities, "including all residential picketing within one-half mile of the Aquinos' home"⁶⁶ After the jury found for the Aquinos, the trial court awarded the Aquino family actual and punitive damages for infliction of emotional distress resulting from the breach of privacy caused by the demonstrators.⁶⁷ The district judge wrote:

"I believe Texas recognizes a right to privacy. This right, I believe, includes the right to be free from willful intrusions into one's personal life at home and at work—this right to be left alone from unwanted attention that may be caused by picketing or other unwanted demonstrations . . . is protected by injunctive relief."⁶⁸

The court of appeals (Corpus Christi), in affirming the trial court's permanent injunction, found that there was a "significant governmental interest in protecting the privacy and domestic tranquility of the home," and the injunction was "narrowly tailored to serve [that] interest."⁶⁹ The court of appeals did however, reverse the jury's award of damages for the Aquinos' emotional distress resulting from an invasion of privacy because the court believed the monetary award constituted an infringement or "chill" on the protestors' freedom of speech.⁷⁰

⁵⁹ *Ibid.*, 520–21.

⁶⁰ *Ibid.*, 521.

⁶¹ *Ibid.*, n.2.

⁶² *Ibid.*, 521.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* n.3. The temporary injunction was subsequently dissolved for being overly broad, see *Valenzuela v. Aquino*, 763 S.W.2d 43, 45–46 (Tex. App.—Corpus Christi 1988, no writ).

⁶⁷ *Valenzuela*, 853 S.W.2d at 521 (Spector, J., dissenting).

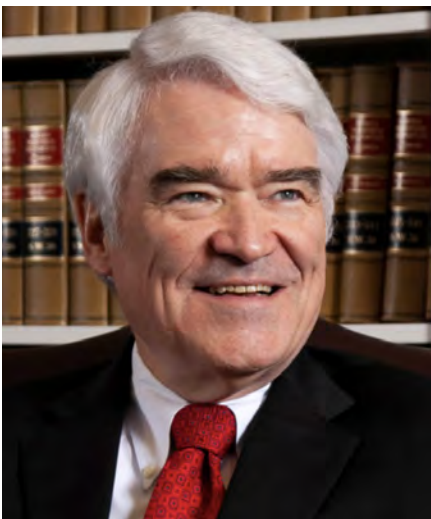
⁶⁸ *Ibid.*, 522.

⁶⁹ *Valenzuela v. Aquino*, 800 S.W.2d 301, 305 (Tex. App.—Corpus Christi 1990) *aff'd in part, rev'd in part*, 853 S.W.2d 512 (Tex. 1993).

⁷⁰ *Ibid.*, 309. Justice Gonzalez, in agreeing with the court of appeals' reversal, stated that "[t]he uncertainty of not knowing where one might be penalized for expressive speech would have an unacceptable *chilling effect* on the right of free speech." *Valenzuela*, 853 S.W.2d at 519 (Gonzalez, J., dissenting) (emphasis added).

On appeal the Texas Supreme Court focused on a number of questions. First, should the Justices analyze the dispute under the state or federal constitution? The U.S. Supreme Court made clear in *Frisby v. Schultz* that a “focused” and extended demonstration by anti-abortion protestors in front of a physicians’ residence can be prohibited in the interest of the homeowner’s right to privacy.⁷¹ Some of the Texas Justices seem to try to “work around” or downplay the importance of *Frisby’s* privacy argument because the protesters had more speech protection at the state level than under the U.S. Constitution. Focused conduct, where the demonstrators target the Dr. Aquino’s family and home, as opposed to targeting his professional actions where he practiced, should receive less speech protection. Unfocused expressive conduct, such as flag burning in a public forum or protesting in the vicinity of an abortion clinic, should receive more protection. In the former instance the *Frisby* privacy interest would apply.

Ultimately, the Texas Supreme Court reversed the permanent injunction and remanded the case back to the trial court.⁷² Writing for the majority, Justice Nathan Hecht refused to



Justice Nathan Hecht

address what he believed to be the “hypothetical” constitutional question of competing rights. Aquino theoretically *could* have recovered damages for invasion of privacy, but the trial court would have needed to determine whether the picketing “would be highly offensive to a reasonable person.”⁷³ Dr. Aquino could have claimed that the protestors’ acts resulted in an *intentional* intrusion on his privacy that was highly offensive to the average person, but the majority wrote that the testimony among the protestors and witnesses, relating to the presences of an intent to intimidate, was ambiguous and contradictory to establish the second element of invasion of privacy.⁷⁴ The majority reasoned that, as horrible as the effect of the intense protesting might have been on the family, it could be argued that the demonstrators were not trying to intimidate Aquino but merely trying to express their heartfelt belief that abortion was morally wrong.⁷⁵

Reading the opinion it is at first unclear why the majority split hairs by focusing solely on the question of intentional versus negligent infliction of emotional distress when the basis for Aquino’s original petition was an invasion of privacy based on the U.S. Supreme Court’s ruling in *Frisby v. Schultz*.⁷⁶ Was the majority simply avoiding a thorny political issue in conservative Texas or was it an understandable and legitimate reluctance to expand the number of privacy suits by allowing for negligent acts? Notwithstanding a half-decade of protesting, Aquino’s lawyers could not convince the majority that the breach of privacy was intentional and offensive.

⁷¹ *Valenzuela*, 853 S.W.2d at 517 (Gonzalez, J., dissenting) (discussing *Frisby*, 487 U.S. at 486).

⁷² See *Valenzuela*, 853 S.W.2d at 514 (majority opinion) (affirming the court of appeals’ judgment “insofar as it sets aside the trial court’s award of damages, and revers[ing] in all other respects . . .”).

⁷³ See *ibid.*, 513 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (1977)). In discussing the two elements for an invasion of privacy cause of action, the Texas Supreme Court noted that Aquino failed to request that *either* element be submitted to the jury; furthermore, the evidence presented failed to conclusively establish either element.

⁷⁴ *Ibid.*, n.1.

⁷⁵ See *ibid.*

⁷⁶ *Frisby v. Schultz*, 487 U.S. 474 (1987).

In a dissenting opinion, Justice Gammage agreed that under the Texas Constitution's Bill of Rights -- Article I, section 8 -- a person cannot win damages from a group engaged in protected speech; however, the targeted individual may be allowed to recover damages that arise from conduct (namely intrusion into one's privacy) unrelated to protected expression.⁷⁷ He argued that the picketing of the doctor's home was an invasion of privacy in the form of an assault on his family domain. Citing the Texas Supreme Court's ruling in *Casso v. Brand* in 1989, Gammage argued that under article I, section 8 of the Bill of Rights of the Texas Constitution, speech loses protection and may give rise to liability for damages where the conduct associated with the speech is "so excessive and intrusive" that it does not deserve protection.⁷⁸ Also relying on another Texas case, *James v. Brown*, Gammage added that liability for one's speech may arise only when "unprotected conduct is intertwined with protected expression," and the award for damages is based on that unprotected conduct involving the invasion of privacy.⁷⁹

Dissenting Justice Rose Spector wrote a lengthy instructive analysis of the privacy interests at stake in this case.⁸⁰ Spector argues that the case originated as what she called a "breach-of-privacy claim."⁸¹ By remanding the case back to the trial court, "the majority needlessly prolongs this litigation and effectively endangers a family's most basic rights."⁸² When a violation of the right to privacy exists, injunctive relief is necessary—especially when legal remedies are inadequate, there are inadequacies with damages, or there is evidence of future violations.⁸³ Here, the evidence and the jury's finding that the picketing was "focused and directed" at the Aquino residence met the *Frisby* standard discussed above, which protects the right to residential privacy.⁸⁴ The dissenters relied on *Billings v. Atkinson*, which defines the right to privacy under Texas law as "the right of an individual to be left alone, to live a life of seclusion,"⁸⁵ to be free "from unreasonable intrusion,"⁸⁶ and "to preserve the sanctity of the home."⁸⁷ The conduct also threatened other privacy rights. By targeting and harassing doctors as the "weak link," anti-abortion rights groups knew that they could make *Roe v. Wade* "an empty promise."⁸⁸ In the end, the dissenters agreed



Justice Rose Spector

⁷⁷ *Ibid.*, 519–20 (Gammage, J., dissenting) ("[e]very person shall be at liberty to speak, write or publish his opinions on any subject, *being responsible for the abuse of that privilege* . . ." (emphasis in original) (quoting TEX. CONST. art. I, § 8)) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56–57 (1988); *United States v. O'Brien*, 391 U.S. 367, 382 (1968)).

⁷⁸ *Valenzuela*, 853 S.W.2d at 520 (Gammage, J., dissenting) (citing *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989)).

⁷⁹ *Ibid.* (citing *James v. Brown*, 637 S.W.2d 914, 917 (Tex. 1982)).

⁸⁰ *Ibid.*, 519.

⁸¹ *Ibid.*, 522 (Spector, J., dissenting).

⁸² *Ibid.*, 520.

⁸³ *Ibid.*, 522 (citations omitted).

⁸⁴ *Ibid.*, 523 (citing *Frisby v. Schultz*, 487 U.S. 474, 486–87 (1987)).

⁸⁵ *Ibid.*, 524 (quoting *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973)).

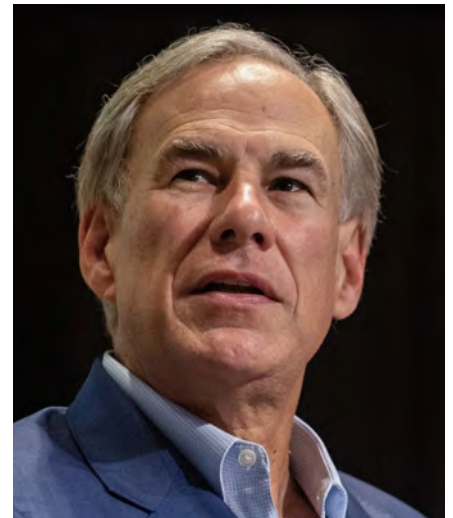
⁸⁶ *Ibid.* (citing *Texas State Employees Union v. Tex. Department of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987)).

⁸⁷ *Ibid.* (citing *Iken v. Olenick*, 42 Tex. 195, 198 (1874)).

with the court of appeals that the award of damages in this case *would* inhibit debate on public issues, but that an injunction is a reasonable restriction on expressive conduct.⁸⁹ The dissenting Justices appeared puzzled by the absolute refusal of the majority to discuss the constitutional tension between Aquino's right to privacy and the expressive conduct rights of South Texans for Life – even though this issue was brought up during oral argument and is mirrored by *Frisby*. The Aquino family suffered one of the most intrusive and punishing campaigns undertaken by an anti-abortion group. In a competing rights claim the Texas courts have generally favored expression over privacy, but one cannot help but wondering after reading the Aquino opinion whether in this instance the right to privacy was trumped by politics.

Does privacy in Texas extend beyond the right to be let alone into the realm of privacy as autonomy as articulated in *Griswold v. Connecticut*? The Texas Supreme Court had the opportunity to address this question nearly a decade after *Texas State Employees Union (TSEU)* when the Justices unanimously ruled that the right to privacy does not confer a right to commit adultery, something that an Austin newspaper enthusiastically pointed out.⁹⁰ *City of Sherman v. Henry*, originated when Otis Henry, a Sherman, Texas police officer, was denied a promotion because he was sexually involved with another officer's wife.⁹¹ Before he was denied the promotion the police chief authorized an extensive investigation to determine if the rumors of the affair were true. Colleagues were interviewed and love letters discovered. A district court ruled in favor of Henry and a court of appeals court agreed that the investigation and denial of promotion because of this admittedly morally wrong but distinctly private and intimate matter violated his right to privacy. However, the Texas Supreme Court reversed in a 7-2 vote.

Writing for the majority Justice Greg Abbott wrote a strong reaffirmation of the right to privacy established in the *Texas State Employees Union* decision but did not apply the principles contained in *TSUE* to the facts of Henry – that is, to the question of whether Henry's right to privacy was violated by the city. Instead, Abbott reasoned that the right to privacy under the Texas Constitution or United States Constitution does not include a right to maintain a sexual relationship with the spouse of another person. Abbott stated that the decision “does not mean...that the government is free to engage in intrusive investigation methods to determine the sexual practices of individuals,” but what was at issue in *Henry* was not intrusion into his private life, but more a matter of the “autonomy aspect of privacy – the right to make certain fundamental decisions and engage in certain conduct without state interference.”⁹² This definition of privacy as autonomy— while recognized by *Griswold* and *Roe*—is definitely not a recognized doctrine in Texas, Abbott concluded.



Gov. Greg Abbott

⁸⁸ *Ibid.*, 524–25 (quoting David A. Grimes, “Clinicians Who Provide Abortions: The Thinning Ranks,” 80 *Obstetrics & Gynecology* 719, 721–22 (1992)); see also Angela Christina Couch, “Wanted: Privacy Protection for Doctors Who Perform Abortions,” 4 *Am. U. J. Gender & L.* 361, 361–62 (1996).

⁸⁹ *Valenzuela*, 853 S.W.2d at 525 (Spector, J., dissenting).

⁹⁰ See Peggy Fikac, “Privacy rights don’t protect adultery, court rules,” *Austin American-Statesman*, July 9, 1996.

⁹¹ *City of Sherman v. Henry*, 928 S.W.2d 464 (1996).

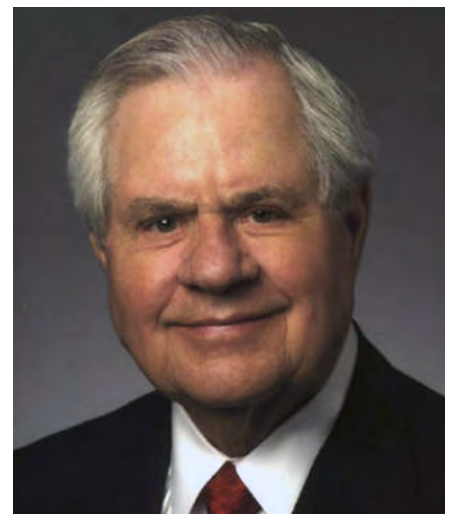
⁹² *Ibid.*, 468–69.

In a concurring opinion Justices Rose Spector and Priscilla Richman (formerly Priscilla Owen) conceded the point made by the majority that the denial of the officer's promotion was not a violation of a constitutional right, but argued that in deciding *Henry* the majority "shriveled" the right to privacy "to the point that the most personal aspects of our lives are the government's business..." Of course, this decision was handed down prior to the United States Supreme Court ruling on sexual privacy in *Lawrence v. Texas* so the majority's decision relied in part on *Bowers v. Hardwick*.⁹³ At the time of *Henry*, laws criminalizing adultery in Texas had been repealed since 1973,⁹⁴ but the court ruled that adultery is not protected by the concept of privacy as autonomy which extends to such activities as marriage, procreation, contraception, and parenting.⁹⁵ Privacy as autonomy as an independent doctrine or right has not been recognized by the Texas Supreme Court.



Justice Priscilla Richman

Recall that in *TSEU*, Chief Justice John Hill wrote that "a right of individual privacy in Texas parallels those found in the United States Constitution" and protects personal privacy from unreasonable intrusion. Sections 9 and 25 of the Texas Constitution guarantee the right to be free from intrusions into the sanctity of the home and person.⁹⁶ The majority in *Henry* did not apply *TSEU* in this case. Nor does it apply two important court of appeals privacy rulings: *City of Dallas v. England* and *State v. Morales*. In 1993 the Court of Appeals (Austin) set an important precedent in *England* by ruling that the City of Dallas had discriminated against a lesbian who applied for a position as a police officer.⁹⁷ Police departments across the state had routinely invoked the state's anti-sodomy law to deny employment to openly gay and lesbian job applicants on the grounds that they *might* potentially be engaged in criminal behavior.⁹⁸ The trial court struck down the law as an unconstitutional violation of the right to privacy under the Texas Constitution⁹⁹ and enjoined the city from enforcing the statute in a discriminatory manner. The Court of Appeals upheld the trial court's decision, but the Texas Supreme Court did not rule



Chief Justice John Hill

⁹³ For a scholarly commentary of the case shortly after it was handed down see Shelly L. Skeen, "City of Sherman v. Henry: Is the Texas Constitutional Right of Privacy Still a Source of Protection for Texas Citizens?", 4 *Texas Wesleyan Law Review* 99 (Fall 1999).

⁹⁴ Act of June 14, 1963, 63rd Legislature, R.S. chapter 399, 3, 1973 Texas General Laws 883, 992 repealing Texas penal Code article 499 (1925).

⁹⁵ See *Henry*, 928 S.W.2d at 470-71.

⁹⁶ Texas Constitution, article 1, sections 9 and 25.

⁹⁷ *England and Morales* were decided at roughly the same time in the Texas court system. In *Morales* the supreme court stated that it was not addressing the merits of *England*. See *Texas v. Morales*, 869 S.W. 2d 941, 942 n. 5.

⁹⁸ See *City of Dallas v. England*, 846 S.W.2d 957, 958 (Tex. App.—Austin 1993, writ dismissed w.o.j.).

⁹⁹ In *Texas v. Morales*, 826 S.W. 2d 201, 205 (Tex. App. – Austin 1992), the Third Court of Appeals in Austin ruled that although the right to privacy is not expressly contained in the Texas Constitution, it is created or implied by sections 6, 8, 9, 10, 19, and 25 of the Texas Bill of Rights.

on the merits of the case because the city never filed a motion for rehearing within the required deadline.¹⁰⁰ In *Morales*, the Court of Appeals at Austin relied on *TSEU* to conclude that the sodomy law violated the fundamental right of two consenting adults to engage in private sexual behavior.¹⁰¹ In *Morales*, three lesbian women and two gay men¹⁰² challenged the law on the grounds that it violated the Texas Constitution.¹⁰³ The case took five years to work its way through the Texas court system, although similar laws had been challenged in a number of states for two decades.¹⁰⁴ At the time of the *Morales* decision in 1994, sodomy was a criminal offense in over twenty states and the District of Columbia.¹⁰⁵ The United States Supreme Court 1986 ruling *Bowers v. Hardwick*,¹⁰⁶ which upheld the Georgia's sodomy law, was still the law of the land, but the *Morales* plaintiffs challenged the sodomy statute in state court under the constitutional right to privacy, due course of law¹⁰⁷ and equal protection¹⁰⁸ provisions of Texas Constitution.¹⁰⁹ According to the record, the sodomy law was rarely if ever enforced, and it was unlikely that the State would enforce it in the near future.¹¹⁰ Nevertheless, the law was used to stigmatize and discriminate against homosexuals in areas such as housing, family law, and employment.¹¹¹

The fact that the criminal law was not currently being enforced made it more difficult to challenge its constitutionality. Unless a person was prosecuted for an act of sodomy, the case would not go to Texas' highest criminal court, the Texas Court of Criminal Appeals. Texas has a bifurcated court system with distinct civil and criminal courts. The Supreme Court hears appeals in civil matters while the Court of Criminal Appeals hears appeals in criminal matters. In a criminal court a constitutional challenge to the sodomy law could be used as a defense, so that an affirmative or negative vote on its constitutionality would take place.¹¹² Since there were no pending prosecutions under the law, the only feasible strategy for the *Morales* plaintiffs was to challenge the law in a civil court. At the time of *Morales*, Texas civil courts had only twice reviewed the constitutionality of unenforced criminal statutes.¹¹³ The *Morales* case could have been brought

¹⁰⁰ *State v. Morales*, 869 S.W.2d 941, 942, n. 5.

¹⁰¹ See *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, 746 S.W.2d 203, 204 (Tex. 1987), in which the Texas Supreme Court ruled that the policy of requiring certain employees to take mandatory polygraph tests impermissible violated the right to privacy found in the Texas Bill of Rights.

¹⁰² Linda Morales, Tom Doyal, Patricia Cramer, Charlotte Taft, and John Thomas.

¹⁰³ See *Morales*, 869 S.W.2d at 942 n.4 (citing TEX. CONST. art. I, §§ 3(a), 13, 19).

¹⁰⁴ Michael H. Garbarino, *Homosexuality and Texas Law: An Analysis of Texas v. Morales and Its Implications*, 1 TEX. F. on C.L. & C.R. 50 (Spring 1994).

¹⁰⁵ See *Lawrence*, 539 U.S. at 572 (explaining that at the time of the *Bowers v. Hardwick* decision, over twenty states and the District of Columbia had sodomy laws); see also Carlos Maza, "State Sodomy Laws Continue to Target LGBT Americans," *Equality Matters Blog* (Aug. 8, 2011, 3:26 PM), (noting that in 2013, sodomy was still a criminal offense in 18 states).

¹⁰⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁷ Tex. Const. art I, sections 13, 19.

¹⁰⁸ Tex. Const. art I, sections 3, 3A.

¹⁰⁹ See *State v. Morales*, 826 S.W.2d 201, 202 (Tex. App.—Austin 1992), *rev'd*, 869 S.W.2d 941 (Tex. 1994).

¹¹⁰ *Ibid.*, 203, 205.

¹¹¹ *Ibid.*, 203.

¹¹² See *Morales*, 869 S.W.2d at 953.

¹¹³ See *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 528–29 (Tex. 1894) (discussing whether it was constitutional for a city to enforce an ordinance regulating the burial of the dead by prohibiting funerals on specific property);

in one of four federal districts in Texas. Then, on appeal, a ruling by either the United States Court of Appeals for the Fifth Circuit or the U.S. Supreme Court could overturn the sodomy law.¹¹⁴

In a surprise ruling, the Texas trial court declared the sodomy statute¹¹⁵ unconstitutional and enjoined the enforcement of the law.¹¹⁶ The State countered with a procedural argument that the civil court was precluded from deciding the case, because the court's equity jurisdiction did not extend to questions regarding the constitutionality of criminal statutes.¹¹⁷ As aforementioned the Court of Appeals (Austin) rejected the State's procedural argument and affirmed the trial court's ruling,¹¹⁸ relying on the key 1987 Texas Supreme Court privacy ruling, *Texas State Employees Union (TSEU) v. Texas Department of Mental Health & Mental Retardation*, in which the Justices ruled that the policy of requiring certain employees to take mandatory polygraph tests impermissible violated the right to privacy found in the Texas Bill of Rights. Recognizing that right to privacy contained in the Texas constitution offered broader protections than the right to privacy under the U.S. Constitution, the court of appeals held that the sodomy law violated the fundamental right of two consenting adults to engage in private sexual behavior.¹¹⁹ The court of appeals added in *Morales* that since the sodomy law did not advance any compelling governmental interest, section 21.06 of the Texas Penal Code was therefore unconstitutional.¹²⁰

In the end, the Texas Supreme Court had the opportunity to make history by striking down the invidious law but in a narrowly decided (5–4) decision it rejected the appellate court's holding on procedural grounds and remanded the case back to the trial court with orders to dismiss.¹²¹ The narrow majority argued that when no actual or threatened enforcement of a criminal statute occurs, a civil court cannot enjoin the enforcement of the statute.¹²²

The majority also rejected the appellate court's interpretation of *Passel v. Fort Worth Independent School District*, which held that equity power *did* extend to the protection of personal privacy rights violated by a criminal statute. *Passel* involved a lawsuit brought against an unenforced criminal statute prohibiting fraternities, sororities, and secret societies in public schools below college level. Because the law itself was never enforced, nor was anyone punished by it, the lawsuit challenged Fort Worth ISD's administrative policy that based on the statute on the grounds that it

see also Passel v. Fort Worth Independent Sch. Dist., 440 S.W.2d 61, 62 (Tex. 1969) (questioning whether a statute prohibiting school-age children from joining clubs constituted an unwarranted interference with their constitutional rights to free speech and private association).

¹¹⁴ See generally Christopher R. Leslie, *Procedural Rules or Procedural Pretexts? A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law*, 89 Ky. L.J. 1109, 1115 (2001) (discussing in detail the history of challenges to the Texas sodomy law and the procedural hurdles faced).

¹¹⁵ Section 21.06 of the Texas Penal Code.

¹¹⁶ *Morales*, 826 S.W.2d at 202.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, 202–03.

¹¹⁹ See *Texas State Employees Union v. Texas Department of Mental Health & Mental Retardation*, 746 S.W.2d 203, 204 (Tex. 1987), in which the Texas Supreme Court ruled that the policy of requiring certain employees to take mandatory polygraph tests impermissible violated the right to privacy found in the Texas Bill of Rights.

¹²⁰ *Ibid.*, 205.

¹²¹ *State v. Morales*, 869 S.W.2d 941, 942 (Tex. 1994).

¹²² See *ibid.*

deprived students of their personal privacy rights.¹²³ The majority reiterated that legal precedent has long recognized that the equity jurisdiction of civil courts is limited to violations of vested property rights and not to personal rights such as privacy.¹²⁴

In a 2002 privacy as autonomy/abortion rights case, *Bell v. Low Income Women of Texas*,¹²⁵ the Texas Supreme Court ruled that the state constitution's implied guarantee of the right to privacy is not violated by the Texas Medical Assistance Program funding scheme, which prohibits funding for abortions unless pregnancy results from rape or incest or places the woman in danger of death. Notwithstanding the Court's ruling, the Justices, citing *Henry* and *TSEU*, posited a very broad definition of privacy by stating that the Texas Constitution "protects personal privacy from unreasonable governmental intrusions and unwarranted interference with personal autonomy."¹²⁶ Although the Court discussed federal abortion rulings—particularly the matter of whether a right to an abortion requires state assistance in obtaining one—the justices declined to discuss whether the Texas Constitution "creates privacy rights coextensive with those recognized under the United States Constitution..."¹²⁷

Do the rights of married individuals include the common law right to privacy or do spouses relinquish a degree of their right to privacy when living in the same house and sharing a bedroom? Would the act of placing a camera in a spouse's bedroom be an invasion of privacy? In 1999, Marie Clayton, estranged wife of Gary Clayton, hired private investigator James Richards to install a video camera in her husband's bedroom just prior to Mrs. Clayton departing for Virginia to visit her family. Mrs. Clayton had visited her psychic recently, who informed her that her husband with whom she was in divorce proceedings might be committing adultery. While in Virginia, Mrs. Clayton contacted Richards by phone to arrange for him to reenter the house and change the tape in the recorder, obtaining entry into the home from a neighbor with a spare key. Upon discovering this invasion after the fact, Mr. Clayton sued the investigator, claiming that his intrusion into personal seclusion was a tortious invasion of privacy. *Clayton v. Richards*¹²⁸ in 2001 addressed the question was whether the act of one placing a camera in a spouse's bedroom was an invasion of privacy. Richards was acting on the orders of Mrs. Clayton in this scenario, having only entered the house at her request. As such, was he merely being used as an agent of Mrs. Clayton's capacity as a spouse? The Court of Appeals (Texarkana) concluded that this was indeed the case. To determine whether his actions were an invasion of privacy, they would instead need to view the case as if Mrs. Clayton were the one who installed the camera. However, citing Professor Prosser, the court produced one caveat, that the investigator Richards was still a party in this case. Prosser states:

"All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify

¹²³ *Ibid.*, 946–47 (citing *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63–64 (Tex. 1969)). *Ibid.*, 62–63.

¹²⁴ *Morales*, 869 S.W.2d at 944–45.

¹²⁵ 95 S.W.3d 253 (Tex. 2002).

¹²⁶ *Ibid.*, 265.

¹²⁷ *Ibid.*, 265.

¹²⁸ *Clayton v. Richards*, 47 S.W.3d 149 (2001).

and adopt his acts done for their benefit, are equally liable with him.”¹²⁹

While Justice Grant acknowledged that a person willingly loses a degree of their right to privacy upon entering a marriage, this in no way meant that their bedroom was no longer a private subspace. Citing *Collins v. Collins*¹³⁰, a 1995 Texas spousal wiretapping case, he concluded that the rights of married individuals still include the common-law right to privacy. Justice Grant also attempted to reason by analogy in order to determine where the line is drawn. If a spouse looked through a bedroom door to view their partner, would they still be violating that spouse’s expectation of privacy just as if they placed a hidden camera? Grant wrote a comprehensive account of marital privacy in Texas:

“A spouse shares equal rights in the privacy of the bedroom, and the other spouse relinquishes some of his or her rights to seclusion, solitude, and privacy by entering into marriage, by sharing a bedroom with a spouse, and by entering into ownership of the home with a spouse. However, nothing in the Texas Constitution or our common law suggests that the right of privacy is limited to unmarried individuals.”¹³¹

When a person – married or not – enters their bedroom they have the expectation of privacy in their seclusion. An audio or video recording made when the person believes that a condition of complete privacy exists is offensive to any reasonable person.¹³²

The video recording of the husband without his consent in the privacy of the bedroom even if it is carried out by his wife violates his right to privacy. Although there was disclosure of embarrassing facts, the actions taken by the wife and the private investigator were a violation of privacy interests even without public disclosure. The court did not analyze the case from the standpoint of the public disclosure doctrine, but rather the doctrine of intrusion or invasion into personal solitude. This doctrine does not consider the disclosure or potential for disclosure of information to the public to constitute a tortious act. Instead, it focuses on the physical and intrusion to be the actionable invasion of privacy.

B. Public Disclosure Privacy Doctrine

The doctrine of public disclosure of private information can best be understood as a right to exert control over one’s personal information. The issues and questions that fall under its rubric are diverse, ranging from the release of candid photos or videos of celebrities to the unauthorized release of medical records. According to Prosser, the general intent of the doctrine is to protect a person’s self-image and reputation.¹³³ Three years after the landmark *Billings* decision, in *Industrial Foundation of the South v. Texas Industrial Accident Board* in 1976 the Texas Supreme Court expressly adopted the public disclosure doctrine, recognized as the right to be free from the

¹²⁹ Prosser, W. Handbook of The Law of Torts § 46 at 292 (4th ed. 1971).

¹³⁰ *Collins v. Collins*, 904 S.W.2d 792 (1995).

¹³¹ *Clayton v. Richards*, 47 S.W.3d 149, 155 (2001).

¹³² *Ibid.*

¹³³ Prosser, “Privacy,” 10.

public disclosure of embarrassing private facts. *Industrial Foundation of the South*, a private non-profit organization, requested that the State of Texas' Industrial Accident Board furnish personal information of all persons who filed claims for workmen's compensation.¹³⁴ The state board refused to turn over records, arguing that such information is protected by the right to privacy.¹³⁵ As it turned out several claimants for employment compensation had arrest records and the foundation sued to release these records.¹³⁶ The Texas Supreme Court ruled that the board could not withhold information: "[T]he State's right to make available for public inspection information pertaining to an individual does not conflict with the individual's constitutional right of privacy unless the State's (Board) action restricts his freedom in a sphere recognized to be within a zone of privacy protected by the Constitution."¹³⁷ The Court found that no privacy interests were violated because the records dealt with public arrests and not personal information protected by the constitutional right to privacy, such as the nature of injuries or matters of marriage, procreation, or association. Nevertheless, in *Industrial Foundation*, the Court did expressly recognize the right to be free from public disclosure of embarrassing private facts.¹³⁸ Justice Ross E. Doughty wrote:

"We must decide. Therefore, whether any of the information requested by the Foundation is 'private' within the meaning of the tort law, and whether the Board's action in making the information available to the public would constitute a wrongful 'publicizing' of such information and thus an invasion of a claimant's right to privacy."¹³⁹



Justice Ross E. Doughty

According to *Industrial Foundation*, in order to recover under public disclosure doctrine of privacy a person must prove that the information contains intimate and embarrassing facts about a person's private affairs and that its publication to the public at large would be objectionable to a person or ordinary sensibilities. The privacy interest protected by the public disclosure doctrine also requires the injured party to show that publicity is given to the individual's private affairs. The definition of publicity requires the communication of the private information to more than a small group of persons – that is, to the public at large and, lastly, the information that is publicized is not of legitimate concern to the public. Thus, the Court expressly adopted the public disclosure privacy doctrine -- the right to be free from public disclosure of embarrassing private facts. The court's decision in *Industrial Foundation* relied on both the constitutional right to privacy and a tort doctrine, in this instance public disclosure.

The Texas Supreme Court again addressed the public disclosure privacy doctrine 1995 in

¹³⁴ *Indus. Found.*, 540 S.W.2d at 672.

¹³⁵ *Ibid.*, 678.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, 680–81.

¹³⁸ *Ibid.*, 682.

¹³⁹ *Industrial Foundation*, 540 S.W.2d.

Star-Telegram, Inc. v. Doe.¹⁴⁰ *Star-Telegram* weighed the freedom of the press against the individual's right to privacy, and, more specifically, whether a newspaper may be held liable for invasion of privacy after disclosing private facts about a victim of sexual assault.¹⁴¹ The case originated when *The Fort Worth Star-Telegram* published a news article based on a police report for the crime.¹⁴² The attack occurred in her home in the darkness of the early morning. Doe was bound with strips of her bed sheets, but she freed herself and called the police. Her assailant was apprehended by police two days after the crime, driving the woman's car in Oklahoma. The news article did not name the victim, but it provided so much detail about her that it was almost impossible for acquaintances and neighbors not to know her identity.¹⁴³ The news report disclosed Doe's age, her neighborhood, the fact that she drove a Jaguar, and even the medication she took.¹⁴⁴ A second published story gave an account of her sexual assault and added that she owned a travel agency.¹⁴⁵ The "police beat" reporter for the newspaper obtained information about the crime from an unredacted police report at the Fort Worth Police Department.¹⁴⁶ Jane Doe sued the newspaper and Betsy Tong, the "police beat" reporter, for invasion of privacy, and intentional and/or negligent infliction of emotional distress.¹⁴⁷ The newspaper responded that the information published was of legitimate public concern, citing the federal constitutional standard set adopted by the United States Supreme Court in *Florida Star v. B.J.F.*, which provides that "[i]f a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order."¹⁴⁸ In *Florida Star* a newspaper ran a similar story about a sexual assault victim based on an official police press report. However, the report identified B.J.F. by her full name, and made it available to reporters in the sheriff's department's press room. A reporter-trainee copied the police report verbatim, including B.J.F.'s full name, and ran the story in the paper contrary to state law which made it unlawful to publish the names of sexual assault victims. B.J.F. then won civil damages against the newspaper. The trial court denied the *Florida Star*'s claim that civil sanctions against the newspaper violated the First Amendment. The verdict was upheld on appeal. The U.S. Supreme Court reversed, holding that imposing damages on the *Star* for publishing B.J.F.'s name violates the First Amendment.¹⁴⁹

Returning to *Star-Telegram*, the trial court granted summary judgment in favor of the newspaper and reporter without specifying the grounds upon which judgment was based."¹⁵⁰ The Texas court of appeals reversed and remanded the case for the trial court to answer the question of whether the information had been lawfully obtained by the newspaper.¹⁵¹ Even if the

¹⁴⁰ 915 S.W.2d 471 (Tex. 1995)

¹⁴¹ *Star-Telegram, Inc. v. Doe*, 915 S.W.2d. 471, 472 (Tex. 1995).

¹⁴² *Ibid.*, 472–73.

¹⁴³ *Ibid.*, 473.

¹⁴⁴ *Ibid.*, 472.

¹⁴⁵ *Ibid.*, 472–73.

¹⁴⁶ *Ibid.*, 472.

¹⁴⁷ *Ibid.*, 473.

¹⁴⁸ *Ibid.* (alteration in original) (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989)).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

news articles contained information of legitimate public concern, the appeals court reasoned, the publications were not protected by the First Amendment because the information was unlawfully obtained. Oral argument before the Texas Supreme Court illustrated the fact that the Justices all seemed very reluctant to challenge the newspaper's assertion of press freedom. The Court then unanimously reversed the court of appeals and held that no privacy violation had occurred, since the public disclosure of private facts disclosed about Doe, a crime victim, were of legitimate public concern.¹⁵²

Writing the opinion for the unanimous court Justice Gammage began his analysis of the competing privacy rights versus freedom of expression claim by arguing that the right to be let alone... "is as much a part of personal liberty as the right to be free from physical restraint and the right to possess property."¹⁵³ The concept has since been incorporated into a common-law tort in Texas and serves to protect individuals from invasion of privacy.¹⁵⁴ However, Gammage concluded that *Star-Telegram's* detailed account of Jane Doe did not violate her right to privacy. Newspapers should take precautions to avoid the public disclosure of private facts, and that under Texas law the public has no legitimate interest in embarrassing facts about private citizens. A chilling effect on the freedom of press would occur if newspapers were required by law to take measures to avoid the publication of facts that may or may not subject innocent persons to unwanted or unpleasant notoriety.¹⁵⁵ Doe was correct in her argument that more personal information was published than was necessary in the name of a legitimate public interest in newsworthy information, however, the media should *not* be expected to comb through all of the facts and "catalogue each of them according to their individual and cumulative impact."¹⁵⁶

Several of the Justices in the *Star* decision were concerned that ruling for the newspaper might leave private citizens naked to media scrutiny simply because they are involved in a newsworthy event of legitimate public concern. If death penalty protesters incite a small riot in front of a courthouse and a well-known attorney is inadvertently assaulted on the way to her car, does the media have the right to publish personal information about the lawyer? Gammage suggested that this question must be answered on a case-by-case basis. The determination of whether privacy can be sacrificed in the name of newsworthiness must be made "in the context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure."¹⁵⁷

Can an injured party recover for negligent invasion of privacy, or must the breach be intentional act? The caselaw shows that negligent invasion of privacy is not a settled matter. The authoritative Texas precedent rejecting negligence as a cause of action for privacy torts remains *Billings v. Atkinson*, with its firm declaration that negligence does not apply to privacy.

¹⁵² *Ibid.*, 474–75. The Texas Supreme Court did not address the question of whether the information was or was not legally obtained.

¹⁵³ *Ibid.*, 473 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harvard Law Review* 193, 193 (1890).

¹⁵⁴ *Star-Telegram, Inc.*, 915 S.W.2d. at 473.

¹⁵⁵ *See Star-Telegram, Inc.*, 915 S.W.2d at 474–75.

¹⁵⁶ *Ibid.*, 475.

¹⁵⁷ *Indus. Found.*, 540 S.W.2d at 685.

A 2001 public disclosure case, *Doe v. Mobile Video Tapes*,¹⁵⁸ revisited the question of whether a person can recover for negligent invasion of privacy for public disclosure. The case originated when an anonymous person delivered several video tapes found in a dumpster to a local TV station. These tapes contained recordings made by a local high school band director using a video camera hidden in the girls' locker room. The band director had placed the camera there ostensibly for security reasons, as someone was stealing belongings from the locker room. After discovering that the thief was actually the assistant band director, he presumably discarded the tapes in the dumpster, leaving them to be found soon thereafter. The television station aired distorted parts of this footage the next day, reusing it in subsequent broadcasts after the band officials were fired and under investigation by the District Attorney. The parents of the students on the videotape sued the station, claiming that the station negligently invaded their privacy by publicly disclosing private facts and causing intentional infliction of emotional distress. A trial court ruled in favor of the TV station, but a portion of the original group of plaintiffs chose to appeal. One of their claims detailed an error made by the trial court, in refusing to submit a jury question on the subject of negligent invasion of privacy. They argued that if libel actions can be based on negligent conduct by the tortfeasor¹⁵⁹ so too should invasion of privacy tort actions.¹⁶⁰

The Court of Appeals (Corpus Christi) rejected the concept of negligent invasion of privacy, deciding to adhere to *Billings v. Atkinson* by stating, "Invasion of privacy is an intentional tort."¹⁶¹ Writing for the majority Justice Hinojosa rejected appellants' claims that if libel can be negligent¹⁶² so too should invasion of privacy tort actions. The appellants argued that Texas court had recognized a negligent standard of invasion of privacy¹⁶³ but Justice Hinojosa responded to their argument by citing caselaw from the previous decade rejecting negligent invasion of privacy, including *Dallas County v. Harper*,¹⁶⁴ *Fulmer v. Rider*,¹⁶⁵ and *Childers v. A.S.*¹⁶⁶ Hinojosa used the principle that negligent standards of recovery should not be applicable to scenarios of intentional action. He wrote:

"Although some courts in Texas recognize negligent invasion of privacy, we decline to adopt a negligent invasion of privacy cause of action. We agree with the Fort Worth Court of Appeals that invasion of privacy has been recognized as an intentional tort and "appellant should not be able to recover for intentional conduct under a negligence theory."¹⁶⁷

¹⁵⁸ *Doe v. Mobile Video Tapes, Inc.*: 43 S.W.3d 40 (2001).

¹⁵⁹ *Citing Foster v. Laredo Newspapers, Inc.*, 541 S.W.3d 809 (1976).

¹⁶⁰ Such as *Boyles v. Kerr*, 806 S.W.2d 255 (1991), overturned by the Texas Supreme Court in 2001; and *C.T.W. v. B.C.G.*, 809 S.W.2d 788 (1991).

¹⁶¹ *Ibid.*, 32.

¹⁶² *Citing Foster v. Laredo Newspapers, Inc.*, 541 S.W.3d 809 (1976).

¹⁶³ Such as *Boyles v. Kerr*, 806 S.W.2d 255 (1991), overturned by the Texas Supreme Court in 2001; and *C.T.W. v. B.C.G.*, 809 S.W.2d 788 (1991).

¹⁶⁴ *Dallas County v. Harper*, 913 S.W.2d 207 (1995).

¹⁶⁵ *Fulmer v. Rider*, 635 S.W.2d 875, 881 (1982).

¹⁶⁶ *Childers v. A.S.*, 909 S.W.2d 282, 291 (1995).

¹⁶⁷ *Citing Childers*, 909 S.W.2d at 291 (citing *Fulmer v. Rider*, 635 S.W.2d 875, 881 (Tex.App.—Tyler 1982, writ ref'd n.r.e.) and *National Union Fire Ins. Co. v. Bourn*, 441 S.W.2d 592, 596 (Tex.Civ.App.—Fort Worth 1969, writ ref'd n.r.e..

In *Comptroller v. Attorney General*¹⁶⁸ in 2010 the Supreme Court of Texas again attempted to clarify boundaries between the media's freedom of the press and the privacy of persons. The



Susan Combs

Texas Comptroller of Public Accounts, Susan Combs, was approached by the *Dallas Morning News* requesting that highly personal information about public officials be made available to the newspaper under the Texas Public Information Act (PIA).¹⁶⁹ The newspaper sought access to this information in the claimed interest of detecting potential corruption in state government. The decision used a balancing test, with the public interest in the information pitted against the officials' right to privacy.

The PIA is intended to shed light on the inner workings of government, while ensuring that doing so is within the bounds of protection by state privacy doctrines, in particular the doctrine of public disclosure of private facts. Under the Act, any citizen may request that information created or assembled by a government agency be made available to them. The law ensures that confidential information and information in a personnel file that would, upon disclosure, be a "clearly unwarranted" invasion of privacy are therefore exempt from disclosure. If the governmental body believes the requested information to be excepted from disclosure, they may seek a ruling from the Office of the Attorney General. In this case, the information requested included the dates of birth of governmental employees, which then-Comptroller Susan Combs believed to be exempt from disclosure.¹⁷⁰ After the Office of the Attorney General issued a decision favoring the news outlet, Combs sued for declaratory relief against then-Attorney General Greg Abbott. The district court held for the newspaper that disclosure of date-of-birth information was not an invasion of privacy, which was affirmed by the appellate court. The Supreme Court also used the findings of the appellate court to assert that the tests to determine confidential information and information whose disclosure would invade an individual's right to privacy were fundamentally equivalent to the test for invasion defined by *Industrial Foundation*. Applying this test would allow the court to analyze the issue under Texas's common-law privacy doctrines, as opposed to the shallower statutory protections. As such, the case evolved from a statutory interpretation case into one involving the issue of competing rights: those of the privacy of individuals whose information would be disclosed against the public's right to view government information.



Chief Justice Wallace Jefferson

Writing for the court, Chief Justice Wallace Jefferson analyzed the competing rights claim by arguing that the public interest (and therefore the media's right to access the information) in the birth dates was minimal in this case, as the newspaper themselves admitted they would not

¹⁶⁸ Texas Comptroller of Public Accounts vs. Attorney General of Texas, 354 S.W.3d 336 (2010).

¹⁶⁹ See Texas Gov't Code § 552.101 and 102.

¹⁷⁰ *Ibid.*

disclose this information to the public and would only use it behind the scenes to look into the state's hiring practices and other statistics. However, after information is disclosed once under this act, it must be disclosed at any time to any member of the public who requests it, including anyone who could potentially use this information to harm the individuals to whom the information belongs. According to Chief Justice Jefferson, the disclosure of birth dates was inconsistent with the intentions of the PIA:

Employee birth dates shed little light on government actions. The *News* points out that the public has an interest in monitoring the government, and birth dates could be used to determine whether governmental entities like school districts and hospitals have hired convicted felons or sex offenders. But when a protected privacy interest is at stake, the requestor must identify a sufficient reason for the disclosure; mere allegations of the possibility of wrongdoing are not enough.¹⁷¹

In other words, the Court believed that the newspaper's justification did not warrant the release of data. Potentially, if the newspaper were conducting a specific investigation of a matter of significant public interest and requested the birth dates of certain officials, this may have played out differently. Perhaps the most important caveat of this decision is the Chief Justice's assertion that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."¹⁷² The government employee's right to privacy is not voided simply because their birth date can be found from other public sources. As such, the information is indeed exempt from disclosure under PIA.

¹⁷¹ Jefferson cited *Favish v.* , 541 U.S. at 172, noting that, when protected privacy interests are at stake, the requestor must "establish a sufficient reason for the disclosure".

¹⁷³ *Ibid.* (quoting *U.S. Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 500, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994)).

Part 3 of this article will appear in the Summer 2023 Issue of the Journal.



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Historic Irony and Modern Perspective: Slavery and the Supreme Court of the Republic of Texas

By David Coale

During its short but prolific life, the Supreme Court of the Republic of Texas wrote three opinions in civil cases involving slavery.

Each opinion offers a strong example of historic irony: the fresh—and uncomfortable—perspective gained only from hindsight.¹ On the surface, each opinion capably analyzes a basic concept in commercial law. But while doing so, each opinion also ignores how that concept is not compatible with the institution of slavery.



Seal of the Republic of Texas

This article reviews those opinions to consider how we can avoid similar missteps today.

I. The Cases

Heavily indebted and surrounded by unfriendly neighbors, the Republic of Texas was in dire straits during the early 1840s. By 1845 it will give up independence to become the 28th American state.

But despite its many challenges, the Republic had a reasonably functional court system. Each county has a trial court with a right of appeal to a Supreme Court.² More or less consistently, five Justices sat for each yearly term of the court, presided over during the 1840s by the legendary John Hemphill (the “John Marshall of Texas”).³ The court’s opinions are published in a single volume titled *Dallam’s Decisions*, named for the court’s reporter, George Dallam.

That court’s opinions involving slavery are, in hindsight, extraordinarily ironic:

- In its 1841 opinion of *Hall v. Phelps*,⁴ the court affirmed the cancellation of a deed obtained after the defendant “with violence ... expelled the overseer and the slaves” from the property, “driving them to some distant huts on the land[.]”⁵

¹ See generally Studiobinder, *Irony Explained: The Ultimate Guide for Storytellers*, 120 (2022) (defining “historical irony” as one of twelve types of irony).

² See James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 Tex. L. Rev. 237 (1986).

³ James L. Haley, *The Texas Supreme Court: A Narrative History, 1836–1986*, 18 (2013)

⁴ Dallam, 435 (1841).

⁵ *Ibid.*

- In that same vein, in its 1843 case of *Hill v. M'Dermot*,⁶ the court invalidated the sale of two slaves when the seller had “with force ... taken them away” from the rightful owner.⁷
- And in the 1843 case of *Walker v. McNeils*, the court resolved a dispute about “the conveyance of certain lands and slaves”⁸ by holding that the trial judge had incorrectly defined “duress” for the jury.⁹

Each opinion voids a slave-related conveyance as unfair, while never acknowledging the far greater unfairness of slavery itself.

This article now reviews the details of these cases’ facts and legal reasoning.

A. *Hall v. Phelps*

Hall v. Phelps arose from what the Supreme Court called “the distracted state of Texas from 1832 to 1835, and the revolution that occurred”¹⁰ during that violent time.

James Phelps moved to Texas in 1824 as a colonist, receiving a land grant from the Mexican government. He returned to the United States to visit family in 1831. Warren Hall then invaded Phelps’s property, and:

... with violence and without any right or authority, expelled the overseer and the slaves from the dwelling and tenements they occupied, driving them to some distant huts on the land; and [later] in like manner drove them wholly from the land, putting out of the enclosures the household furniture, etc., leaving the same to be wasted and destroyed, and took entire possession of the dwelling, tenements and premises, and continued with force to occupy until March following ...¹¹

When Phelps returned, Warren refused to return Phelps’s land to him “until after an agreement was extorted from him to convey 1,000 acres ... in consideration of being restored to possession of the residue[.]”¹²

Understandably, Phelps was unhappy with this situation. After he reestablished his household on his land, Phelps sued Warren to invalidate the 1,000-acre deed. Phelps won in the Brazoria County trial court, and Hall appealed.

Undeterred by the awkward fact that his client had stolen Phelps’s land by force, Hall’s counsel advanced four arguments to the Supreme Court: (1) the deed had been lost and thus

⁶ Dallam, 419 (1841).

⁷ *Ibid.*, 420.

⁸ Dallam, 541 (1843).

⁹ *Ibid.*, 544.

¹⁰ Dallam, 441.

¹¹ Dallam, 436.

¹² *Ibid.*

could not be voided, (2) that the jury should have been instructed on law about “compromise of a disputed right,” (3) Phelps’s suit was barred by the statute of limitations, and (4) the parties’ performance was waiver of any irregularities with the deed.¹³

The Supreme Court ruled for Phelps. In colorful language, the court faulted Hall for abusing Phelps’s trust:

Hall, availing of the temporary absence of Phelps and his wife on a visit to their child, in the spirit and with the hand of rapacity, took possession of the domicile and soil which the unsuspecting and confiding Phelps had acquired by the enterprise and privations of years and trusted would be kept inviolate to receive him on his return.¹⁴

And from there, concluded that the deed to Hall was invalid:

Let it not be imagined that we will descend into the detail of the continued outrage inflicted. It will be enough to remark that he, in his own audacious words, reigned sole possessor of the usurped manor and premises, affecting all the power and vaunted hospitality of a successful marauder of the dark ages, until the deed was signed and delivered and thereafter, until it pleased him to depart!¹⁵

Similar rhetoric appears throughout the opinion’s discussion of specific legal issues.

A modern court would surely reach the same conclusion—stealing your neighbor’s house by force of arms continues to be unlawful. But a modern court would also notice the plight of the “dispossessed ... slaves” who appear at the start of the opinion. Of course, the slaves only appear in this story because the slave trade created a “distracted state” in their homeland, allowing them or their ancestors to be kidnapped and sold into slavery. The court correctly faulted Hall for acting like “a successful marauder of the dark ages,” but it did not blink at the plight of others who were also dispossessed by violence.

Indeed, Phelps’s own title can be criticized as the product of a “distracted state,” from the perspective of Native American tribes that once lived in the Brazoria County area. But that criticism was answered only a few years earlier by the U.S. Supreme Court’s opinion in *Johnson v. M’Intosh*, which confirmed that a chain of title running from European settlement was superior to one arising from a conveyance by an Indian.¹⁶ Chief Justice Marshall bluntly summarized: “Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”¹⁷

¹³ *Ibid.*, 437-40.

¹⁴ *Ibid.*, 438

¹⁵ *Ibid.* (emphasis in original).

¹⁶ 21 U.S. 543 (1823).

¹⁷ *Ibid.*, 588.

B. *Hill v. M'Dermot*

Even by clerical standards of 1841, the record in *Hill v. M'Dermot* is sparse; the Supreme Court observed: "The record is obviously incomplete. It is not certified by the judge, nor does it otherwise appear, that these were all the facts proved."¹⁸

That said, these are the facts recorded in *Dallam's Decisions*. Whitfield Sledge owned two slaves: a woman named Priscilla, and her daughter Sylvia. (The opinion gave no other names for them.) In 1834, Sledge borrowed money from John Chafin, pledging those two slaves as the security. Sledge died in 1835. Then, "in the spring of 1837, Chafin, with force, took both slaves out of the possession of [Sledge's widow] and carried them away."¹⁹ A witness identified only as "the deponent Tennelli" testified that Sledge's widow owned the slaves at that time.

In the same spirit as *Hill*, the Supreme Court faulted Chafin for his violent conduct. But the court's specific holding is that the loan by Chafin to Sledge was usurious (specifically, it "attempted on its face to secure 12 1/2 percent. interest per annum and 5 percent. per month; both illegal and usurious exactions").²⁰ Chafin thus "acquired no right under the deed because of its turpitude," and it "was not such as would have been enforced, either in the ordinary mode by judicial suit, or by the award of executive process."²¹

Fair enough. But if the loan was unenforceable because the bargain between Sledge and Chafin was unfair, what about the relationship between the Sledges and their slaves? It is ironic for the Supreme Court to hold that Chafin overreached by gouging Sledge on interest, when Sylvia and Priscilla had no opportunity to negotiate at all with the Sledges.

C. *Walker v. McNeils*

Showing that some things never change, *Walker v. McNeils* arose because family members did not get along.²² Specifically, "D.R. and E.B. Walker" sued "J.G. McNeil²³ and R.M. Calder," after the Walkers conveyed "certain lands and slaves" to them. The Walkers claimed that they made the conveyance under duress and sought to have it set aside.

The case was tried to a jury. The court's charge defined "duress" as being of "[t]wo kinds – duress of imprisonment, where the person is confined, and duress of threats, where the act of violence is declared, or hanging over the party."²⁴ It further explained that:

... this fear must be well grounded; not mere conjecture or suspicion of danger,

¹⁸ Dallam, 419.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 423.

²¹ *Ibid.*, 424.

²² See, e.g., Genesis 4:9-10 ("Then the Lord said to Cain, 'Where is your brother Abel?' He said 'I do not know; am I my brother's keeper?'").

²³ The case style refers to "McNeils," while the body of the opinion says "McNeil."

²⁴ Dallam, 543.

such as a timid mind might conjure up in a moment of alarm. The fear of losing one's property is no duress, because the injury may be repaired by damages; but no adequate atonement can be made for the loss of life, or limb, or liberty, or ignominious punishment."²⁵

So instructed, the jury found no duress.

The Walkers appealed on the ground that the judge had not stated the law broadly enough, asking for this additional instruction:

"[W]hen a party is subjected to undue influence of extreme terror, or threats, or apprehensions short of duress, and executes a deed under such circumstances, it is void; also, that a deed made under such circumstances of extreme necessity and distress of the party, although not accompanied by any direct restraint or duress, is void."²⁶

The Supreme Court agreed with the Walkers. Lacking its own precedent, it relied on Joseph Story's "Commentaries on Equity Jurisprudence," and held: "Nowhere do we find that the threats of violence, which are the inducement to a particular act, must be made at the very time and place of the execution of that act" Rather, said the court, "it is for the jury to say, when those threats and circumstances are proven, whether they are sufficient to induce such fear as might move a man of ordinary firmness to the execution of his deed."²⁷ It thus reversed and remanded for a new trial.²⁸

That holding is ironic in two ways. Most obviously, slavery by definition is a "loss of liberty." And it was enforced by means that these Justices would surely have seen as "ignominious punishments" had Walker inflicted one upon McNeils. More specifically, the Supreme Court's precise holding—that duress can arise without an immediate threat—goes directly to the pervasiveness of slavery that made it such a lasting institution.²⁹ The Supreme Court acknowledged neither of these potential applications of the doctrine that it otherwise defined and applied.

II. Lessons Learned

Could these cases have turned out differently?

Of course, history does not record whether any judges in these cases even noticed the incongruity between their holdings and slavery. And if a Justice had noticed, many influences would have deterred him from going further—personal economic interests, peer pressure, or even the potential threat of violence.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, 544.

²⁸ *Ibid.*

²⁹ See *Dred Scott v. Sandford*, 60 U.S.393, 406 (1857) (describing how "the English Government and English people ... took them as ordinary articles of merchandise to every country where they could make a profit on them").

Perhaps most powerfully, a judge's own cognitive bias—the human tendency to cling to ideas, even when confronted with strong contrary evidence against them—would also have discouraged him from action. After a lifetime in a culture where slavery was legal and accepted, a natural response to a nagging doubt would be to ignore it or kick it down the road to examine “some other time.”

That said, courts have a significant, built-in check on cognitive bias—judges don't decide what cases are filed. A person who wants the courts to hear an issue only needs to pay a filing fee if that issue arises in a justiciable “case” or “controversy.” Could someone involved in this litigation have forced the court to at least confront, if not squarely address, the glaring problem that a contract to sell a slave involves “terror, or threats, or apprehensions”?³⁰

Here again, the likely answer is “no,” because of two other checks on judicial power, both very much in place at the time of these cases. The first is the concept of standing, which limits who can bring a particular issue before a court. The slaves lacked standing to say anything to a court then; as the United States Supreme Court awkwardly summarized in *Dred Scott*, a slave “could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and consequently, was not entitled to sue in its courts.”³¹

Further illustrating that point, the slaves in these cases did not just lack standing, they lacked personhood. In *Hill*, for example, the court quoted a legal principle that applied “[i]f the thing pledged had been sold by the pledgor,”³²—when those “thing[s]” were in fact the two slaves named Priscilla and Sylvia.

The other such doctrine is precedent. Both the Texas and United States Supreme Courts have recently confirmed that the question of when to overrule precedent is central to the operation of a common-law system.³³ The Republic of Texas' supreme court very much saw itself as part of that tradition:

Organized as our system is on the principles of the common law, both reason and prudence should lead us to adopt decisions of courts whose system is the same; especially when supported by the authority of reason and the dignity of names eminent for their proficiency in science and wisdom and their elucidation of the principles of the common law. ... [W]e should follow in the beaten track, guided by the lights which they have shed, to conclusions correct in principle, guarded by precedent, and just in their effects.³⁴

As precedent on the substantive issues they addressed, the holdings of these cases remained viable long after the abolition of slavery by the Thirteenth Amendment. *Hill v. M'Dermot* was never cited again by a Texas court. But *Hall v. Phelps* was reviewed at length by the Texas Supreme Court

³⁰ *Walker*, Dallam, 641.

³¹ *Scott*, 60 U.S. at 406.

³² Dallam, 423.

³³ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Mitschke v. Borromeo*, 645 S.W.3d 251 (Tex. 2022).

³⁴ *Carr v. Wellborn*, Dallam 624, 627 (1844).

in 2015 as part of a comprehensive study of the elements of trespass.³⁵ And *Walker v. McNeils* was cited into the Twentieth Century about its definition of duress,³⁶ which is materially similar to the definition that appears in today's Pattern Jury Charge.³⁷

These observations help explain why the end of slavery did not come from the courts, but from Congress and a substantial majority of states after the Civil War. Even if a would-be litigant had wanted to get the attention of a judge in these cases, rules about standing and *stare decisis* would have kept those efforts from proceeding far. The courts operate with blinders that keep them focused on specific disputes and the rules that govern them, rather than broader structural issues in the society that produces those disputes.

Conclusion

When Hannah Arendt watched the trial of Adolf Eichmann, she talked about “the banality of evil,” explaining: “The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal.”³⁸

If you asked the judges what these three cases were about, they would have called them contract or secured-credit disputes—for example, a question whether a conveyance should be set aside because of duress. Much of their legal analysis is straightforward and with some updating, would not be out of place in a modern court.

But they were also about slavery. And by looking at how casually these well-intentioned judges discussed slavery, we can gain some insights about what courts do well, and what they do not. Hopefully those insights can help us avoid similar oversights and missed opportunities.

³⁵ *Environmental Processing Systems, L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 419-20 (Tex. 2015).

³⁶ *Ward v. Baker*, 135 S.W.620, 624 (Tex. App. 1911) (citing *Walker* to support the dismissal of a duress claim when no threat had occurred).

³⁷ Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment § 101.26 (2020) (defining “duress” as “the mental, physical, or economic coercion of another, causing that party to act contrary to his free will and interest” (citing, *inter alia*, *Black Lake Pipe Line Co. v. Union Constr. Co.*, 538 S.W.2d 80, 85 n.2 (Tex. 1976), overruled on other grounds by *Sterne v. Marathon Oil Co.*, 767 S.W.2d 686 (1989))).

³⁸ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, 276 (1963).



Widely recognized as one of the top appellate lawyers in Texas, **DAVID COALE**'s diverse experience ranges from sophisticated constitutional issues in the U.S. Supreme Court to defense of a payphone operator before a Tarrant County Justice of the Peace. He publishes *600camp.com*, a popular blog about business cases in the U.S. Court of Appeals for the Fifth Circuit, and *600commerce.com*, a similar blog about the Dallas Court of Appeals and Texas Supreme Court.

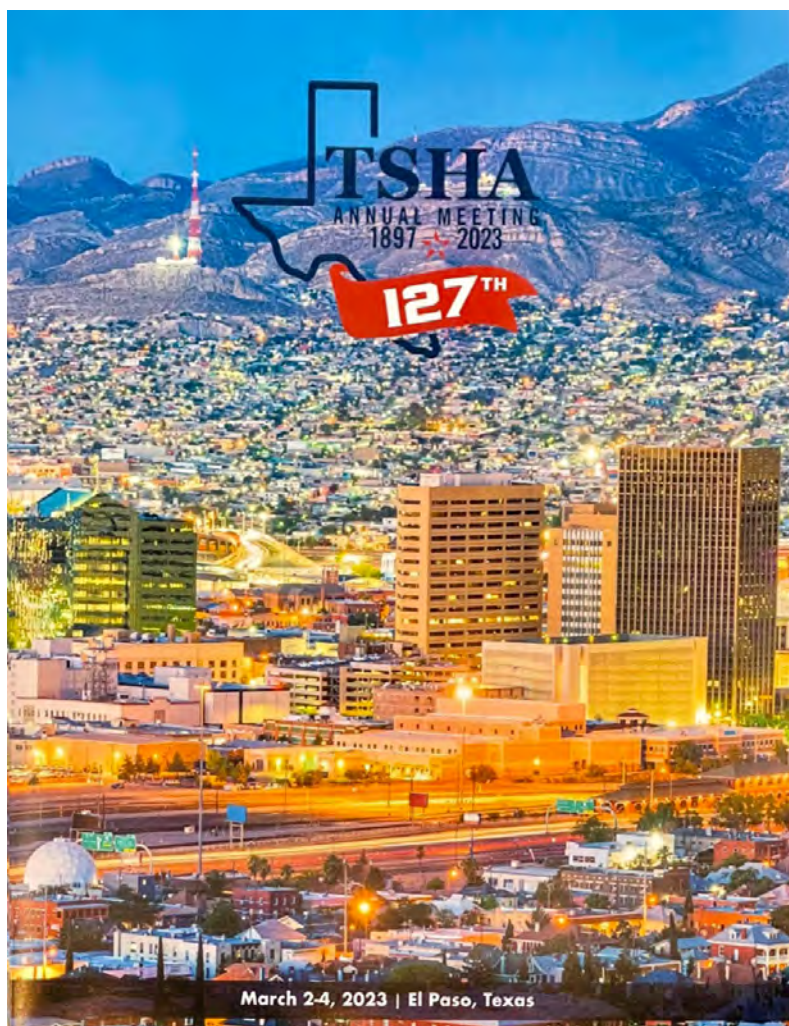
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Advancing the Rule of Law along Contested Frontiers: the 2023 TSHA Annual Meeting

Story and photos by David A. Furlow

Our society made its annual contribution to Texas history this year at the Texas State Historical Association's 127th Annual Meeting from March 3-4 in Old El Paso, a vibrant, richly historic city, the 23rd-largest in the United States and the second-largest majority-Hispanic city in the U.S. When conquistadors arrived at the Great Pass of the North, El Paso del Norte, in the sixteenth century, they passed through the future location of two border cities—Ciudad Juárez on the south or right bank of the Rio Grande, and El Paso, Texas, on the opposite side of the river.

El Paso bestrides a continental crossroads; a north-south route along a historic *camino real* (a royal highway), and a stopping-point along Interstate 10 running from Georgia to California.



Spanish conquistador and New Mexico Governor Juan de Oñate led a major colonizing expedition through El Paso on his way north. On April 30, 1598, he conducted a claiming ceremony, *La Toma*, in which Spanish invaders set down to celebrate a communal meal with local Natives.

Recently referred to as the “real first Thanksgiving,” it was part of a ceremony in which de Oñate took formal possession of the territory drained by Río del Norte (the Rio Grande) at San Elizario Mission southeast of El Paso on April 30, 1598. The Texas House and Senate each commemorated this historical milestone in 1990, when Governor Rick Perry recognized April 30 as the official day of the First Thanksgiving. For twenty years, the El Paso Mission Trail Association has conducted an annual historical reenactment of the event, and their work was honored by the Texas House in 2006. Some people in other states, namely, residents of St. Augustine, Florida and Plymouth, Massachusetts, beg to differ, stubbornly referring to events in 1565 and 1620.



Painter Jose Cisneros depicted the “first Thanksgiving” celebration in North America when Spanish colonists dined with Mansos Indians near El Paso.
University of Texas at El Paso Library, on the *KUT* website.



Top left: It was a cold and windy day when Society Executive Director Sharon Sandle explored San Elizario Mission, site of America's first thanksgiving, according to the Texas Legislature. Bottom left: Inside the San Elizario Mission. Top right: The owners of the historic Plaza Theatre in El Paso, built in 1930, welcomed Texas State Historical Association attendees to town.

"The Society sponsors scholarship relating to the history of the Texas judiciary," our Society's "About Us" web-page declares, "and furthers efforts to raise public awareness about the judicial branch of government and its role in the development of Texas." Our Mission Statement states that, "Through research and scholarship, the Society educates the public about the judicial branch and its role in the development of Texas." One of the most important ways the Society fulfills its educational mission is by presenting panel programs at Texas State Historical Association (TSHA) annual meetings.

Our Society's program, "Advancing the Rule of Law along Contested Frontiers," focused on ways that attorneys and judges advanced the rule of law in the nineteenth and twentieth centuries in jury trials and a landmark U.S. Supreme Court case.

9:00am El Paso Convention Center, El Paso Room CD
Advancing the Rule of Law Along Contested Frontiers

Chair: Sharon Sandle, Executive Director, Texas Supreme Court Historical Society

Presenters: Hon. Ken Wise, "Trials on the Prairie: The American Legal System and the Plains Indian Wars," Justice, 14th Court of Appeals; Hon. Gina M. Benavides, "Gustavo 'Gus' Garcia, a Life of Service, and *Hernandez v. State of Texas*: The Lawyer Who Desegregated Texas Juries," Justice, 13th Court of Appeals

Commentator: Colbert N. Coldwell, Independent Scholar, El Paso historian, and law firm partner, Author

Sponsor: Texas Supreme Court Historical Society



Sharon Sandle described the Society's origins and accomplishments.

The Hon. Ken Wise, Justice of the Texas Court of Appeals for the Fourteenth District and the Society's President, made the first presentation: "Trials on the Prairie, the American Legal System, and the Plains Indian Wars." Judge Wise described two contrasting instances when Americans modified the Anglo American legal system to provide jury trials for Native Americans indicted for crimes arising out of their raiding and resistance during the settlement of America's western frontier. In addition to his legal experience, Justice Wise brought first-hand, personal knowledge of Texas battlefields and courthouses he acquired while researching, scripting, and hosting the *Wise about Texas* podcast.



Justice Ken Wise discussed the military commissions that conducted trials at the conclusion of the Sioux Indian wars.



The first Indian trials occurred in the aftermath of the Dakotas War of 1862, a conflict between Native Dakota warriors and settlers, which raged throughout southwestern Minnesota. When news of Dakota attacks reached St. Paul, Minnesota Governor Ramsey appointed a colonel in the state's militia forces, Henry Sibley, to march against the Dakota. Sibley led four companies of the Sixth Infantry Regiment from Fort Snelling to St. Peter. Minnesota's military forces came under U.S. President Abraham Lincoln's federal control on September 16, 1862, when Major General John Pope took control of the Military Department of the Northwest. President Lincoln appointed Sibley to serve as a brigadier general of U.S. Army volunteers responsible for leading Union forces into the Battle of Wood Lake on September 23, 1862.

After the battle, a federal military commission, similar in some ways to the Guantanamo military commissions of recent years, tried 392 Dakota men for their participation in the war, sentenced 303 of them to hang, and sentenced another 16 to prison. Some trials lasted five minutes. Justice Wise examined those trials, the evidence presented, and issues of fairness involving the procedures used to conduct them.

Justice Wise then compared the Dakota War trials with a very different system: the jury trials of three Native leaders in Texas, a story Justice Wise has also explored in "Their Day in Court:

The Rule of Law and the War on the Plains,” in the Fall 2021 issue of this Society’s *Journal*. Justice Wise examined the arrests of three generations of Native Kiowa leaders tried for murder because of their roles in the 1871 Warren Wagon Train Raid: Satank, who exemplified the traditional Kiowa elder, Satanta, who represented the then-governing generation of tribal leaders, and Big Tree, a youth, destined to assume leadership in the next generation.



Justice Wise discussed the trials of three generations of Native Kiowa leaders tried for murder because of their roles in the 1871 Warren Wagon Train Raid. Left: Satank (Oklahoma Historical Society Collection). Center: Satanta wearing a peace medal. Right: Big Tree as a young chief.

Justice Wise held the audience’s attention as he told how Satank concealed a knife he used to make a suicidal attack on his guards, resulting in the warrior’s death the old chief sought. The other two submitted to proceedings before District Judge Charles Soward of the 13th Judicial District Court in Jack County, beginning with grand jury indictments of Satanta and Big Tree for the murder of the seven teamsters. Two jury trials followed. “It was the first time in U.S. history that Indian raiders had been tried in a civilian court,” Judge Wise told the audience. “Not only were Satanta and Big Tree on trial, so was the entire idea that the rule of law could cause a change in the Indians’ violent behavior toward Texans.” The twelve-man jury that convicted Big Tree convicted Satanta of murder. Judge Soward sentenced each of the chiefs to “hang by the neck until he is dead, dead, dead, and may God have mercy on his soul. Amen!” Soon came calls to spare Satanta and Big Tree the sentence of hanging. Justice Wise then analyzed the complicated post-trial proceedings both defendants experienced as well as their later lives.




A large audience of historians, lawyers, and history-minded members of the public gathered to hear the Society's speakers discuss the development of Texas law.



Justice Gina M. Benavides

**Advancing
the Rule of
Law along
Contested
Frontiers**



**Justice Gina
Benavides,
Texas Court of
Appeals for the
13th Circuit,
Trustee, TSCHS**

Gustavo 'Gus' Garcia, a Life of Service, and *Hernandez v. Texas*: The Lawyer Who Desegregated Texas Juries

Texas Supreme Court Historical Society
TSHA 2023 Annual Meeting, El Paso, Friday, March 3, 2023

The Hon. Gina M. Benavides, Senior Justice, Texas Court of Appeals for the Thirteenth District in Corpus Christi, was the Society's next speaker. Named "Latina Judge of the Year" in 2007 by the National Hispanic Bar Association and she was also elected Regional Director 11 of the National Association of Women Judges that covers Texas, Oklahoma, and Arkansas. A Society Trustee, she told a story of self-sacrifice and devotion: "Gustavo 'Gus' Garcia, a Life of Service, and *Hernandez v. State of Texas*: The Lawyer Who Desegregated Texas Juries." She recently published two articles in our Spring 2021 issue of the Journal profiling Texas Supreme Court Justice Eve Guzman and Court of Criminal Appeals Judge Elsa Alcala, the two first Latinas on the Texas highest courts.

Justice Benavides began by reviewing the facts in *Hernandez v State of Texas*, 347 U.S. 475 (1954). The State of Texas indicted Pete Hernandez, a farm worker, for the murder of Joe Espinoza through the actions of an all-Anglo (white) grand jury in Jackson County, Texas. Arguing that Mexican Americans were barred from the jury commission that selected juries, and from petit juries, Hernandez' attorneys tried to quash the indictment. Hernandez's counsel tried to quash the petit jury panel called for service because persons of Mexican descent were excluded from jury service in this case. The evidence presented showed that a Mexican American had not served on a jury in Jackson County in over twenty-five years and that, as a result, citizens of Mexican ancestry had been discriminated against as a special class in Jackson County, Texas. The county courthouse where the trial occurred, for examples, featured segregated bathrooms that barred Hispanics.



The trial court denied the motions. An all-Anglo jury found Hernandez guilty of murder and sentenced him to life in prison. In affirming, the Texas Court of Criminal Appeals found that "Mexicans are...members of and within the classification of the white race as distinguished from members of the Negro Race" as a basis for rejecting Hernandez's arguments about his membership in a "special class" within the meaning of the Fourteenth Amendment. Furthermore, the court pointed out that "so far as we are advised, no member of the Mexican nationality" had challenged this classification as white or Caucasian.



Gus Garcia, photo courtesy of the *Huffington Post*.

The Supreme Court granted certiorari to address one issue: "Is it a denial of the Fourteenth Amendment equal protection clause to try a defendant of a particular race or ethnicity before a jury where all persons of his race or ancestry have, because of that race or ethnicity, been excluded by the state?" The Supreme Court held that exclusion of Hispanics from criminal court juries violated the Fourteenth Amendment of the U.S. Constitution.

Justice Benavides showed that *Hernandez* was important because its recognition of the realities of discrimination against people of Mexican descent paved the way for later legal challenges in cases involving housing, education, and employment discrimination. Justice Benavides showed that attorney Gus Garcia was responsible for that landmark legal victory. Born in 1915 in Laredo, Texas and raised in San Antonio, Texas, he earned a Bachelor's Degree and an LLM from the University of Texas. He served his nation as a First Lieutenant during World

War II. Alcoholism made his life tragic. He suffered the revocation of his law license and died of liver disease. Yet he changed the world through his zealous advocacy of his clients' interests.

There was a tragic aspect to this panel program. One month before this TSHA annual meeting, our commentator, Colbert N. Coldwell, an independent scholar, successful El Paso attorney, and an author of a recently published book about his ancestor's life and service on the Reconstruction era Texas Supreme Court who had agreed to serve as our commentator, discovered that he had contracted multiple myeloma while being hospitalized for other conditions.

Colbert suffered a dramatic decline at the end of January 2023. Colbert underwent emergency cancer therapies that reduced his immunity to disease and left him unable to participate in last-minute preparation for the panel program or to attend TSHA's annual meeting. Since I made a presentation to the El Paso County Bar Association in 2017, I stepped in to serve as the commentator. As discussed in the "In Memoriam" article that follows this report, Colbert Coldwell passed away on March 17, 2023.

We will all miss trial lawyer and judicial historian Colbert Coldwell, who spoke about his Reconstruction era ancestor, Texas Supreme Court Associate Justice Colbert Coldwell, during the Society's April 2017 hanging of Justice Coldwell's portrait. Photo by Mark Matson.



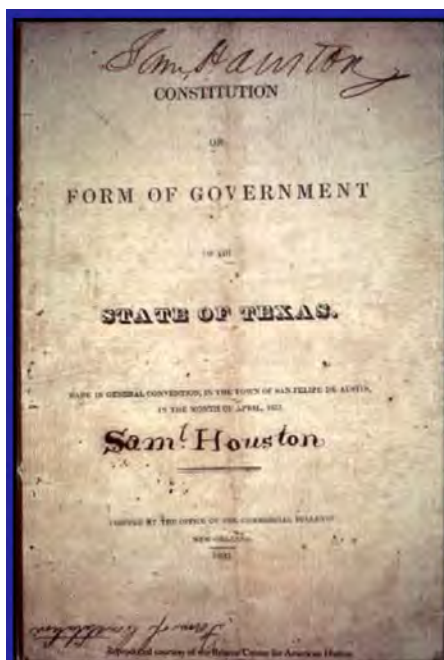
In addition to the Society's panel program, I participated in a separate panel that afternoon: *The Mexican State that Never Was: Perspectives on the Constitution of 1833*. I spoke about "The Legal Origins of Sam Houston's 1833 Draft Constitution for an Independent Mexican State of Texas." Mexican scholar Rodrigo Galindo analyzed Mexican constitutionalism from the 1824 Federal Constitution of Mexico through the 1827 Constitution of the Mexican twin-state of Coahuila and Texas and the Texas Revolution of 1835-1836.

I examined the related issue of whether another state's constitution served as a model for the constitution of a Mexican Texas that Sam Houston drafted in early 1833 at San Felipe de Austin. I asked whether Houston relied upon the Coahuiltecan Twin-State Constitution of 1827, or, instead, John Adams' Massachusetts Constitution of 1780. I will publish the results of that inquiry in a separate article at a later time.

2:00pm El Paso Convention Center, El Paso Room CD
The Mexican State that Never Was: Perspectives on the Constitution of 1833

Chair: Hon. Ken Wise, 14th Court of Appeals, State of Texas
Presenters: Manuel González Oropeza and Rodrigo Galindo, "The Last Mexican Constitution in Texas," Universidad Nacional Autónoma de México; David Furlow, "The Legal Origins of Sam Houston's 1833 Draft Constitution for an Independent Mexican State of Texas," Independent Researcher
Commentator: Hon. Ken Wise, 14th Court of Appeals, State of Texas

Sponsor: David A Furlow, Historian



Sam Houston drafted a Texas Constitution at the 1833 Convention

Signed by Sam Houston at the Convention of 1833 at San Felipe de Austin in April 1833, but printed in New Orleans.

The 1833 Convention was an extra-legal, *ultra vires* assembly under the 1827 Coahuila y Texas.



Top left: The signboard of our panel at TSHA's Annual Meeting;
Top right: Mexican scholar Rodrigo Galindo;
Bottom left: the draft Texas Constitution of 1833, courtesy of the University of Texas School of Law's Tarlton Law Library;
Bottom right: David Furlow; at the TSHA Annual Meeting.

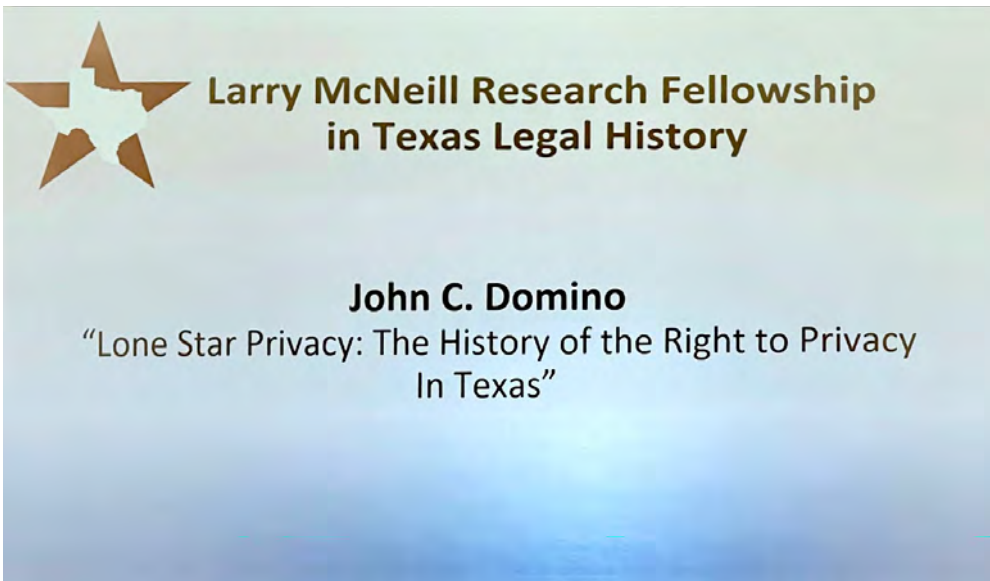
The next TSHA Annual Meeting will occur at Texas A&M University from February 28 through March 2, 2024. Please save the date and consider joining us there.

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And the 2023 Larry McNeill Research Fellowship in Texas Legal History goes to . . . John Domino

Article and photos by David A. Furlow

Congratulations to John Domino, the winner of the Texas State Historical Association's 2023 Larry McNeill Fellowship in Legal Research. Domino's proposed research-topic is "Lone Star Privacy: The History of the Law of Privacy in Texas." You can read a wonderful article he has written on the topic for this issue of the Journal.



John C. Domino is Professor of Political Science at Sam Houston State University, where he teaches constitutional law, judicial politics, and legal history. He is the author of the books *Civil Rights & Liberties in the 21st Century* (2018) and *Texas Supreme Court Justice Bob Gammage: A Jurisprudence of Rights & Liberties* (2019). His articles have appeared in such journals as *Justice Systems Journal*, *South Texas Law Review*, the *British Journal of American Legal Studies*, and the *Journal of the Texas Supreme Court Historical Society*.

And the 2024 Larry McNeill Fellowship goes to...

Applications are now being accepted for TSHA's 2024 Larry McNeill Research Fellowship in Texas Legal History. <https://www.tshaonline.org/awards/larry-mcneill-research-fellowship-in-texas-legal-history>. Our Society worked together with TSHA to establish the Larry McNeill Research Fellowship in Texas Legal History in 2019 to honor Larry McNeill, a past president of the Society and TSHA. The \$2,500 award recognizes an applicant's commitment to fostering academic and grassroots research in Texas legal history. TSHA awards the annual fellowship to an applicant who submits the best research proposal on an aspect of Texas legal history. Judges may withhold the award at their discretion.

Competition is open to any applicant pursuing a legal history topic, including judges, lawyers, college students, and academic and grass-roots historians. The award will be made at the Texas Historical Association's Annual Meeting at Texas A&M University in College Station from February 28 through March 2, 2024. The deadline for submission is November 15, 2023. An application should be no longer than two pages, specify the purpose of the research and provide a description of the end product (article or book). An applicant should include a complete vita with the application. Judges may withhold the award at their discretion. TSHA will announce the award at the Friday Awards Luncheon during TSHA's Annual Meeting in College Station on March 1, 2024.



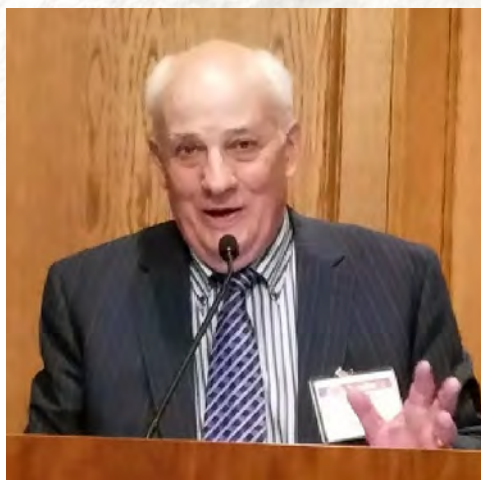
Larry McNeill

TSHA has not yet set a deadline for submissions, but previous ones were in the autumn. Individuals wishing to apply should submit an application form and attach the proposal and a curriculum vita. Only electronic copies submitted through TSHA's link and received by the deadline will be considered. Anyone who has trouble submitting the form electronically should email TSHA at amawards@tshaonline.org or call TSHA Annual Meeting Coordinator Angel Baldree at 512-471-2600.

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In Memoriam: Colbert Nathaniel Coldwell, 1943-2023

By David A. Furlow



Colbert N. Coldwell spoke at the Society's April 27, 2017 symposium on the history of the Texas Supreme Court.

A long-time friend of this Society, El Paso attorney Colbert Nathaniel Coldwell, passed away on March 17, 2023. He died from complications related to a multiple-myeloma diagnosis he received in late January 2023. He touched many lives in the Society, advanced the cause of scholarship, and shared what he knew.

Colbert was born on October 10, 1943 in Seattle, Washington to Commander Harold Coldwell, USNA 1920, and Corinne Leora Helber Coldwell. His parents named Colbert in honor of his great-grandfather, Reconstruction Era Texas Supreme Court Justice and El Paso Customs Collector Colbert Coldwell. Colbert graduated from high school in El Paso in 1961 and went in search of the world. He studied in Mexico City and London, then earned a Bachelor's Degree and Law Degree from the University of Texas at Austin in 1965 and 1968, respectively.

Five years ago, on January 23, 2018, Colbert Coldwell the great-grandson presented his ancestor Colbert Coldwell's portrait to the Texas Supreme Court in a proceeding our Society sponsored. The photo at right shows Colbert at the speaker's podium. The Hon. Wallace B. Jefferson, former Chief Justice of the Texas Supreme Court (ret.), thanked Colbert for the portrait and for other contributions to preserving Texas's legal history.

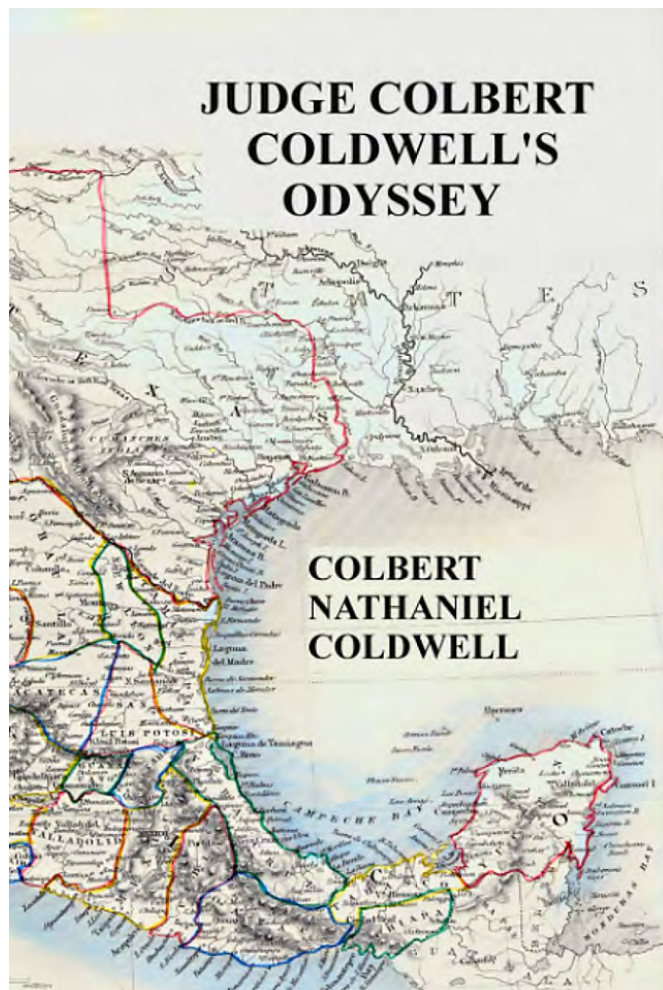


I came to know Colbert while in El Paso presenting a State Bar of Texas program about Hispanic contributions to Texas legal history—and while editing Colbert Coldwell's excellent article about the first Colbert Coldwell in our society's journal. See Colbert N. Coldwell, "Setting the Record Straight: Colbert Coldwell's Quest for Justice," *Journal of the Texas Supreme Court Historical Society*, vol. 3, no. 3 (Spring 2014): 21-26, https://www.texascourthistory.org/Content/Newsletters//TSCHS_Journal_Spring_20141.pdf, accessed April 8, 2023.

Colbert and his good friend Clinton Cross memorialized important incidents of Texas Supreme Court Justice Colbert Coldwell's life in *Judge Colbert Coldwell's Odyssey: Reconstruction and the Stockade Case*, a book available from Amazon.com.



Colbert and his wife Eleanor



Colbert Nathaniel Coldwell was a good man and a fine scholar. He made a difference to this Society, his friends and clients, his wife Eleanor, and their family. Colbert will be missed.

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Journal Editor-in-Chief Wins Posthumous Bar Admission For 1855 Black Dartmouth Grad



Edward Garrison Draper

Securing the posthumous bar admission for an aspiring lawyer of color who was denied entry to the legal profession on racial grounds has only happened six times in American legal history. On October 26, 2023, it will occur a seventh time, when the Supreme Court of Maryland holds a special ceremony marking the posthumous admission of Edward Garrison Draper, a free Black man and Dartmouth graduate who was denied admission to the Maryland bar nearly 166 years ago, on October 29, 1857.

The event marks the culmination of years of research and work by Journal Editor-in-Chief John G. Browning. After seeing fleeting references to Draper's unsuccessful quest, Justice Browning set out to document it, set against the larger backdrop of the state of Maryland's unusually obstinate resistance to the integration of its bar. Maryland was the last of the former slaveholding states to allow Black lawyers to practice in its state courts, resisting a series of legal challenges until 1885 (the racially restrictive bar statute wasn't formally repealed until 1888—more than twenty years after the passage of the Fourteenth Amendment). It is a story that was never fully told until Justice Browning's article, *To Fight the Battle, First You Need Warriors: Edward Garrison Draper, Everett Waring, and the Quest for Maryland's First Black Lawyer*, published as the lead article in Vol. 53 of *The University of Baltimore Law Forum* (Fall 2022).

Draper, the son of a free Black tobacconist in Baltimore, was unusually well-qualified for admission to practice. Like his white counterparts, he had spent two years "reading the law" under the tutelage of an older lawyer, Charles Gilman. But Draper was also a college graduate—of Dartmouth, no less—and had spent an additional several months in the Boston law office of a prominent abolitionist, Charles Storey, observing courtroom proceedings in hopes of becoming a trial lawyer. Those hopes were dashed, however, when the judge who examined Draper for admission refused to admit the "young man of color"—despite finding him "most intelligent and well informed in his answers to the questions propounded by me, and qualified in all respects to be admitted to the Bar in Maryland, if he was a free white citizen of this State." Draper went off to Liberia, where he would die of tuberculosis only two weeks before his twenty-fifth birthday.

Justice Browning's research took him from the records of the Maryland Colonization Society (which supported Black migration to Liberia) to the special collections of Dartmouth's Rauner Library. After his law review article was completed, Browning drafted a petition to the Maryland Supreme Court. Reaching out to supporters at Dartmouth, the American Board of Trial Advocates, and minority bar associations in Maryland like the Monumental City Bar Association and the Alliance of Black Women Attorneys, Browning and his Maryland co-counsel Domonique Flowers soon gathered an impressive array of supporting letters. Shortly before



Domonique Flowers

filing the petition, Browning and Flowers spoke at a symposium organized by the University of Baltimore School of Law, which was attended by Chief Justice Matthew Fader of the Supreme Court of Maryland, along with a number of leading members of the Maryland judiciary. Within days of filing their petition, Browning and Flowers were informed that the Supreme Court would be granting it.

Had he been admitted in 1857, Edward Garrison Draper would have been only the fifth Black lawyer in the United States. Now, 166 years later, history will still be made as the Supreme Court of Maryland corrects a racial injustice.



Hon. John G. Browning

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Journal's Production Manager Takes to the Stage

Production photos by Suzanne Cordeiro

The Production Manager of our Journal, David Kroll, performed in a production of the play *ROE* in April in Austin. The play gives context to the landmark U.S. Supreme Court case *Roe v. Wade* and its aftermath through the memories of Sarah Weddington, the Austin lawyer who argued the case, and Norma McCorvey, the “Jane Roe” plaintiff.



Zach's 420-seat Topfer Theatre

Since its completion in 2016, Lisa Loomer has revised portions of her script to reflect changing circumstances, most notably the overturning of *Roe* by the Supreme Court in 2022.

Like most of the 12-member cast, David portrayed a number of characters as needed, including Justice Harry Blackmun, who wrote the *Roe* opinion. “I was extremely lucky to get to work with an incredibly talented cast and crew on such a topical play,” he said.



Left: David as Justice Harry Blackmun. Right: Amber Quick as Norma McCorvey, David as her doctor.

Produced on Zach Theatre's Topfer stage, the play ran April 8-30 to enthusiastic audiences.



Top left: Amber Quick as Norma McCorvey, David as TV producer Fred Friendly. Top right: Jeff Mills as minister Flip Benham, David as a member of Flip's congregation. Bottom: The cast takes a curtain call.

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The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

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2022-23 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2022, the beginning of the membership year.

HEMPHILL FELLOW

David E. Chamberlain

TRUSTEE

Kirsten Castañeda

CONTRIBUTING

Kelley Clark Morris

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2022-23 New Member List

The Society has added 30 new members since June 1, 2022. Among them are 19 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

TRUSTEE

Jennie C. Knapp
Ryan Luna
Kirk Pittard

CONTRIBUTING

C. B. Harrison
Jennifer Landrum
David Moshier
Hon. Staci Williams

REGULAR

Alexa Acquista*
Laura Bach*
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Seth Smitherman*
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Membership Benefits & Application

Hemphill Fellow \$5,000

- Autographed Complimentary Hardback Copy of Society Publications
- Complimentary Preferred Individual Seating & Recognition in Program at Annual Hemphill Dinner
- All Benefits of Greenhill Fellow

Greenhill Fellow \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of All Society Publications
- Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- Recognition in All Issues of *Quarterly Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership \$1,000

- Historic Court-related Photograph
- All Benefits of Patron Membership

Patron Membership \$500

- Discount on Society Books and Publications
- All Benefits of Contributing Membership

Contributing Membership \$100

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership \$50

- Receive *Quarterly Journal of the Texas Supreme Court Historical Society*
- Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs

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