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## No Harm, No Foul? "Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion

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**NO HARM, NO FOUL?  
“ATTEMPTED” INVASION OF PRIVACY AND THE  
TORT OF INTRUSION UPON SECLUSION**

*Eli A. Meltz\**

*The tort of intrusion upon seclusion protects individuals from unwanted invasions into their personal space and personal affairs. While courts differ as to the precise definition and scope of this tort, at the most basic level, a claim for intrusion upon seclusion alleges that the defendant has unreasonably interfered with the plaintiff’s legitimate interest in maintaining some degree of privacy in his or her personal affairs. This Note analyzes an interesting issue that has emerged concerning the application of this tort: Should a defendant be held liable when he or she has attempted to observe the plaintiff in a private setting but is ultimately unsuccessful?*

*Some courts have held that the mere placement of surveillance equipment that is capable of transforming a private space into a public one constitutes an intrusion, even if the defendant never uses the device to view or hear the plaintiff. Other courts, however, have held that the plaintiff must prove that the defendant overheard, viewed, or otherwise observed the plaintiff using the device. This Note analyzes the underlying basis and purpose of the intrusion tort and argues that a plaintiff should not need to prove that the defendant actually used the device to see or hear the plaintiff—in other words, the placement alone of surveillance equipment is an invasion of the plaintiff’s privacy and should be sufficient to state a claim for intrusion upon seclusion.*

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#### INTRODUCTION

On November 3, 2014, Aksana Kutzmitskaya filed a complaint in New York State Supreme Court alleging that her former employers, two managing members and supervisors of a Manhattan apartment building where she lived and worked, installed spy cameras in her apartment without her consent.<sup>1</sup> According to the complaint, these cameras, which the defendants placed in Ms. Kutzmitskaya's bedroom and bathroom, allowed them to view her performing highly personal and private activities, including showering, using the bathroom, and engaging in sexual activity, through a wireless feed transmitted to one of their computers.<sup>2</sup> The complaint alleged that the defendants made at least seventy videos of Ms. Kutzmitskaya, all without her knowledge or consent, and that she suffered humiliation and emotional distress from learning about the secret tapes.<sup>3</sup>

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1. See Complaint at 2–3, *Kutzmitskaya v. 7 W. 82 LLC*, No. 160918/2014 (N.Y. Sup. Ct. Nov. 3, 2014); see also Ben Yakas, *UWS Maid Sues Bosses for Spying on Her with Hidden Cameras*, GOTHAMIST (Nov. 6, 2014, 5:02 PM), [http://gothamist.com/2014/11/06/uws\\_maid\\_sues\\_landlords\\_for\\_spying.php](http://gothamist.com/2014/11/06/uws_maid_sues_landlords_for_spying.php).

2. See Complaint, *supra* note 1, at 4.

3. See *id.*

The complaint further averred that the defendants invaded the plaintiff's privacy by intruding upon her seclusion, among other claims.<sup>4</sup>

Although the complaint stated that the spy cameras were fully operational and that the defendants made and watched the secret recordings,<sup>5</sup> assume for a moment that the defendants never watched the recordings because they were accidentally deleted before they could be viewed. Assume further that the cameras had subsequently stopped working, thereby precluding the possibility of future recordings. Finally, assume that Ms. Kutzmitskaya discovers the hidden cameras (believing that the defendants had been watching her this whole time) and sues for invasion of privacy, alleging that the defendants intruded upon her seclusion by placing the cameras in her apartment without her consent. The defendants argue that they cannot be held liable for invasion of privacy because they never viewed Ms. Kutzmitskaya using the hidden cameras, which have since stopped working. Who should prevail?

The answer to this seemingly straightforward but deceptively complex question depends on which state's privacy law is applied.<sup>6</sup> Some states have held that the placement of a camera or other recording device where the plaintiff has a reasonable expectation of privacy is actionable even without anyone else seeing or viewing the plaintiff with the device.<sup>7</sup> Other states have taken the view that someone else must actually see, hear, or observe the plaintiff to state a claim for intrusion upon seclusion; in other words, there must be acquisition of information about the plaintiff.<sup>8</sup>

Although this conflict is not a new development, it is increasingly relevant in modern society as recording devices like camera phones become ubiquitous and as notions of privacy adapt to technological advances.<sup>9</sup> For example, should a plaintiff be able to recover if he or she discovers a dummy camera<sup>10</sup> in a place where he or she has a reasonable expectation of privacy? If the court requires actual observation of the plaintiff to state a claim, then the plaintiff would be precluded from any intrusion upon seclusion-based recovery, no matter how offensive the conduct in question.<sup>11</sup> In addition, this conflict concerns fundamental questions about the nature of the injury for which the intrusion tort provides a remedy: Is the plaintiff injured when she unexpectedly discovers a hidden camera in

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4. *See id.* at 10.

5. *See id.* at 4, 8.

6. *See* 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 12:6, at 12-96 (4th ed. 2010 & Supp. 2014) (noting that the answer to this question is "a matter of some dispute").

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. *See, e.g.,* Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1017-25 (1995) (describing technological advances that pose threats to privacy concerns).

10. A dummy camera is a "fake" camera that gives the appearance of functioning but does not actually work.

11. *See, e.g.,* *Meche v. Wal-Mart Stores, Inc.*, 692 So. 2d 544, 547 (La. Ct. App. 1997) (holding that the plaintiffs had not stated an invasion of privacy claim because they had not met their burden of proving that they were recorded and viewed).

her bedroom that, for whatever reason, never records her, or is there an injury only when someone else observes her using the hidden camera?<sup>12</sup>

This Note seeks to answer this challenging question. Part I outlines the common law and statutory recognition of privacy as it has developed in the several states, focusing particularly on the intrusion upon seclusion branch of the privacy tort. Part II provides an overview of cases from different jurisdictions that have decided whether an intrusion without acquisition of information about the plaintiff is actionable. Lastly, Part III argues that acquisition of information should not be required to state a claim and proposes a standard for future cases.

## I. THE DEVELOPMENT AND RECOGNITION OF INTRUSION UPON SECLUSION IN THE UNITED STATES

Part I of this Note describes the right of privacy, with particular emphasis on intrusion upon seclusion. Part I.A focuses on the historical development of the privacy torts. Part I.B explains the three sources of the right of privacy in the United States: the common law, the U.S. Constitution, and state and federal statutes. Part I.C provides an overview of the elements and recognition of intrusion in the fifty states and then gives a comparative analysis of different states' decisions and required elements of an intrusion claim. Part I.D discusses the rationales and purposes of the intrusion tort according to scholars.

### A. *History and Development of the Right of Privacy*

In what is one of the most influential legal articles ever written,<sup>13</sup> Samuel Warren and Louis Brandeis set forth the conceptual basis for modern privacy law.<sup>14</sup> Warren and Brandeis argued that just as the law had come to recognize the protection against bodily injury (battery), protection against attempts to cause bodily injury (assault), and protection against offensive noises and odors (nuisance), so, too, should the law recognize a person's

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12. See *Koeppel v. Speirs*, 808 N.W.2d 177, 184 (Iowa 2011) ("The point of disagreement among courts across the nation essentially boils down to whether the harm sought to be remedied by the tort is caused by accessing information from the plaintiff in a private place or by placing mechanisms in a private place that are capable of doing so at the hand of the defendant.").

13. See, e.g., *Howard v. Antilla*, 294 F.3d 244, 247–48 (1st Cir. 2002) ("It is rare that the pedigree of a whole breed of common law tort claims can be traced with pinpoint accuracy. But in the case of common law claims for invasion of the right of privacy, most sources agree that the broad contours of these legal theories were first outlined by Samuel Warren and Louis Brandeis in the pages of the *Harvard Law Review*."); RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW* 38 (2d ed. 2002) ("It is likely that the Warren and Brandeis article has had as much impact on the development of law as any single publication in legal periodicals."); Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 624 (2002) ("The citation alone is a ubiquitous one in privacy law circles and familiar to most lawyers or scholars whose work has touched on the law's protections of privacy.").

14. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

right “to be let alone.”<sup>15</sup> The authors suggested that property law is not a sufficient basis to protect the right to keep one’s “thoughts, sentiments, and emotions” private, whether they are expressed in a personal diary or constitute a literary masterpiece.<sup>16</sup> Instead, it is “the more general right of the individual to be let alone” that protects the publication of these personal expressions, especially when expressed in personal letters, for example, and not in an artistic work where there is potential for profits from their production and where property law can provide protection from publication.<sup>17</sup>

The first major case to decide the issue after the Warren and Brandeis article<sup>18</sup> was *Roberson v. Rochester Folding Box Co.*,<sup>19</sup> decided by the New York Court of Appeals in 1902. In *Roberson*, the plaintiff alleged that the defendant violated her right of privacy by using a picture of her without consent on advertisements for its flour.<sup>20</sup> Finding that there was no recognition of the right of privacy in prior decisions, the court refused to recognize a common law right of privacy in New York.<sup>21</sup> Three years later, however, the Supreme Court of Georgia unanimously reached the opposite conclusion in *Pavesich v. New England Life Insurance Co.*,<sup>22</sup> holding that the law recognized the right of privacy,<sup>23</sup> becoming the first court to recognize and affirm the right.<sup>24</sup>

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15. *See id.* at 193–95 (quoting THOMAS M. COOLEY, *THE LAW OF TORTS* 29 (2d ed. 1888)).

16. *See id.* at 198–205.

17. *See id.* at 205 (“The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.”).

18. DAVID A. ELDER, *PRIVACY TORTS* § 1:1, at 1-4 (2002 & Supp. 2014) (noting that *Roberson* was the first major case to confront the question of whether to recognize a cause of action for invasion of privacy).

19. 64 N.E. 442 (N.Y. 1902).

20. *Id.*

21. *See id.* at 447–48. A dissenting opinion disagreed, finding that the lack of precedent recognizing the right was not fatal to the plaintiff’s case and that New York should recognize a common law right of privacy. *See id.* at 448–51 (Gray, J., dissenting) (“It would be a reproach to equitable jurisprudence if equity were powerless to extend the application of the principles of common law or of natural justice in remedying a wrong, which, in the progress of civilization, has been made possible as the result of new social or commercial conditions.”). Because of the negative reaction surrounding the *Roberson* decision, the New York legislature passed a statute in 1903 that, in its current form, permits recovery when one’s “name, portrait, picture or voice is used . . . for advertising purposes or for the purposes of trade.” N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009); *see also* Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1893 (2010) (noting that the “popular outcry” against *Roberson* led the legislature to pass the privacy tort statute).

22. 50 S.E. 68 (Ga. 1905).

23. *See id.* at 80–81 (“So thoroughly satisfied are we that the law recognizes, within proper limits, as a legal right, the right of privacy . . . that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability . . .”).

24. *See* JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY* 17 (1997). In reaching its decision, the court relied on a theory of rights known as natural law, which recognizes that certain individual rights derive from nature and not just from positive rules and principles set forth by judges and legislatures. *See id.*; TURKINGTON & ALLEN, *supra* note 13, at 58.

The next major step in the history of the development of the right of privacy was William L. Prosser's 1960 article in the *California Law Review*.<sup>25</sup> By the time of his article, a majority of American courts had come to recognize the right of privacy.<sup>26</sup> It was Prosser, however, who postulated that the right of privacy was really comprised of four separate torts which, except for sharing a common name, had essentially nothing in common other than that they each protect the individual's right "to be let alone."<sup>27</sup> For his contribution to the history and development of the law of privacy, Prosser has been called the "chief architect" of privacy law.<sup>28</sup>

In his article, Prosser outlined the four branches of the privacy tort:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.<sup>29</sup>

These four branches of the privacy tort were later incorporated into the Restatement (Second) of Torts,<sup>30</sup> for which Prosser was the chief reporter.<sup>31</sup> It is difficult to overstate the impact of Prosser's article, as courts have continued to apply the four branches of the privacy tort that Prosser first set forth in 1960.<sup>32</sup>

### B. *Legal Sources of the Right of Privacy*

This section explores and clarifies the three sources of the recognition of the right of privacy: the common law, the Constitution, and federal and state statutes.

The common law roots of the right of privacy can be traced back to the Warren and Brandeis article in the *Harvard Law Review*, in which the authors argued that the common law should recognize the right of privacy.<sup>33</sup> As a civil wrong, invasion of privacy is properly classified as an

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25. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

26. See *id.* at 386; see also Dora Georgescu, Note, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907, 913 (2014).

27. See Prosser, *supra* note 25, at 389 (quoting COOLEY, *supra* note 15, at 29).

28. See Richards & Solove, *supra* note 21, at 1888 (discussing the influence of Prosser's article on the development of privacy law in the United States); see also ELDER, *supra* note 18, § 1:1, at 1-5 (describing Prosser's work as "enormously influential").

29. Prosser, *supra* note 25, at 389. This Note focuses on the intrusion tort, the first branch of the privacy tort enumerated in Prosser's article.

30. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

31. See Richards & Solove, *supra* note 21, at 1890.

32. See *id.*; see also West v. Media Gen. Convergence, Inc., 53 S.W.3d 640, 642-43 (Tenn. 2001) ("The protection of privacy rights are still reflected in current law, owing much to the efforts of Dean William L. Prosser, whose analysis of invasion of privacy resulted in the classification of that tort into four separate causes of action.").

33. See *supra* notes 13-17 and accompanying text; see also Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 646 (Cal. 1994) ("The origin of the common law right to

intentional tort.<sup>34</sup> As most of tort law is made by state judges, state court decisions are largely responsible for much of the current state of privacy law.<sup>35</sup> Tort law is, generally speaking, the basis for privacy rights asserted by a private party against others.<sup>36</sup> *Pavesich*<sup>37</sup> became the leading case recognizing the common law right of privacy.<sup>38</sup> This Note is concerned primarily with the common law right of privacy and the intrusion branch as it has been applied and interpreted by state courts.

Although the right of privacy is not specifically enumerated in the Constitution, the U.S. Supreme Court has come to recognize “zones of privacy” established by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>39</sup> While the common law right of privacy protects individuals from the acts of other private individuals or businesses, the constitutional right of privacy protects citizens from governmental invasions of privacy, such as warrantless searches.<sup>40</sup> In *Katz v. United States*,<sup>41</sup> the Court explained that the Fourth Amendment prohibits “certain kinds of governmental intrusion,” but a person’s general right to be left alone by other people is to be governed by the states.<sup>42</sup> Despite the differences between tort law and constitutional protections of privacy, it is still reasonable to view the interests and values that each protect as connected and related.<sup>43</sup> Additionally, constitutional privacy cases may address similar interests as the common law right, including “expectations of seclusion and [the protection of] very intimate and personal areas of

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privacy is often traced to a seminal law review article written at the end of the last century.”).

34. See KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 1–2 (4th ed. 2012).

35. See *id.* at 1.

36. See *id.*; DECEW, *supra* note 24, at 18 (“Tort rights are generally held by individuals against private persons or businesses.”).

37. See *supra* notes 23–24 and accompanying text.

38. See Prosser, *supra* note 25, at 386.

39. See *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965) (finding that several constitutional guarantees, and not just the Fourth Amendment, created a protected right of privacy); see also *Paul v. Davis*, 424 U.S. 693, 712–13 (1976); James W. Hilliard, *A Familiar Tort That May Not Exist in Illinois: The Unreasonable Intrusion on Another’s Seclusion*, 30 *LOY. U. CHI. L.J.* 601, 606 (1999).

40. See, e.g., *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971) (explaining that the Fourth Amendment prohibits certain conduct by a federal agent regardless of whether state law would similarly prohibit or penalize the conduct if it were done by a private citizen); see also Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 *CORNELL L. REV.* 291, 298 (1983) (“Whereas the Constitution insulates individuals from governmental intrusion in their private lives, it does not dictate rights between private citizens.”).

41. 389 U.S. 347 (1967).

42. See *id.* at 350–51; see also *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (holding that the Fourth Amendment does not apply to a search and seizure conducted by a private party).

43. See DECEW, *supra* note 24, at 18 (“While some commentators have viewed the protection of informational privacy in tort law as distinct from privacy protection under the Fourth and Fifth Amendments to the Constitution, the more common and reasonable view is to recognize the link between them.”).



life.”<sup>44</sup> The constitutional right of privacy is not without confusion and controversy, owing in part to the range of cases interpreting it and the difficulty in attributing its foundation to a specific provision of the Constitution.<sup>45</sup>

There are many federal statutes that protect privacy.<sup>46</sup> Among these statutes is the Omnibus Crime Control and Safe Street Act of 1968,<sup>47</sup> also known as Title III, which provides a private right of action for anyone whose communications have been intercepted without authorization.<sup>48</sup> Other examples of federal statutes concerned with the protection of privacy include the Crime Control Act of 1973,<sup>49</sup> which protects the privacy and confidentiality of criminal justice records,<sup>50</sup> and the Right to Financial Privacy Act of 1978,<sup>51</sup> which protects the confidentiality of financial records.<sup>52</sup> In addition to federal statutes, many states also have enacted legislation providing for protection of privacy.<sup>53</sup> In New York, for example, invasion of privacy claims only can be brought under the privacy statute; New York does not recognize a common law right of privacy.<sup>54</sup> Some states also have criminal statutes making it a crime to install recording devices in private places without consent.<sup>55</sup>

### C. *Jurisdictional Overview and Comparative Analysis of Intrusion upon Seclusion*

This section first provides a brief overview of the elements of the intrusion branch of the privacy tort, focusing specifically on the widely adopted Restatement (Second) of Tort’s formulation. It then provides an analysis of the intrusion branch in all fifty states, focusing on whether these jurisdictions recognize a cause of action for intrusion upon seclusion, whether they do so under common law or by statute, and whether they follow the Restatement (Second) of Tort’s formulation or have adopted different standards and elements. Lastly, this section compares and contrasts some of the differences in states’ applications of the elements of an intrusion claim.

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44. Zimmerman, *supra* note 40, at 298.

45. See DECEW, *supra* note 24, at 21.

46. See TURKINGTON & ALLEN, *supra* note 13, at 72–74 (providing an overview of federal statutes protecting privacy). This discussion highlights a few examples, but there are many more.

47. 18 U.S.C. §§ 2510–2520 (2012).

48. See *infra* Part II.D.

49. 42 U.S.C. § 3789g (2012).

50. *Id.*

51. 12 U.S.C. §§ 3401–3422 (2012).

52. See *id.* § 3403.

53. See *infra* notes 105–08, 111–12 and accompanying text.

54. See *infra* note 111.

55. See *infra* notes 109–10 and accompanying text.

1. Elements of Intrusion upon Seclusion  
and the Restatement (Second) of Tort's Formulation

In determining their own set of required criteria to state a claim for invasion of privacy based on intrusion upon seclusion, many courts follow the formulation set forth in section 652B of the Restatement (Second) of Torts.<sup>56</sup> As provided in the Restatement, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”<sup>57</sup> The Restatement provides four explanatory comments. Comment a states:

The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.<sup>58</sup>

Comment b states that an intrusion need not be physical to be actionable (although a physical invasion into an area where the plaintiff has secluded him or herself would suffice), and that an intrusion occurs when the defendant taps the plaintiff's telephone wires or uses some other device “to oversee or overhear the plaintiff's private affairs.”<sup>59</sup> Comment c specifies that the intrusion must concern something that is private; for example, examining information about the plaintiff that is public or taking the plaintiff's picture when the plaintiff is in a public place, do not constitute intrusions into the plaintiff's private affairs.<sup>60</sup> Lastly, comment d states that the interference must be substantial and “of a kind that would be highly offensive to the ordinary reasonable man.”<sup>61</sup> In other words, a landlord paying an early Sunday morning visit to her tenant to demand rent payment

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56. *See, e.g.*, Phillips v. Smalley Maint. Servs., 435 So. 2d 705, 708–09 (Ala. 1983) (holding that Alabama recognizes the tort of intrusion upon seclusion as defined in the Restatement); Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 647 (Cal. 1994) (noting that California follows the Restatement's definition of privacy interests); Koepfel v. Speirs, 808 N.W.2d 177, 181 (Iowa 2011) (“We adopted the definition of invasion of privacy recognized by the Restatement (Second) of Torts, including unreasonable intrusion upon seclusion.”); *see also infra* Part I.C.3.a.

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

58. *Id.* § 652B cmt. a. Several courts holding that overhearing or observation of the plaintiff is not required to state a claim for intrusion upon seclusion have relied upon this comment as support. *See, e.g.*, Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983); Geraci v. Conte, No. 72440, 1998 WL 323564, at \*3 (Ohio Ct. App. June 18, 1998).

59. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

60. *Id.* § 652B cmt. c. This comment notes that even in public places, there might be matters that the plaintiff would not expect to be disclosed, such as the plaintiff's underwear while walking along a public highway (assuming that the plaintiff has not otherwise made his or her underwear easily viewable in public), and an intrusion into these matters would still be an invasion of privacy despite being in public. *See id.*

61. *Id.* § 652B cmt. d.

that the landlord knows the tenant does not have, while annoying, is not an invasion of the tenant's privacy.<sup>62</sup>

## 2. Overview of the Recognition of Intrusion in the Fifty States

This section provides a survey of the recognition of intrusion upon seclusion in the fifty states, whether it is recognized under common law or statute, and whether the jurisdiction follows the Restatement (Second) of Tort's formulation or deviates from the definition of intrusion in section 652B.

Currently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute. The following states recognize intrusion upon seclusion under common law and follow the Restatement's formulation, either explicitly adopting it or closely mirroring the Restatement's definition and description of the cause of action: Alabama,<sup>63</sup> Alaska,<sup>64</sup> Arizona,<sup>65</sup> Arkansas,<sup>66</sup> California,<sup>67</sup> Colorado,<sup>68</sup> Connecticut,<sup>69</sup> Delaware,<sup>70</sup> Georgia,<sup>71</sup> Hawaii,<sup>72</sup> Idaho,<sup>73</sup> Illinois,<sup>74</sup> Iowa,<sup>75</sup> Kansas,<sup>76</sup> Kentucky,<sup>77</sup> Louisiana,<sup>78</sup> Maine,<sup>79</sup> Maryland,<sup>80</sup> Minnesota,<sup>81</sup>

62. *Id.* § 652B cmt. d, illus. 8.

63. *See Phillips v. Smalley Maint. Servs.*, 435 So. 2d 705, 708–09 (Ala. 1983).

64. *See Greywolf v. Carroll*, 151 P.3d 1234, 1244–45 (Alaska 2007).

65. *See Hart v. Seven Resorts Inc.*, 947 P.2d 846, 853 (Ariz. Ct. App. 1997). The Supreme Court of Arizona initially granted review, but after oral argument and further consideration, it vacated its order granting review. *See Hart v. Seven Resorts, Inc.*, 955 P.2d 534 (Ariz. 1998).

66. *See Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 644 (Ark. 2002).

67. *See Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 489–90 (Cal. 1998).

68. *See Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1066–67 (Colo. App. 1998). The Supreme Court of Colorado has indicated that by denying certiorari in *Doe*, it allowed the Court of Appeals's recognition of intrusion to stand. *See Denver Pub. Co. v. Bueno*, 54 P.3d 893, 897 (Colo. 2002) (en banc).

69. The Supreme Court of Connecticut has indicated that it recognizes intrusion upon seclusion, but does not appear to have decided an intrusion case or specified the elements. *See Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1327–29 (Conn. 1982). When evaluating intrusion upon seclusion claims, the lower courts have (in the absence of guidance from the Connecticut appellate courts) relied upon the Restatement's formulation as to the necessary elements to state a claim. *See Carney v. Amendola*, No. CV106003738, 2014 WL 2853836, at \*17 (Conn. Super. Ct. May 14, 2014).

70. *See Barker v. Huang*, 610 A.2d 1341, 1349–50 (Del. 1992).

71. *See Yarbray v. S. Bell Tel. & Tel. Co.*, 409 S.E.2d 835, 837 (Ga. 1991).

72. *See Mehau v. Reed*, 869 P.2d 1320, 1330 (Haw. 1994).

73. *See Hoskins v. Howard*, 971 P.2d 1135, 1141 (Idaho 1998).

74. *See Lawlor v. N. Am. Corp. of Ill.*, 983 N.E.2d 414, 424–25 (Ill. 2012).

75. *See Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 686–87 (Iowa 1987).

76. *See Werner v. Kliewer*, 710 P.2d 1250, 1255 (Kan. 1985).

77. *See McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882, 887 (Ky. 1981).

78. *See Parish Nat'l Bank v. Lane*, 397 So. 2d 1282, 1285–86 (La. 1981).

79. *See Nelson v. Times*, 373 A.2d 1221, 1223–24 (Me. 1977).

80. *See Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380–81 (Md. 1997).

81. *See Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233–35 (Minn. 1998).

Mississippi,<sup>82</sup> Missouri,<sup>83</sup> Nevada,<sup>84</sup> New Hampshire,<sup>85</sup> New Jersey,<sup>86</sup> New Mexico,<sup>87</sup> North Carolina,<sup>88</sup> Ohio,<sup>89</sup> Oklahoma,<sup>90</sup> Oregon,<sup>91</sup> Pennsylvania,<sup>92</sup> South Dakota,<sup>93</sup> Tennessee,<sup>94</sup> Texas,<sup>95</sup> Utah,<sup>96</sup> Vermont,<sup>97</sup> Washington,<sup>98</sup> and West Virginia.<sup>99</sup>

Decisions from several other jurisdictions indicate that intrusion is recognized under common law, but these states have not adopted or have not followed the Restatement's formulation. These states are Florida,<sup>100</sup> Indiana,<sup>101</sup> Michigan,<sup>102</sup> Montana,<sup>103</sup> and South Carolina.<sup>104</sup>

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82. See *Plaxico v. Michael*, 735 So. 2d 1036, 1039 (Miss. 1999). Mississippi also requires that "the plaintiff must show some bad faith or utterly reckless prying to recover on an invasion of privacy cause of action." *Id.*

83. See *Sofka v. Thal*, 662 S.W.2d 502, 510–11 (Mo. 1983) (en banc).

84. See *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995), *rev'd on other grounds*, *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 127 (Nev. 1997).

85. See *Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1008 (N.H. 2003).

86. See *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 660 (N.J. 2010).

87. Several New Mexico appellate court decisions favorably refer to the Restatement's formulation of intrusion and indicate that a cause of action for intrusion exists in New Mexico, but none has dealt extensively with an intrusion claim or elaborated on the elements. See *Moore v. Sun Publ'g Corp.*, 881 P.2d 735, 742–43 (N.M. Ct. App. 1994); *McNutt v. N.M. State Tribune Co.*, 538 P.2d 804, 807–08 (N.M. Ct. App. 1975).

88. See *Miller v. Brooks*, 472 S.E.2d 350, 354 (N.C. Ct. App. 1996).

89. See *Sustin v. Fee*, 431 N.E.2d 992, 993–94 (Ohio 1982).

90. See *Munley v. ISC Fin. House, Inc.*, 584 P.2d 1336, 1339–40 (Okla. 1978).

91. See *Mauri v. Smith*, 929 P.2d 307, 310 (Or. 1996).

92. See *Burger v. Blair Med. Assocs.*, 964 A.2d 374, 379 (Pa. 2009).

93. See *Kjerstad v. Ravellette Publ'ns, Inc.*, 517 N.W.2d 419, 424 (S.D. 1994).

94. See *Givens v. Mullikan ex rel. Estate of McElwaney*, 75 S.W.3d 383, 411–12 (Tenn. 2002). While favorably citing the Restatement and its comments, the court indicated that the plaintiff must also prove "(1) that the information sought by the opposing party was not properly discoverable or was otherwise subject to some form of privilege; [and] (2) that the opposing party knew that the information was not discoverable or was subject to privilege, but nevertheless proceeded to obtain that information." *Id.* at 412.

95. See *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

96. See *Cox v. Hatch*, 761 P.2d 556, 563–64 (Utah 1988).

97. See *Hodgdon v. Mt. Mansfield Co.*, 624 A.2d 1122, 1129 (Vt. 1992).

98. See *Mark v. Seattle Times*, 635 P.2d 1081, 1094 (Wash. 1981) (en banc).

99. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 85 (W. Va. 1984).

100. Florida appears to have adopted a narrower definition than the Restatement, defining intrusion as "physically or electronically intruding into one's private quarters." *Allstate Ins. Co. v. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). The Supreme Court of Florida has also indicated that its definition of intrusion is different than Alabama's (which has adopted the Restatement formulation). See *id.* at 161 n.3.

101. In *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991), the Indiana Supreme Court indicated that intrusion is recognized in Indiana, but a recent district court decision from the Southern District of Indiana suggests that the "scope of the tort of invasion of privacy by intrusion upon seclusion remains unsettled in Indiana," that Indiana courts construe it narrowly, and that no intrusion cases to date have been proven "without physical contact or an invasion of the plaintiff's physical space, such as his home." *Lockhart v. ExamOne World Wide, Inc.*, 904 F. Supp. 2d 928, 948–49 (S.D. Ind. 2012) (citing *Curry v. Whitaker*, 943 N.E.2d 354 (Ind. 2011)).

102. The Supreme Court of Michigan has indicated that the elements of an intrusion claim, as articulated previously by a Michigan appellate court, are "(1) the existence of a secret and private subject matter; (2) a right possessed by plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter by defendant through

Several other states recognize intrusion by statute: Massachusetts,<sup>105</sup> Nebraska,<sup>106</sup> Rhode Island,<sup>107</sup> and Wisconsin.<sup>108</sup> Utah, while recognizing intrusion under common law, also has a criminal statute that is of particular interest to this Note. Utah's statute provides that an individual is guilty of a privacy violation if he "[i]nstalls in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in the place or uses any such unauthorized installation."<sup>109</sup> Michigan has a similar statute.<sup>110</sup>

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some method objectionable to the reasonable man." *Tobin v. Mich. Civil Serv. Comm'n*, 331 N.W.2d 184, 189 (Mich. 1982). This third element is absent from the Restatement formulation. Notably, a Michigan appellate court held just one year after *Tobin* that a plaintiff could state an intrusion claim without proof that information was obtained about the plaintiff. *See infra* notes 242–48 and accompanying text.

103. At least two Montana Supreme Court decisions appear to recognize intrusion, defining invasion of privacy as "wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities," but neither decision provides much guidance as to the specific elements of the cause of action. *Rucinsky v. Hentchel*, 881 P.2d 616, 618 (Mont. 1994) (quoting *Sistok v. Nw. Tel. Sys., Inc.*, 615 P.2d 176, 182 (Mont. 1980)).

104. South Carolina recognizes intrusion and its Supreme Court has indicated that it consists of a "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." *O'Shea v. Lesser*, 416 S.E.2d 629, 633 (S.C. 1992) (quoting *Meetze v. The Associated Press*, 95 S.E.2d 606 (S.C. 1956)). Although the South Carolina Supreme Court does not appear to have elaborated on the elements of the cause of action, an appellate court has explained them in detail. *See Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989); *infra* notes 192–94 and accompanying text (explaining the elements).

105. *See MASS. ANN. LAWS ch. 214, § 1B* (LexisNexis 2011) ("A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."). The Supreme Judicial Court of Massachusetts has held that the statute covers claims for intrusion upon seclusion. *See Polay v. McMahan*, 10 N.E.3d 1122, 1126 (Mass. 2014).

106. *See NEB. REV. STAT. ANN. § 20-203* (LexisNexis 2008) ("Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy."). The Nebraska Supreme Court has relied upon Restatement (Second) of Torts section 652B and its comments and illustrations in applying the statute. *See Polinski v. Sky Harbor Air Serv., Inc.*, 640 N.W.2d 391, 396 (Neb. 2002).

107. *See R.I. GEN. LAWS § 9-1-28.1(a)(1)* (2012). The statute provides that [i]n order to recover for violation of [unreasonable intrusion upon seclusion], it must be established that: (A) It was an invasion of something that is entitled to be private or would be expected to be private; [and] (B) The invasion was or is offensive or objectionable to a reasonable man.

*Id.*

108. *See WIS. STAT. ANN. § 995.50(2)(a)* (West 2007) (describing that invasion of privacy includes "[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass"). The statute also states that it "shall be interpreted in accordance with the developing common law of privacy." *Id.* § 995.50(3).

109. *UTAH CODE ANN. § 76-9-402(1)(b)* (LexisNexis 2012).

110. *See MICH. COMP. LAWS ANN. § 750.539d* (West 2004).

Two states explicitly have refused to recognize intrusion; these states are New York<sup>111</sup> and Virginia,<sup>112</sup> both of which limit recovery for invasion of privacy claims by statute and only recognize a cause of action for misappropriation of one's name, picture, or portrait for commercial purposes without consent.

Finally, two states do not appear to have decided if they will recognize intrusion claims: North Dakota<sup>113</sup> and Wyoming.<sup>114</sup>

### 3. Comparative Analysis of Variations of the Intrusion Tort

This section provides a comparative analysis of the recognition of the intrusion tort, focusing on the rationales and decisions of courts in several jurisdictions that define the tort differently and their points of disagreement.

#### a. Restatement Jurisdictions

While universal agreement does not exist, most states that follow the Restatement require the plaintiff to prove the following elements: (1) an intentional intrusion (2) upon the plaintiff's seclusion or private affairs in which the plaintiff has a legitimate expectation of privacy (3) that is highly offensive to a reasonable person.<sup>115</sup>

A leading California Supreme Court case, *Shulman v. Group W Productions, Inc.*,<sup>116</sup> provides a good overview of the Restatement's approach. In *Shulman*, the plaintiffs—a mother and her son—were injured in a car accident on the highway.<sup>117</sup> A rescue helicopter soon arrived, carrying a nurse, a medic, and a camera operator working for defendants

111. *See* *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703–04 (N.Y. 1993). The right of privacy in New York is governed exclusively by statute—Civil Rights Law sections 50 and 51—and there is no common law right of privacy in New York. *See id.* at 703; *see also* N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) (“Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action in the supreme court of this state . . .”).

112. *See* *WJLA-TV v. Levin*, 564 S.E.2d 383, 394 n.5 (Va. 2002). Like New York, an invasion of privacy claim in Virginia must be brought under the Virginia privacy statute, as there is no common law right of privacy in Virginia. *See id.* at 395; *see also* VA. CODE ANN. § 8.01-40 (2007) (codifying the misappropriation branch of invasion of privacy). Because there is not much Virginia case law on invasion of privacy claims, the Supreme Court of Virginia has indicated that Virginia courts can look to New York decisions in certain circumstances as guidance in interpreting its own privacy statute. *See* *WJLA-TV*, 564 S.E.2d at 395; *Town & Country Props. v. Riggins*, 457 S.E.2d 356, 362 (Va. 1995).

113. *See* *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 816 (N.D. 1998) (refraining from deciding whether intrusion upon seclusion is recognized in North Dakota); *City of Grand Forks v. Grand Forks Herald, Inc.*, 307 N.W.2d 572, 578 n.3 (N.D. 1981) (“Whether or not the tort of invasion of privacy exists under North Dakota law has not been determined.”).

114. There do not appear to be any Wyoming cases addressing the issue. *See* ELDER, *supra* note 18, § 1:1, at 1-7; 1 SACK, *supra* note 6, § 12:2.2, at 12-12.

115. *See, e.g.,* *Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634, 644 (Ark. 2002); *Mauri v. Smith*, 929 P.2d 307, 310 (Or. 1996).

116. 955 P.2d 469 (Cal. 1998).

117. *Id.* at 475.

Group W Productions, Inc. and 4MN Productions.<sup>118</sup> The camera operator filmed the rescue on the ground and the subsequent ride to the hospital, while the nurse wore a microphone that picked up conversations between rescue personnel and the injured mother throughout the rescue.<sup>119</sup> The footage of the rescue was later broadcast on television without the plaintiffs' consent, during a documentary show titled *On Scene: Emergency Response*.<sup>120</sup> The plaintiffs sued for invasion of privacy, alleging that the defendants intruded upon their seclusion by videotaping the rescue.<sup>121</sup>

The court noted that there were two elements of an intrusion claim for it to consider: "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person."<sup>122</sup>

In order to prove the intrusion element, "the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source."<sup>123</sup>

The court held that the cameraman's mere presence at the scene of the accident itself did not constitute an intrusion because the accident happened in a place where the plaintiffs had no reasonable expectation of privacy.<sup>124</sup> The court reasoned that the plaintiffs did not have any control over the property where the accident happened and could not have reasonably expected that members of the media would be prohibited from covering a highway accident.<sup>125</sup> However, the court held that a jury could reasonably find that the plaintiffs had a reasonable expectation of privacy in the interior of the helicopter (as opposed to the scene of the accident itself) or in the private conversations with the nurse, which were recorded and overheard by the defendants.<sup>126</sup>

The court then turned to the element of offensiveness, noting that "all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element."<sup>127</sup> The court concluded that the defendants' actions could be considered "highly

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118. *Id.*

119. *Id.* at 475–76.

120. *Id.* at 475.

121. *Id.* at 476. Plaintiffs also sued for invasion of privacy by public disclosure of private facts arising from the broadcast. *Id.*

122. *Id.* at 490.

123. *Id.*

124. *See id.*

125. *See id.*

126. *See id.* at 491.

127. *Id.* at 493. Factors to be considered in determining offensiveness include "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 679 (Ct. App. 1986); *see also Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996).

offensive to a reasonable person.”<sup>128</sup> The court held that riding in an ambulance with an injured patient and recording otherwise private conversations between the patient and the nurse caring for her, could be considered highly offensive to a reasonable person.<sup>129</sup>

Discussing intrusion specifically, the court explained that “[i]t is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity.”<sup>130</sup> Later in the opinion, when analyzing the element of offensiveness, the court similarly referred to “respect for human dignity” as a basis for which a reasonable jury might find the cameraman’s recording of the injured plaintiffs during the helicopter ride to the hospital highly offensive.<sup>131</sup> The court was particularly focused on balancing the public’s legitimate interest in the reporting of newsworthy events (like the car crash) with individuals’ right to privacy, noting that society’s interest in the complete reporting of the news may, in some situations, justify an otherwise offensive intrusion, but to a limit and subject to the reporter’s “legitimate motive of gathering the news.”<sup>132</sup> Ultimately, the court concluded that regardless of the public’s interest in the reporting of the news, the techniques used in *Shulman* reasonably could be found highly offensive.<sup>133</sup>

*Phillips v. Smalley Maintenance Services, Inc.*,<sup>134</sup> an Alabama Supreme Court case, is also illustrative of the Restatement’s approach. In *Phillips*, the defendant, a company providing cleaning, janitorial, and other services, employed the plaintiff as an “overhead cleaner.”<sup>135</sup> Over the course of her employment, the plaintiff was repeatedly called into the office of Ray Smalley, the company’s principal owner and president, where he asked her if she engaged in oral sex and other highly inappropriate personal questions about her relationship with her husband, including how often they had sex.<sup>136</sup> Smalley also demanded that plaintiff “engage in oral sex with him” or she would be fired, and at one point hit her “across the bottom.”<sup>137</sup>

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128. *Shulman*, 955 P.2d at 494 (quoting *Miller v. Nat’l Broad. Co.*, 187 Cal. App. 3d 1463 (1986)).

129. *See id.* at 494–95 (“A reasonable jury could find that defendants, in placing a microphone on an emergency treatment nurse and recording her conversation with a distressed, disoriented and severely injured patient, without the patient’s knowledge or consent, acted with highly offensive disrespect for the patient’s personal privacy . . .”).

130. *Id.* at 489.

131. *See id.* at 494 (“A jury could reasonably believe that fundamental respect for human dignity requires the patients’ anxious journey be taken only with those whose care is solely for them and out of sight of the prying eyes (or cameras) of others.”).

132. *See id.* at 493–94. The court discussed two extremes on both sides of the spectrum, first explaining that routine questioning of individuals with information about a story would rarely be actionable, while intruding into a private home or tapping a telephone line to acquire information would almost always constitute an offensive intrusion, regardless of the information sought. *See id.* at 494; *see also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 1 (1977) (describing that a reporter who enters a sick patient’s hospital room despite her objections to take her picture for a news story constitutes an intrusion upon seclusion).

133. *See Shulman*, 955 P.2d at 494–95.

134. 435 So. 2d 705 (Ala. 1983).

135. *Id.* at 707.

136. *Id.*

137. *Id.*



Among other claims, the plaintiff alleged that the defendant invaded her privacy by intruding upon her seclusion.<sup>138</sup>

After affirmatively adopting section 652B as Alabama law,<sup>139</sup> the court addressed various elements of an intrusion claim under the Restatement. First, the court disagreed with the defendants' contention that information about the plaintiff must be acquired for an intrusion claim to succeed.<sup>140</sup> The defendants argued that because the plaintiff did not answer Smalley's inquiries about her relationship with her husband, there was no intrusion because no information about the plaintiff was acquired.<sup>141</sup> The court cited an illustration from section 652B as support for its holding.<sup>142</sup> In the illustration, a photographer's repeated calls made during meals and late at night to a woman of "social prominence" seeking that she come to his studio to promote his business constituted an invasion of privacy.<sup>143</sup> Similarly, the court held that the lack of acquisition of information about the plaintiff's private activities did not prevent the plaintiff's claim from succeeding, concluding that acquisition of information is not required under section 652B.<sup>144</sup>

Next, the court turned to the question of whether private information about the plaintiff must be disclosed or communicated to a third party to state a claim.<sup>145</sup> Relying on section 652B comments a<sup>146</sup> and b,<sup>147</sup> both of which emphasize that no publication is necessary for an intrusion claim, the court held that the lack of communication of plaintiff's private information to a third party was not fatal to the plaintiff's claim.<sup>148</sup>

The court then dismissed the defendants' argument that section 652B requires "surreptitious" behavior in attempting to acquire private information about the plaintiff, declining to bar the plaintiff's intrusion claim simply because Smalley's behavior was "out in the open."<sup>149</sup>

Lastly, the court addressed the issue of where an intrusion can occur and whether only a physical intrusion suffices. The defendants had argued that "there can be no doubt that for the intrusion category of this tort the

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138. *Id.* at 708.

139. *Id.* at 709.

140. *See id.*

141. *Id.*

142. *Id.*

143. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 5 (1977).

144. *See Phillips*, 435 So. 2d at 709 ("We hold that acquisition of information from a plaintiff is not a requisite element of a § 652B cause of action.")

145. *See id.*

146. *See supra* note 58 and accompanying text.

147. Although comment b is primarily concerned with explaining that an intrusion can be by both physical and non-physical means, *see supra* note 59 and accompanying text, it also states that "[t]he intrusion itself makes the defendant subject to liability, even though there is no publication." RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

148. *See Phillips*, 435 So. 2d at 709. The court also distinguished between libel and invasion of privacy, explaining that with libel, "there can be no offense until the contents are communicated to another" and that "[t]wo persons are necessary. One's right of privacy, however, may be invaded by a single human agency." *Id.* (quoting *Estate of Berthiaume v. Pratt*, 365 A.2d 792 (Me. 1976)).

149. *Id.* at 710.

plaintiff must be in a physical place of solitude or seclusion which the defendant invades,” and an invasion of “‘psychological’ solitude” did not count.<sup>150</sup> Relying on comment b, which emphasizes that an intrusion can occur not only when the plaintiff has physically secluded himself, but also by some “other form of investigation or examination into his private concerns,”<sup>151</sup> the court held that Smalley’s repeated inquiries into the plaintiff’s sexual behavior and related sexual demands constituted an examination into her private concerns and was actionable.<sup>152</sup> According to the court, to hold that Smalley’s inappropriate behavior and intrusive questioning was actionable in one physical space (i.e., where the plaintiff had secluded herself) but not actionable in another (i.e., where the plaintiff had not secluded herself) would be contrary to the interest protected by the tort.<sup>153</sup>

*Phillips* and *Shulman* highlight several key elements of the Restatement’s approach to an intrusion claim. Notably, not all jurisdictions that follow the Restatement seem to have given equal weight to section 652B’s comments and illustrations. Although purporting to follow the guidance of the Restatement (Second) of Torts in *Nelson v. Times*,<sup>154</sup> the Supreme Judicial Court of Maine held that “a complaint should minimally allege a physical intrusion upon premises occupied privately by a plaintiff for purposes of seclusion.”<sup>155</sup> Because the plaintiff in *Nelson* did not allege a physical intrusion (and instead based the intrusion claim on a publication of a photograph of the plaintiff without consent), the court denied the intrusion claim.<sup>156</sup> This proposition is contrary to the holding in *Phillips*<sup>157</sup> and to section 652B comment b.<sup>158</sup>

The cases discussed provide guidance on several of section 652B’s elements including the highly offensive standard,<sup>159</sup> where an intrusion can occur,<sup>160</sup> and where one has a reasonable expectation of privacy.<sup>161</sup> These cases also highlight several criteria that section 652B does not require, such as disclosure to a third party<sup>162</sup> and actual acquisition of private information

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150. *Id.*

151. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b.

152. *See Phillips*, 435 So. 2d at 711 (“While in some instances physical location may be a factor in determining whether the alleged intrusion is actionable, the offensive conduct demonstrated by the evidence of record in this case is of such a personal nature that, as [p]laintiff suggests, it would be wrongful, and thus actionable, no matter where it occurred.”).

153. *See id.*

154. 373 A.2d 1221 (Me. 1977) (citing section 652B’s definition of intrusion upon seclusion and listing the four invasion of privacy branches described in section 652A).

155. *Id.* at 1223; *see also* *Loe v. Town of Thomaston*, 600 A.2d 1090, 1093 (Me. 1991).

156. *See Nelson*, 373 A.2d at 1223. The court also noted that the plaintiff’s complaint made no allegation that the photograph at issue was offensive to a reasonable person as required by section 652B. *See id.*

157. *See supra* notes 152–53 and accompanying text.

158. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

159. *See supra* notes 127–29 and accompanying text.

160. *See supra* notes 150–53 and accompanying text.

161. *See supra* notes 123–26 and accompanying text.

162. *See supra* notes 145–48 and accompanying text.

about the plaintiff.<sup>163</sup> But what does section 652B mean by “intentional intrusion”? The Oregon Supreme Court, which follows section 652B,<sup>164</sup> has stated that this element is satisfied “if the actor either desires to cause an unauthorized intrusion or believes that an unauthorized intrusion is substantially certain to result from committing the invasive act in question.”<sup>165</sup> In other words, an unintentional or consensual intrusion upon seclusion does not exist.<sup>166</sup>

*b. Non-Restatement Jurisdictions*

Not all jurisdictions recognizing intrusion have adopted the Restatement formulation. This section will highlight cases from several jurisdictions that have adopted different or contrasting standards from many of the Restatement jurisdictions.

Indiana’s formulation of the intrusion tort provides a stark contrast to the Restatement approach and *Phillips*, both of which do not limit recovery to physical invasions.<sup>167</sup> In Indiana, however, intrusion upon seclusion requires a physical intrusion, “as by invading [plaintiff’s] home or conducting an illegal search.”<sup>168</sup> For example, in *Munsell v. Hambright*,<sup>169</sup> the court held that telephone calls made to the plaintiff’s employer about the plaintiff’s unstable mental condition did not intrude upon the plaintiff’s seclusion.<sup>170</sup> The court noted that the same would be true even if the calls had been made to the plaintiff because there was no intrusion into the plaintiff’s physical space.<sup>171</sup>

Wisconsin, which recognizes intrusion by statute,<sup>172</sup> also deviates from section 652B’s formulation by requiring a physical invasion. In *Hillman v. Columbia County*,<sup>173</sup> the plaintiff, an HIV-positive inmate of the Columbia County Jail, experienced various medical problems that required frequent hospitalization outside of the jail.<sup>174</sup> After one of his hospital visits, the plaintiff returned to the jail with a medical file that was opened and examined by various jail employees, apparently without his consent.<sup>175</sup> Soon thereafter, the plaintiff realized it had become common knowledge among jail employees and other inmates that he had AIDS.<sup>176</sup> The plaintiff

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163. *See supra* notes 140–44 and accompanying text.

164. *See supra* note 91 and accompanying text.

165. *Mauri v. Smith*, 929 P.2d 307, 311 (Or. 1996); *see also* *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1381 (Md. 1997) (citing *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 7 (S.C. Ct. App. 1989)) (noting that the tort of intrusion requires intentional conduct and cannot be committed unintentionally).

166. *See Mauri*, 929 P.2d at 311.

167. *See supra* Part I.C.3.a.

168. *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991); *see also supra* note 101.

169. 776 N.E.2d 1272 (Ind. Ct. App. 2002).

170. *See id.* at 1283.

171. *See id.*

172. *See supra* note 108 and accompanying text.

173. 474 N.W.2d 913 (Wis. Ct. App. 1991).

174. *Id.* at 916.

175. *Id.*

176. *Id.*

brought suit, alleging that the opening and examination of his medical file constituted an intrusion upon his seclusion.<sup>177</sup>

Under the Wisconsin privacy statute, intrusion upon seclusion is defined as “[i]ntrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.”<sup>178</sup> The court therefore had to determine if a medical record constituted a “place” within the meaning of the statute.<sup>179</sup> The court first noted that unauthorized examination of a medical record could constitute an intrusion upon the plaintiff’s seclusion or private affairs under section 652B, but that the Wisconsin legislature had used the word “place” instead of the phrase “solitude or seclusion of another or his private affairs or concerns” contained in the Restatement.<sup>180</sup>

After consulting a dictionary, the court concluded that the plain meaning of “place” is geographical and therefore held that the plaintiff had not stated a claim for intrusion because a medical file was not a place within the meaning of that term in the statute.<sup>181</sup> Interestingly, a district court applying Wisconsin law found this reasoning unpersuasive, concluding that the statutory language on its face was not limited to a person’s immediate physical environment and could also include one’s private belongings if contained somewhere where one has a reasonable expectation of privacy.<sup>182</sup> The court further noted that the Wisconsin statute states that it “shall be interpreted in accordance with the developing common law of privacy,”<sup>183</sup> which would “support[] a reading in accordance with the general common law as reflected by the *Restatement*.”<sup>184</sup>

The Supreme Court of Florida faced a similar issue with its interpretation of the word “place” in *Allstate Insurance Co. v. Ginsberg*.<sup>185</sup> In *Allstate*, the court considered whether unwelcome sexual contact and sexual comments made by an employer to his employee constituted an intrusion upon the employee’s seclusion.<sup>186</sup> The court affirmed that under Florida law, an intrusion is defined as “physically or electronically intruding into one’s private quarters,”<sup>187</sup> finding that the tort did not include unwelcome sexual contact and offensive sexual comments.<sup>188</sup> The court noted that

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177. *Id.*

178. *See supra* note 108.

179. *See Hillman*, 474 N.W.2d at 919.

180. *Id.*

181. *See id.*

182. *See Fischer v. Mt. Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914, 928 (W.D. Wis. 2002).

183. WIS. STAT. ANN. § 995.50(3) (West 2007); *see also supra* note 108.

184. *Fischer*, 207 F. Supp. 2d at 928.

185. 863 So. 2d 156 (Fla. 2003).

186. *See id.* at 157–58.

187. *Id.* at 162; *see also supra* note 100 (explaining that intrusion in Florida is more narrowly defined than section 652B’s formulation).

188. *See Allstate*, 863 So. 2d at 162 (“[T]he tort of invasion of privacy was not intended to be duplicative of some other tort. Rather, this is a tort in which the focus is the right of a private person to be free from public gaze.”).

“[t]he intrusion to which this [definition] refers is into a ‘place’ in which there is a reasonable expectation of privacy and is not referring to a body part.”<sup>189</sup> A dissenting opinion disagreed, finding that unwelcome sexual contact did constitute an intrusion upon an individual’s solitude or seclusion, seeing no rational basis to exclude from the tort’s coverage this type of intrusive behavior.<sup>190</sup> The court’s interpretation of the cause of action in *Allstate* contrasts with that of the Alabama Supreme Court in *Phillips*, where unwanted sexual comments and touching were held to constitute an intrusion.<sup>191</sup>

South Carolina’s formulation of the intrusion tort also contrasts with section 652B by requiring acquisition of information about the plaintiff. In South Carolina, there are four elements to the cause of action: (1) an intrusion (2) into that which is private, (3) which is substantial and unreasonable enough to be legally cognizable and (4) intentional.<sup>192</sup> As to the element of intrusion, it “may consist of watching, spying, prying, besetting, overhearing, or other similar conduct. Whether there is an intrusion is to be decided on the facts of each case.”<sup>193</sup> Further, “[i]n an action for wrongful intrusion into private affairs, the damage consists of the unwanted exposure resulting from the intrusion.”<sup>194</sup> In South Carolina, an intrusion was found where an individual placed a videotape camera and recorder in his bedroom to film swimsuit models changing in and out of swimsuits without their consent while at his house.<sup>195</sup>

Although these facts likely would constitute an intrusion under section 652B as well, South Carolina’s formulation of the cause of action indicates that, unlike section 652B, information must be acquired about the plaintiff to be actionable: the damage is from the unwanted exposure arising from the intrusion<sup>196</sup> and not from the intrusive act itself, as the Restatement indicates.<sup>197</sup>

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189. *Id.*

190. *See id.* at 165 (Anstead, C.J., concurring in part and dissenting in part) (“I can see no rational basis for distinguishing, for instance, between a situation where a defendant is alleged to have secretly, and without consent, visually spied upon another person in a state of undress and in a private place, from the situation presented here . . .”).

191. *See supra* notes 137, 152–53 and accompanying text.

192. *See Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989).

193. *Id.*

194. *Id.*

195. *See id.* at 4, 8.

196. *See supra* note 194 and accompanying text.

197. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1977) (explaining that the form of invasion of privacy covered by intrusion upon seclusion “consists solely of an intentional interference” with the plaintiff’s seclusion and does not depend on publicity given to the plaintiff’s private affairs); *supra* note 144 and accompanying text (finding that acquisition of information not required to recover under section 652B).

*D. Scholarly Rationales and Theoretical Bases  
for Intrusion upon Seclusion*

In their seminal article, Warren and Brandeis spoke of the rights and principles of “inviolate personality,”<sup>198</sup> “the more general right to the immunity of the person,”<sup>199</sup> and “the more general right of the individual to be let alone.”<sup>200</sup> According to two scholars, “[t]he core theoretical concepts and assumptions that are employed in the article view privacy as a condition and right that is essentially tied to human dignity, the principle of equal respect for persons, and the notion of personhood itself.”<sup>201</sup>

Referring to the intrusion branch, Prosser wrote in his famous article that “[i]t appears obvious that the interest protected by this branch of the tort is primarily a mental one.”<sup>202</sup> Prosser also noted the different interests protected by intrusion and several of the other branches of the privacy tort.<sup>203</sup> Discussing public disclosure of private facts,<sup>204</sup> Prosser explained that “[t]his branch of the [privacy] tort is evidently something quite distinct from intrusion. The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander.”<sup>205</sup> Similarly, Prosser noted that the interest protected by false light,<sup>206</sup> like that of public disclosure of private facts, is “clearly that of reputation, with the same overtones of mental distress as in defamation.”<sup>207</sup> Other scholars also have emphasized the reputational harm that can result from the public disclosure of private facts or affairs and the interest the disclosure branch has in protecting one’s reputation.<sup>208</sup> Thus, there are several torts that

198. Warren & Brandeis, *supra* note 14, at 205. One author has written that the values implicated by the term “inviolate personality” might accurately be described today as “personhood” or “self-identity.” See DECEW, *supra* note 24, at 16. Another scholar has interpreted “inviolate personality” to mean “the individual’s independence, dignity and integrity; it defines man’s essence as a unique and self-determining being.” Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 971 (1964).

199. Warren & Brandeis, *supra* note 14, at 207.

200. *Id.* at 205.

201. TURKINGTON & ALLEN, *supra* note 13, at 50.

202. Prosser, *supra* note 25, at 392.

203. *See id.* at 398, 400–01.

204. According to the Restatement, one commits the tort of public disclosure of private facts when “[o]ne . . . gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” RESTATEMENT (SECOND) OF TORTS § 652D (1977).

205. Prosser, *supra* note 25, at 398.

206. The Restatement (Second) of Torts explains that a cause of action for false light exists when

[o]ne . . . gives publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E.

207. Prosser, *supra* note 25, at 400.

208. *See, e.g.*, Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1811–14 (2010) (providing examples of instances where public disclosures on the

protect against reputational harm—libel, slander, disclosure of private facts, and false light (where recognized)—and the disclosure branch allows the plaintiff to recover where a harmful statement is true and a claim for libel or slander would therefore fail.<sup>209</sup>

The intrusion tort—unlike disclosure of private facts and false light, which both bear a strong resemblance to defamation—is largely an extension of the tort of trespass.<sup>210</sup> Prosser indicated that at the time of his famous article, the intrusion tort “has been used chiefly to fill in the gaps left by trespass” and other torts.<sup>211</sup> Many courts emphasize the similarities between trespass and intrusion,<sup>212</sup> and some jurisdictions only recognize a cause of action for intrusion upon seclusion if there has been some physical invasion.<sup>213</sup> Scholars also have emphasized these similarities; for example, one scholar has written that trespass and intrusion protect the same interest,<sup>214</sup> and a similar set of facts may give rise to a cause of action under both trespass and intrusion.<sup>215</sup>

But intrusion and trespass can be distinguished: if a defendant enters a plaintiff’s home without consent, reads the plaintiff’s private papers, and takes pictures without causing any damage to the plaintiff’s property, the defendant has committed a trespass but also has invaded the plaintiff’s privacy by intruding upon the plaintiff’s seclusion.<sup>216</sup> The intrusion tort extends trespass by allowing the plaintiff to recover even if the defendant has not physically invaded the plaintiff’s property by, for example, taking a picture with a high-powered camera.<sup>217</sup> While not every trespassory invasion is an intrusion upon seclusion, and an intrusion has been found where the plaintiff has no protected property interest, these two torts both

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internet can have lasting effects on reputation); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 531 (2006) (describing that the harm from disclosure is the damage to one’s reputation caused by dissemination of true information about an individual); Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2032–33 (2010) (explaining that an important distinction between intrusion and public disclosure is the reputational harm resulting from disclosure, while “the reputational harms in a pure intrusion case are necessarily limited”).

209. See James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1835 (2000); see also ELDER, *supra* note 18, § 3:1, at 3-2; I SACK, *supra* note 6, § 12:1.1, at 12-3.

210. See I SACK, *supra* note 6, § 12:1.1, at 12-3 (noting that while the other three branches of invasion of privacy are related to defamation, intrusion upon seclusion is “more closely akin to the ancient action for trespass,” and neither falsity nor publication is necessarily required).

211. Prosser, *supra* note 25, at 392.

212. See, e.g., *Johnson v. Allen*, 613 S.E.2d 657, 660 (Ga. Ct. App. 2005); *Lewis v. LeGrow*, 670 N.W.2d 675, 687 (Mich. Ct. App. 2003); *Doe v. Mills*, 536 N.W.2d 824, 832 (Mich. Ct. App. 1995).

213. See *supra* notes 154–56, 168 and accompanying text.

214. See Gordley, *supra* note 209, at 1834.

215. See I SACK, *supra* note 6, § 12:6, at 12-100; JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORTS* 338 (2010).

216. See Gordley, *supra* note 209, at 1834.

217. See *id.*; see also Solove, *supra* note 208, at 553 (“Intrusion into one’s private sphere can be caused not only by physical incursion and proximity but also by gazes (surveillance) or questioning (interrogation).”).

enforce the notion that individuals have a strong interest in the “protection of personal integrity.”<sup>218</sup>

Thus, like trespass, the intrusion tort protects a “safe zone,” a “private realm” where individuals can be free from the unwanted intrusions of others.<sup>219</sup> The law has recognized the importance of protecting one’s private space and one’s home for a long time, and the intrusion branch is a more recent development that extends this recognition.<sup>220</sup> Just as harm from a trespass can occur even when no damage is done to the plaintiff’s land,<sup>221</sup> the harm from an intrusion occurs even when no information is acquired because the intrusive act itself, the conduct that invades one’s space or disrupts one’s daily activities, takes away from one’s interest in being left alone.<sup>222</sup> Simply put, “intrusion interrupts one’s activities through the unwanted presence or activities of another person.”<sup>223</sup>

Edward J. Bloustein authored a well-known response to Prosser four years after Prosser’s article was published, disagreeing in large part with Prosser’s formulation of the interests protected by the privacy torts.<sup>224</sup> He noted not only that mental distress did not appear to be the basis for the cause of action in the intrusion cases cited by Prosser, but also that even when the plaintiffs did allege mental distress, the court specifically indicated that such distress was not a necessary element of the cause of action.<sup>225</sup> Bloustein proposed that the “gist of the wrong” is the “blow to human dignity,” and not mental distress.<sup>226</sup> Activities like listening to another’s conversations without consent or entering another’s home at will, detract from the “human dignity” of those whose privacy is invaded in these instances.<sup>227</sup>

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218. See ELDER, *supra* note 18, § 2:5, at 2-44 to -47 (quoting *Gonzales v. Sw. Bell Tel. Co.*, 555 S.W.2d 219, 221 (Tex. Civ. App. 1977)).

219. Solove, *supra* note 208, at 552-53.

220. See *id.*

221. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 158-61 (Wis. 1997); Gordley, *supra* note 209, at 1830. In *Jacque*, the Supreme Court of Wisconsin upheld an award of punitive damages for a trespass to land even though the land was not harmed in any way. See *Jacque*, 563 N.W.2d at 158-61. The court concluded that the harm was not the damage (or lack thereof) to the land itself, but rather “in the loss of the individual’s right to exclude others from his or her property.” *Id.* at 159.

222. See Solove, *supra* note 208, at 554 (“While many forms of intrusion are motivated by a desire to gather information or result in the revelation of information, intrusion can cause harm even if no information is involved.”).

223. *Id.* at 553.

224. See generally Bloustein, *supra* note 198.

225. *Id.* at 973.

226. *Id.* at 974; see also TURKINGTON & ALLEN, *supra* note 13, at 50 (“Dean Bloustein argues that the recognition of the right of privacy in legal writings and judicial opinions reflects a concern by writers and courts for protecting human dignity.”).

227. See Bloustein, *supra* note 198, at 973-74 (“Eavesdropping and wiretapping, unwanted entry into another’s home, may be the occasion and cause of distress or embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma.”).



## II. DOES INTRUSION UPON SECLUSION REQUIRE THAT THE DEFENDANT OBSERVE OR OVERHEAR THE PLAINTIFF?

This part of the Note turns to the conflict at issue: whether proof of observation or acquisition of information about the plaintiff is a necessary component of an intrusion upon seclusion claim. Part II.A describes many of the cases holding that an intrusion can occur when the plaintiff is not viewed or observed, while Part II.B sets forth the cases that have taken the opposite approach. Part II.C gives a detailed explanation of one particular state's approach, whose highest court in 2011 set forth a detailed standard after careful consideration of the issue. Lastly, Part II.D includes a discussion of Title III and the requirements to recover under the Wiretap Act, which provides for a private right of action against unauthorized wiretapping and has an underlying rationale similar to the intrusion tort.

### A. *No Human Observation Is Necessary to Constitute Intrusion*

This section provides an overview of the cases holding that a cause of action for intrusion upon seclusion exists even if the defendant has not viewed, recorded, heard, or otherwise observed the plaintiff—that is, the placement of a recording device alone is sufficient.

The seminal case supporting this approach is *Hamberger v. Eastman*,<sup>228</sup> decided by the Supreme Court of New Hampshire in 1964. In *Hamberger*, the plaintiffs, a couple renting and living in a house owned by the defendant (their landlord), alleged that the defendant invaded their privacy by placing a listening and recording device in their bedroom without their consent and knowledge.<sup>229</sup> The court held that the landlord's conduct constituted an intrusion upon seclusion regardless of whether anyone listened to or heard any noise coming from the plaintiffs' bedroom.<sup>230</sup> The court noted that "[t]he tort of intrusion upon the plaintiffs' solitude or seclusion does not require publicity and communication to third persons," and that the potential for overhearing created by the device "impairs the mental peace and comfort of the individual."<sup>231</sup> According to the court, "[i]f the peeping Tom, the big ear and the electronic eavesdropper . . . have a place in the hierarchy of social values, it ought not to be at the expense of a married couple minding their own business in the seclusion of their bedroom."<sup>232</sup>

The Supreme Court of California confronted the issue in 2009 in *Hernandez v. Hillsides, Inc.*<sup>233</sup> and held that the plaintiffs need not prove they were ever recorded or viewed to establish an intrusion.<sup>234</sup> In *Hernandez*, the plaintiffs brought an invasion of privacy suit against their employer, which operated a residential center for neglected and abused

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228. 206 A.2d 239 (N.H. 1964).

229. *Id.* at 239–40.

230. *See id.* at 242.

231. *Id.*

232. *Id.*

233. 211 P.3d 1063 (Cal. 2009).

234. *See id.* at 1077–78.

children.<sup>235</sup> The plaintiffs discovered a hidden camera that had been set up in their office without their consent.<sup>236</sup> The defendant emphasized that the camera never recorded the plaintiffs (and was not installed with that intention), but instead it had been set up to monitor a computer in the plaintiffs' office because there was reason to believe someone other than the plaintiffs was accessing pornographic material on the computer at night.<sup>237</sup> The defendant further testified that while the camera was fully operational and capable of recording the plaintiffs in their office at any time,<sup>238</sup> he never activated the system while the plaintiffs were in their office (which was necessary to make the camera record and display an image on the monitor to which it was connected), and that he only activated the system once the plaintiffs had left work for the day.<sup>239</sup>

Despite evidence that the camera never recorded the plaintiffs and that the defendant never used the camera to view the plaintiffs, the court found that there was an intrusion, rejecting the defendant's argument that there could only be an intrusion if the plaintiffs had been observed.<sup>240</sup> The court further noted that the installation of the camera, which was fully operable and completely capable of recording the plaintiffs at any time if activated, was done without the plaintiffs' knowledge and was a clear violation of their expectation to be free from their employer's intrusion in their office.<sup>241</sup>

In *Harkey v. Abate*,<sup>242</sup> the plaintiff and her daughter visited the defendant's roller skating rink and used the women's restroom while on the premises.<sup>243</sup> Subsequently, the plaintiff learned of the existence of see-through panels in the ceiling that allowed for observation from above.<sup>244</sup> The plaintiff, however, could offer no proof that anyone viewed her or her daughter in the restroom.<sup>245</sup> The court still held for the plaintiff, finding that a lack of proof that the defendant had observed the plaintiff did not preclude a judgment for the plaintiff, and that the plaintiff's privacy may have nevertheless been invaded.<sup>246</sup> As the court explained, "[i]n our opinion, the installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly

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235. *Id.* at 1067.

236. *Id.* at 1070.

237. *Id.* at 1068–70.

238. *Id.* at 1069 (“Once installed in plaintiffs’ office, both the camera and the motion detector were always plugged into the electrical system, and therefore were capable of operating ‘all the time.’”).

239. *Id.* at 1070.

240. *See id.* at 1077.

241. *See id.* at 1077–78 (“Plaintiffs had no reasonable expectation that their employer would intrude so tangibly into their semi-private office.”). While finding that the plaintiffs had established the element of intrusion upon the plaintiffs’ privacy, the court ultimately found that the defendants’ conduct was not highly offensive under all of the circumstances and therefore ruled in favor of the defendants. *See id.* at 1079–81.

242. 346 N.W.2d 74 (Mich. Ct. App. 1983).

243. *Id.* at 75.

244. *Id.*

245. *Id.*

246. *See id.* at 76.

offensive.”<sup>247</sup> The court noted that the issue of whether the panels were used was not relevant to liability but could be applicable to a determination of damages.<sup>248</sup>

In *Amati v. City of Woodstock*,<sup>249</sup> a district court applying Illinois law similarly held that proof of observation should not be required.<sup>250</sup> In *Amati*, police department personnel sued for invasion of privacy, alleging that the defendants (the chief of police and the city itself) had taped telephone calls made on a line at the police station that was supposedly private and left untapped for personal calls.<sup>251</sup> The defendants argued that the plaintiffs could not prove that their calls were listened to (with the exception of one specific conversation involving only two of the many plaintiffs), and that this defeated their invasion of privacy claim.<sup>252</sup> Noting that the issue was previously undecided in Illinois, the court held that proof that someone listened to the telephone conversations was not required, and that the reasoning in *Hamberger*<sup>253</sup> should prevail in Illinois.<sup>254</sup> As support for its conclusion, the court explained that “[t]he placing of a recording device in an area where one has a reasonable expectation of privacy is both intrusive and disruptive. In plain language, it ruins the privacy.”<sup>255</sup> The court further noted that “[i]t is not the information that one obtains from such an intrusion that is necessarily tortious, but rather, the fact someone has accessed an area reasonably expected to be private.”<sup>256</sup>

In *Geraci v. Conte*,<sup>257</sup> the plaintiff sued the defendants on behalf of a class of high school students from Brush High School for invasion of privacy, and the court held that the presence of a one-way peephole was sufficient to state a claim.<sup>258</sup> In the case, the defendants, a former principal of the high school and his wife, invited students to their home for swimming parties but required that all of the students change clothes in a room where the defendant had installed a one-way mirror so he could watch them change, unbeknownst to the students.<sup>259</sup> The trial court dismissed the plaintiff’s intrusion upon seclusion claim because the plaintiff could not prove that the defendants actually spied on the students when they were

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247. *Id.* But see *id.* at 77 (Gillis, J., dissenting) (“[P]lacement of an eavesdropping or peeping device alone does not constitute a cause of action; the device must actually be used in order for the cause of action to arise.”).

248. See *id.* at 76 (majority opinion) (“And though the absence of proof that the devices were utilized is relevant to the question of damages, it is not fatal to plaintiff’s case.”).

249. 829 F. Supp. 998 (N.D. Ill. 1993).

250. See *id.* at 1010.

251. *Id.* at 1001.

252. *Id.* at 1009.

253. See *supra* notes 230–32 and accompanying text.

254. See *Amati*, 829 F. Supp. at 1011 (“Accordingly, the lack of allegations that anyone actually listened to the recorded telephone conversations do not defeat plaintiffs’ claims.”).

255. *Id.* at 1010 (“One would never obtain the full benefits accorded to a private place if he or she reasonably believed someone would or could be listening.”).

256. *Id.* at 1010 n.22.

257. No. 72440, 1998 WL 323564 (Ohio Ct. App. June 18, 1998).

258. *Id.* at \*1, \*4.

259. *Id.* at \*1.

changing.<sup>260</sup> The appellate court reversed, finding that it was not necessary for the plaintiff to prove actual spying, and the presence of the one-way peephole mirror alone was enough to state a claim for invasion of privacy.<sup>261</sup> The court explained that its understanding of intrusion upon seclusion did not require the plaintiff to allege actual spying, relying on the Restatement (Second) of Torts section 652B and favorably citing many of the other cases discussed in this section.<sup>262</sup>

Similarly, *Kohler v. City of Wapakoneta*<sup>263</sup> holds that the placement of a device alone is sufficient to state an intrusion claim.<sup>264</sup> In *Kohler*, the plaintiff was a dispatcher at the City of Wapakoneta Police Department who sued the former chief of police for invasion of privacy.<sup>265</sup> The plaintiff asserted that the defendant had placed a tape recorder in a toilet stall in the women's restroom, and this constituted an actionable intrusion upon seclusion.<sup>266</sup> The defendant argued that because the recorder had not picked up any "personal noises" (and had only recorded sounds like water running in the bathroom), the plaintiff could not sustain a claim for invasion of privacy.<sup>267</sup>

Here, the district court held that the plaintiff's privacy was invaded by the placement of the device, and that the defendant had intruded into a private area despite the plaintiff's inability to prove that the tape recorder had picked up "personal noises."<sup>268</sup> The court also noted that "[t]he invasion consists solely of an intentional interference with the person's interest in solitude or seclusion," and that an intrusion occurs even when the device is not actually used.<sup>269</sup>

In *Carter v. Innisfree Hotel, Inc.*,<sup>270</sup> the plaintiffs, a married couple, rented a room for a night from the defendant, a hotel.<sup>271</sup> While they were in the room, the plaintiffs heard noises coming from a wall by the bathroom and observed two scratches in a mirror against the wall.<sup>272</sup> Upon further investigation, the plaintiffs discovered a space behind the mirror and a hole in the wall of the neighboring room, leading them to believe they had been spied on.<sup>273</sup> The plaintiffs, however, were unable to prove that someone from the neighboring room had viewed them.<sup>274</sup>

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260. *Id.* at \*1–2.

261. *Id.* at \*3–4.

262. *See id.* at \*3.

263. 381 F. Supp. 2d 692 (N.D. Ohio 2005).

264. *See id.* at 704.

265. *Id.* at 697–98.

266. *Id.* at 697.

267. *Id.* at 703.

268. *See id.* at 704.

269. *Id.* (quoting *Geraci v. Conte*, No. 72440, 1998 WL 323564, at \*3 (Ohio Ct. App. June 18, 1998)).

270. 661 So. 2d 1174 (Ala. 1995).

271. *Id.* at 1177.

272. *Id.*

273. *Id.*

274. *Id.* at 1179.

The court held that the plaintiffs did not need to prove the identity of the alleged “peeping Tom,” and that an intrusion could still occur without proof that the spying device had been used while they were in the room.<sup>275</sup> Even though a jury could reasonably conclude that there was actual use of the spying device, such a finding was not necessary for the plaintiffs’ claim to succeed.<sup>276</sup>

The Maryland Court of Special Appeals reached a similar result on a similar issue. In *New Summit Associates Limited Partnership v. Nistle*,<sup>277</sup> the plaintiff rented an apartment from the defendant, her former landlord.<sup>278</sup> During the course of renovations in the building, the plaintiff noticed two circular marks on her bathroom mirror, which she soon realized made it possible to see into her bathroom from the vacant neighboring apartment, where the bathroom mirror had been removed because of renovations.<sup>279</sup> The plaintiff sued her former landlord and its agent for invasion of privacy, and the defendants countered by arguing that the plaintiff could not prove that anyone actually observed her through the holes in the mirror.<sup>280</sup> The court held that it was not necessary for her to prove that someone had viewed her, and it noted that “[t]he intentional act that exposed that private place intruded upon appellee’s seclusion.”<sup>281</sup>

### B. *The Plaintiff Must Be Observed or Overheard*

This section discusses the cases that take the opposite approach to the cases discussed in Part II.A and require the plaintiff to show that the defendant recorded, heard, viewed, or otherwise observed the plaintiff to constitute an intrusion upon seclusion.

In *Meche v. Wal-Mart Stores, Inc.*,<sup>282</sup> the court held that a camera that never recorded the plaintiffs could not be the basis of an intrusion claim.<sup>283</sup> In *Meche*, the plaintiffs alleged that a loss prevention associate of the defendant set up a camera in the unisex employee bathroom to monitor employees whom he suspected of stealing merchandise.<sup>284</sup> Before the camera was fully installed and operational, however, another employee discovered the camera.<sup>285</sup> Because the plaintiffs were unable to prove that the camera ever recorded them (which was further supported by testimony

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275. *See id.* (“There can be no doubt that the possible intrusion of foreign eyes into the private seclusion of a customer’s hotel room is an invasion of that customer’s privacy . . .”).

276. *See id.* (“There is no need for the Carters to establish that they saw another’s eyes peering back at them through their mirror.”).

277. 533 A.2d 1350 (Md. Ct. Spec. App. 1987).

278. *Id.* at 1352.

279. *Id.* at 1353.

280. *Id.* at 1354.

281. *Id.* The court ultimately dismissed the plaintiff’s invasion of privacy claim because “[t]here was no proof that the invasion of appellee’s privacy was committed by any agent, servant, or employee of either of the appellants,” which was necessary to hold the defendants liable for the invasion. *Id.*

282. 692 So. 2d 544 (La. Ct. App. 1997).

283. *See id.* at 546–47.

284. *Id.* at 546.

285. *Id.*

from the loss prevention associate indicating it was never properly configured), the court found that they had not stated a claim for invasion of privacy.<sup>286</sup> The court noted that, at best, the plaintiffs had established an “attempted invasion of privacy,” a tort that was not recognized or known by the court.<sup>287</sup>

An Oregon appellate court reached a similar result in *Oliver v. Pacific Northwest Bell Telephone Co.*<sup>288</sup> In that case, the plaintiff was an employee of a lumber company and filed suit against his employer for allegedly recording and taping his telephone calls to and from the firm without his consent.<sup>289</sup> The plaintiff claimed this was a violation of his right to privacy.<sup>290</sup> The plaintiff, however, was unable to show that his calls specifically had been listened to or monitored, despite the existence of an apparatus for monitoring phone calls and proof that other employees’ phone calls had been listened to.<sup>291</sup> The court therefore found that there was no intrusion.<sup>292</sup>

Pennsylvania also has confronted the issue and reached a similar conclusion: in *Marks v. Bell Telephone Co. of Pennsylvania*,<sup>293</sup> the Supreme Court of Pennsylvania held that another person must overhear a private phone conversation to state a claim for invasion of privacy.<sup>294</sup> In *Marks*, the plaintiff, an attorney, discovered that the defendants had installed a monitoring device on the telephone lines (both incoming and outgoing) of the police department.<sup>295</sup> The plaintiff sued for invasion of privacy, but the court held that he had not stated a cause of action.<sup>296</sup>

The court based this finding on the lack of evidence that anyone at the police station actually listened to the recorded conversations, and because the tapes were reused, no one would ever hear the conversations in the future.<sup>297</sup> According to the court, a required element of the tort is the intentional overhearing of a private conversation by someone not a party to that conversation, and without such an overhearing, there is no intrusion.<sup>298</sup> As the court noted, “the only ear ever to hear appellant’s communication was a mechanical one”—not a human one—and this did not constitute an invasion of privacy.<sup>299</sup>

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286. *See id.* at 547.

287. *Id.*

288. 632 P.2d 1295 (Or. Ct. App. 1981).

289. *Id.* at 1297.

290. *Id.*

291. *Id.* at 1298.

292. *See id.* at 1299 (“We conclude that while the voluminous record in this case makes a factual showing of intrusion by defendants on conversations of *other* employees, there is no evidence at all to indicate any intrusion upon *plaintiff’s* phone conversations.”).

293. 331 A.2d 424 (Pa. 1975).

294. *Id.* at 431.

295. *Id.* at 426–27.

296. *Id.* at 430–31.

297. *See id.* at 431. *But see id.* at 433 (Pomeroy, J., concurring) (agreeing with the majority’s holding concerning the plaintiff’s other claims, but taking the opposite position on the invasion of privacy claim, finding the *Hamberger* reasoning the correct interpretation).

298. *See id.* at 431 (majority opinion).

299. *Id.*

In *Moffett v. Gene B. Glick Co.*,<sup>300</sup> the court held that an intercom could not be the basis of an intrusion claim unless there was evidence that someone had overheard conversations using it.<sup>301</sup> In *Moffett*, the plaintiff sued for invasion of privacy when an employee of the defendant hid an intercom (locked in the “on” position) in an area of the plaintiff’s office where the plaintiff and another individual occasionally had personal conversations.<sup>302</sup> Addressing the contention that the placement of the intercom was an unreasonable intrusion into her private affairs, the court held that because there was no evidence that the plaintiff’s conversations were overheard by anyone, there had been no intrusion.<sup>303</sup> As the court explained, “while Hall’s intercom may have made it possible to overhear a conversation, no intrusion would have occurred until something was actually overheard.”<sup>304</sup>

In *LeCrone v. Ohio Bell Telephone Co.*,<sup>305</sup> an Ohio appellate court reached the same conclusion as the Supreme Court of Pennsylvania in *Marks*<sup>306</sup> on similar facts and held that the mere placement of a tap on the plaintiff’s phone, without further proof of eavesdropping, did not constitute an invasion of privacy.<sup>307</sup> In *LeCrone*, the plaintiff was in the process of obtaining a divorce from her husband and had moved out of their shared home.<sup>308</sup> Unbeknownst to the plaintiff, her husband had requested that the defendant place an extension on her private line at his home, thereby allowing him to listen in on her telephone conversations.<sup>309</sup> The court held that because there was no evidence that the defendant ever overheard any of the plaintiff’s phone conversations, it could not be held liable for intruding upon the plaintiff’s seclusion.<sup>310</sup> According to the court, “the only possible act which could constitute an invasion in the present case is the eavesdropping itself, and the connection or tap here constitutes only a preparation for that invasion of privacy.”<sup>311</sup>

Finally, the Georgia Court of Appeals in *Johnson v. Allen*<sup>312</sup> found that the plaintiffs must raise a “reasonable inference” that a hidden camera was used to improperly monitor the women’s restroom,<sup>313</sup> despite testimony that

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300. 621 F. Supp. 244 (N.D. Ind. 1985), *overruled on other grounds*, Reeder-Baker v. Lincoln Nat’l Corp., 644 F. Supp. 983 (N.D. Ind. 1986). *Moffett* involved Title VII claims related to (but separate from) the invasion of privacy claim. *See id.* at 266.

301. *Id.* at 284.

302. *Id.* at 256.

303. *See id.* at 284.

304. *Id.*

305. 201 N.E.2d 533 (Ohio Ct. App. 1963).

306. *See supra* notes 293–99 and accompanying text.

307. *See LeCrone*, 201 N.E.2d at 538. Notably, Ohio seems to have reversed its position since this case was decided, as two cases applying Ohio law, discussed above, have found an actionable intrusion even though the defendant did not view or overhear the plaintiff. *See supra* notes 257–69 and accompanying text.

308. *LeCrone*, 201 N.E.2d at 535.

309. *Id.* at 536.

310. *See id.* at 537–38.

311. *Id.*

312. 613 S.E.2d 657 (Ga. Ct. App. 2005).

313. *See id.* at 661.

the defendant had acknowledged the presence of the hidden camera therein.<sup>314</sup> In *Johnson*, the plaintiffs sued the operator of a cold storage facility for invasion of privacy when it was discovered that there was a camera in the women's bathroom.<sup>315</sup> Johnson, the facility's manager of operations and a defendant in the case, stated that he had authority to install the camera because of rumors that drugs were being sold on the premises and further indicated to employees that he had installed cameras throughout the facility to monitor them.<sup>316</sup> The trial court denied Johnson's motion for summary judgment on the intrusion claim.<sup>317</sup>

On appeal, the court ruled for the plaintiffs.<sup>318</sup> Notably, in addressing the defendant's argument that there had been no invasion of privacy and that the lower court erred by not granting the defendant's motion for summary judgment, the court focused on whether there was sufficient evidence to "raise a reasonable inference that Johnson used the camera to improperly monitor the women's restroom"—and concluded that there was—rather than focusing on the existence of the device itself.<sup>319</sup> Thus, this case supports the conclusion that mere placement of a recording device is insufficient to state a claim for intrusion upon seclusion.

### C. *The Koepfel Standard*

In 2011, the Iowa Supreme Court confronted the issue and articulated a specific, detailed standard in *Koepfel v. Speirs*,<sup>320</sup> holding that actual viewing or recording is not necessary as long as the recording device was capable of recording the plaintiff. In other words, the potential for projecting private information is sufficient to state an intrusion claim.<sup>321</sup>

In *Koepfel*, the plaintiff, an employee of the defendant, sued for invasion of privacy when she discovered a video camera on a shelf in the bathroom at work.<sup>322</sup> The defendant alleged that he put the camera there to monitor another employee whom he suspected of "conduct detrimental to the operation of his office."<sup>323</sup> The defendant contended that the camera did not function properly and produced only static on his monitor.<sup>324</sup> The next day, the plaintiff discovered the camera in the bathroom and notified the police.<sup>325</sup> When the police arrived, the officers tried to make the monitoring system function properly but were only able to see a "foggy" image on the monitor before it quickly disappeared.<sup>326</sup> The plaintiff did,

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314. *See id.* at 659.

315. *Id.* at 659–60.

316. *Id.* at 659.

317. *See id.* at 660.

318. *Id.* at 661.

319. *Id.*

320. 808 N.W.2d 177 (Iowa 2011).

321. *See id.* at 184–85.

322. *Id.* at 178–79.

323. *Id.* at 178.

324. *Id.*

325. *Id.* at 179.

326. *Id.*



however, present evidence that the camera was capable of operation with a new battery and had successfully operated before in a different area in the office.<sup>327</sup>

After analyzing cases on both sides of the conflict,<sup>328</sup> the court ultimately agreed with the *Hamberger* reasoning, explaining that “the approach taken in *Hamberger* and its progeny is more consistent with the spirit and purpose of the protection of privacy.”<sup>329</sup> While ruling in favor of the plaintiff,<sup>330</sup> the court articulated a standard for Iowa: as long as the plaintiff could prove that the recording device was capable of functioning, even if it was not working at the time that the plaintiff discovered the device and the plaintiff was never recorded, the plaintiff satisfied the intrusion element.<sup>331</sup>

A mere belief by the plaintiff that the device worked is not enough—“proof the equipment is functional is an ingredient in the inquiry” because, according to the court, “[i]t would be inconsistent with the policy of the tort to find an intrusion when the privacy of the plaintiff could not have been exposed in any way.”<sup>332</sup> The placement of an inoperable camera might, however, be actionable as intentional infliction of emotional distress even though it would not give rise to an intrusion upon seclusion claim.<sup>333</sup> Further, it is not necessary that the device is functional at the time it is discovered—it is only necessary to show that it was capable of recording the plaintiff.<sup>334</sup> In the words of the Iowa Supreme Court, “[t]his approach is consistent with *Hamberger*, *Amati*, and other cases that find an intrusion when the potential for projecting private information existed.”<sup>335</sup>

As support for its standard, the court relied on Prosser’s 1960 *California Law Review* article and noted that “the tort protects against acts that interfere with a person’s mental well-being by intentionally exposing the person in an area cloaked with privacy.”<sup>336</sup> The court further explained that, in its view, the harm from an intrusion occurs when the plaintiff discovers the presence of a recording device, even if the defendant never actually viewed the plaintiff.<sup>337</sup> Additionally, rejecting the argument that allowing the plaintiff to recover without proof of recording essentially creates a cause of action for an attempted invasion of privacy, the court held that “the act of intrusion is complete once it is discovered by the plaintiff because acquisition of information is not a requirement.”<sup>338</sup>

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327. *Id.* at 185.

328. *See id.* at 182–84; *see also supra* Part II.A–B.

329. *Koepfel*, 808 N.W.2d at 184 (“The secret use of an electronic listening or recording device is abhorrent to the interests sought to be protected by the tort.” (citing *Amati v. City of Woodstock*, 829 F. Supp. 998, 1010 (N.D. Ill. 1993))).

330. *See id.* at 185.

331. *See id.* at 184–85.

332. *Id.* at 184.

333. *See id.* at 185 n.2.

334. *See id.* at 185.

335. *Id.*

336. *Id.* at 184 (citing Prosser, *supra* note 25, at 392).

337. *See id.* at 185 (citing *Amati v. City of Woodstock*, 829 F. Supp. 998, 1010 (N.D. Ill. 1993)).

338. *Id.* (citing *Phillips v. Smalley Maint. Servs.*, 435 So. 2d 705, 709 (Ala. 1983)).

*D. Requirements to State a Claim Under Title III*

Section 2520 of The Wiretap Act, formally known as Title III of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>339</sup> provides for a private right of action for anyone whose communications have been intercepted without consent.<sup>340</sup> Although this Note is concerned with the way courts define and apply the intrusion upon seclusion tort, an examination of a few Title III cases provides additional guidance on the conflict at issue as Title III draws in part on the intrusion tort for its conceptual basis.<sup>341</sup> Of particular interest is whether Title III requires another individual to overhear a private communication to recover—in other words, whether information must be acquired by another person to recover as the cases in Part II.B require.

In *Broadway v. City of Montgomery*<sup>342</sup> the plaintiffs sued the City of Montgomery and two police officers under 18 U.S.C. § 2520 for allegedly intercepting communications through the use of an illegal wiretap.<sup>343</sup> The plaintiffs alleged that the officers placed a wiretap on the phone of John L. Broadway, who was later charged with drug possession in a separate case.<sup>344</sup> In affirming summary judgment for the defendants, the court noted that the plaintiffs had failed to prove that the defendants had actually intercepted and listened to the tape from the wiretap.<sup>345</sup> The court found that the plaintiffs could not recover under § 2520 because the defendants had not intercepted any of their communications as defined in the statute.<sup>346</sup> As *Broadway* illustrates, the mere placement of a wiretap without interception of an individual's conversation would appear insufficient to recover under § 2520.

However, *Awbrey v. Great Atlantic & Pacific Tea Co.*,<sup>347</sup> a Georgia district court decision, indicates that the plaintiff may not need to prove specific instances of calls being recorded to recover under § 2520. In *Awbrey*, the plaintiffs, employees of the defendant, alleged that the defendant installed wiretaps on workplace phones and recorded the conversations, seeking recovery under § 2520.<sup>348</sup> The defendants argued that the plaintiffs could not prove that any specific calls were overheard through the use of the wiretap, and therefore the plaintiffs had not stated a

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339. 18 U.S.C. § 2520 (2012).

340. *See id.* § 2520(a) (“[A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.”).

341. *See* GOLDBERG & ZIPURSKY, *supra* note 215, at 337.

342. 530 F.2d 657 (5th Cir. 1976).

343. *Id.* at 658.

344. *Id.* at 659.

345. *Id.* at 659–60. The defendants do not appear to contest the existence of the wiretap itself, just the alleged interception of the plaintiffs' communications. *See generally id.*

346. *See id.* at 660. The term “intercept” is defined as “aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” 18 U.S.C. § 2510(4) (2012).

347. 505 F. Supp. 604 (N.D. Ga. 1980).

348. *Id.* at 606.

claim under § 2520.<sup>349</sup> The court found that the plaintiffs did not need to show or have knowledge of particular instances of phone calls being overheard, because the record clearly showed that the defendants had placed wiretaps on the phones, that the taps had been used, and that the calls were replayed at various points.<sup>350</sup> As long as the plaintiffs could prove “by a preponderance of the evidence that defendant has ‘intercepted, disclosed or used’ plaintiffs’ ‘wire or oral communication[s],’” they could recover.<sup>351</sup>

Although the *Awbrey* court may seem to have required a lower standard of proof to recover under § 2520, it still required the plaintiffs to prove that their communications were intercepted, disclosed, or used.<sup>352</sup> In other words, despite evidence that wiretaps had been installed, the placement itself of the taps was not sufficient—the plaintiffs still needed to prove their communications had been intercepted as defined in the statute. *Broadway* and *Awbrey* both appear to indicate that mere placement of a wiretap is not enough, but left unanswered is the question of whether the definition of “intercept”<sup>353</sup> requires a human ear to hear the communication.<sup>354</sup>

The Eleventh Circuit held in *United States v. Nelson*<sup>355</sup> that the aural acquisition of a communication occurs where the communication is obtained and not where it is ultimately heard.<sup>356</sup> This decision supports the conclusion that an interception can occur without the communication being heard by a human.<sup>357</sup> Similarly, *Amati* involved claims brought under the Wiretap Act, and the court held that an aural acquisition could occur even when a human does not hear the recording.<sup>358</sup> The court noted that the policy behind the Wiretap Act is best served by an interpretation of “intercept” requiring only that the communication be recorded and not listened to, as one’s privacy is affected when private conversations are recorded even if they are not ultimately heard.<sup>359</sup>

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349. *Id.* The defendants relied in part on the court’s holding in *Broadway* that the plaintiffs’ inability to prove specific instances of interception precluded judgment in their favor. *See id.*

350. *See id.* at 606–07.

351. *Id.* at 607 (quoting 18 U.S.C. § 2520 (1976)) (“In sum, though it is conflicting, the evidence in the record tends to show that telephones the plaintiffs used were tortiously tapped by defendant’s personnel. If . . . the jury concludes by a preponderance of the evidence that defendant has ‘intercepted, disclosed or used’ plaintiffs’ ‘wire or oral communication[s],’ then plaintiffs may be entitled to judgment and damages as specified in the statute.”). Since *Awbrey* was decided, the statute has since been amended to cover electronic communications. *See* 18 U.S.C. § 2520(a) (2012).

352. *See Awbrey*, 505 F. Supp. at 607.

353. *See supra* note 346.

354. *See United States v. Turk*, 526 F.2d 654, 658 & n.3 (5th Cir. 1976) (noting that it is a “nice question,” but not deciding, whether there is an aural acquisition when a recording is made but is subsequently destroyed before a human hears it).

355. 837 F.2d 1519 (11th Cir. 1988).

356. *See id.* at 1527.

357. *See id.*

358. *See Amati v. City of Woodstock*, 829 F. Supp. 998, 1008 (N.D. Ill. 1993) (“Whether the communication is heard by the human ear is irrelevant.”).

359. *See id.* (“If a wiretap is placed on an individual’s telephone and the conversation is recorded yet never listened to, the individual’s conversations would be chilled if he knew of

III. RESOLVING THE SPLIT:  
WHICH APPROACH SHOULD COURTS FOLLOW?

Part III analyzes both sides of the conflict discussed above and argues that courts should hold that observation is not necessary to constitute an intrusion. It then proposes a resolution similar that of the Iowa Supreme Court in *Koeppel*.

A. *Acquisition of Information Should Not Be  
a Required Element of an Intrusion Claim*

Stated simply, proof of acquisition of information about the plaintiff should not be required to state a claim for intrusion upon seclusion. As Justice Thomas W. Pomeroy Jr.'s concurring opinion in *Marks*<sup>360</sup> eloquently stated, “[t]he tort of intrusion is designed to protect an individual, not against what other human beings may know or think of him, but rather against the very act of interfering with his seclusion.”<sup>361</sup> To hold that acquisition of information should be required to state a claim for intrusion is to misunderstand the interest protected by intrusion upon seclusion, its resemblance and similarity to trespass, and its distinction from public disclosure of private facts and false light. A plaintiff should not need to prove that the defendant used a device to view or listen to the plaintiff to recover for an intrusion claim. To answer the question posed in *Koeppel*,<sup>362</sup> the placement of a mechanism that is capable of recording the plaintiff causes harm to the plaintiff regardless of recordation, viewing, or overhearing.

The intrusion branch of the invasion of privacy tort, unlike the other three branches articulated by Prosser, does not bear a close relationship to defamation and thus should not require publicity.<sup>363</sup> The other branches, particularly public disclosure of private facts<sup>364</sup> and false light,<sup>365</sup> are largely concerned with protection from harm arising from the publication of something false or private and bear a strong resemblance to the torts of libel and slander.<sup>366</sup> Unlike libel and slander, however, truth is not a defense to public disclosure of private facts,<sup>367</sup> and the disclosure branch has therefore provided a viable cause of action to a plaintiff who could not recover under libel or slander.<sup>368</sup> As Prosser and others have articulated, both false light

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the wiretap. This would be so even if the individual was assured *no one* would listen to his conversations, because the individual’s privacy interests are no longer autonomous.”).

360. See *supra* notes 295–99 and accompanying text.

361. *Marks v. Bell Tel. Co. of Pa.*, 331 A.2d 424, 433 (Pa. 1975) (Pomeroy, J., concurring).

362. See *supra* note 12 and accompanying text.

363. See *supra* note 210 and accompanying text.

364. See *supra* note 204.

365. See *supra* note 206.

366. See *supra* notes 203–10 and accompanying text.

367. See *supra* note 209 and accompanying text; see also 1 SACK, *supra* note 6, § 12:4.1, at 12-36.

368. See *supra* note 209 and accompanying text.

and public disclosure of private facts protect against reputational harm and injury to feelings arising from publication.<sup>369</sup>

Intrusion upon seclusion, however, is more closely aligned with trespass than with defamation.<sup>370</sup> A cause of action for trespass does not depend on publicity or harm to reputation; the trespassory act itself makes the defendant liable because it invades the plaintiff's personal space regardless of whether information is obtained.<sup>371</sup> The same is true for intrusion.<sup>372</sup> Whether it is a physical intrusion, such as a defendant coming onto private property and recording intimate activities, or a nonphysical intrusion where the defendant uses a camera to take pictures of the plaintiff engaging in intimate activities in his or her home,<sup>373</sup> the plaintiff's "safe zone," the private area where one reasonably expects to be free from intrusion, has been violated.<sup>374</sup> The harm is not one of damage to reputation or to image; it is simply the unwelcome invasion into a private space.<sup>375</sup>

Given the nature of the harm that intrusion seeks to protect, it logically follows that acquisition of information by another party should not be required to state a claim. Many of the cases discussed in Part II.A prudently note that the presence of a recording device alone, regardless of whether someone else sees or hears the plaintiff, interferes with one's interest in being alone and is thus itself an intrusion.<sup>376</sup> A private place is no longer private when there is the potential that it will be made public by means of a recording device.<sup>377</sup> This is true even if one is assured that tapes of recorded phone calls will be destroyed and never heard—the mere presence of a wiretap interferes with privacy expectations regardless of whether anyone hears the calls.<sup>378</sup> This approach is also consistent with the Title III cases holding that the term "intercept" as used in the statute should be interpreted to require only that communications be recorded but not that they be listened to or overheard by another party.<sup>379</sup>

Several states have enacted criminal statutes imposing liability for installing a recording device in a private place, regardless of whether it is used.<sup>380</sup> These statutes express a clear legislative intent to punish mere installation regardless of subsequent viewing or listening, recognizing the harm that can arise from such an installation.<sup>381</sup> As the court in *Harkey* explained, a Michigan criminal statute of this nature (making it a felony offense to install a viewing device in a private place without consent)

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369. *See supra* notes 208–09 and accompanying text; *see also* 1 SACK, *supra* note 6, § 12:4.1, at 12-36.

370. *See supra* notes 210–18 and accompanying text.

371. *See supra* notes 210–23 and accompanying text.

372. *See supra* notes 210–23 and accompanying text.

373. *See supra* note 217 and accompanying text.

374. *See supra* note 256 and accompanying text.

375. *See supra* notes 219–23 and accompanying text.

376. *See supra* Part II.A.

377. *See supra* note 255 and accompanying text.

378. *See supra* note 359 and accompanying text.

379. *See supra* notes 356–59 and accompanying text.

380. *See supra* notes 109–10 and accompanying text.

381. *See Harkey v. Abate*, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983).

constitutes “a legislative expression of public policy opposed to such conduct.”<sup>382</sup>

The cases discussed in Part II.B that require acquisition of information by another person fail to distinguish between the harm from the intrusive act itself and the harm from the revelation of the information obtained.<sup>383</sup> As this discussion has suggested, harm from an intrusive act arises not when information is revealed or obtained by someone else, but by the intrusive act itself that transforms a private space into one that is no longer private. Thus, acquisition of information should not be a required element of an intrusion upon seclusion claim.

Although lack of acquisition of information about the plaintiff should not be a defense to an intrusion claim, it is still relevant to a determination of damages, as the *Harkey* court articulated.<sup>384</sup> In other words, liability and damages should be considered separately: while still liable for invasion of privacy, a defendant could make a strong argument that damages should be significantly limited when the defendant never observed the plaintiff. The practical effect of such an argument is that plaintiffs conceivably could secure only nominal damages, particularly in instances where the defendant never used the device to view or listen to the plaintiff. And, after all, tort plaintiffs seek damages and redress for their injuries, not simply to establish that the defendant has committed wrongdoing.

This argument is not without merit and deserves serious consideration. An action for intrusion upon seclusion is closely akin to and bears many similarities with an action for trespass, and an action for trespass does not require actual damage to the plaintiff’s property.<sup>385</sup> In fact, as explained by the Supreme Court of Wisconsin in *Jacque v. Steenberg Homes, Inc.*,<sup>386</sup> the harm from an intentional trespass is not limited to damage to the plaintiff’s land but includes the violation of the plaintiff’s right to exclusive possession of his or her property.<sup>387</sup> In *Jacque*, the court upheld an award of punitive damages when the defendant, a seller of mobile homes, cut across the plaintiff’s property over the plaintiff’s objections to deliver a mobile home to the plaintiff’s neighbor, even though the jury did not award any compensatory damages.<sup>388</sup> The court emphasized that the individual landowner and society in general both “have much more than a nominal interest in excluding others from private land,” and punitive damages were therefore appropriate.<sup>389</sup>

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382. *Id.*

383. *See supra* note 222 and accompanying text (noting that an intrusion can occur even when no information is obtained).

384. *See supra* note 248 and accompanying text.

385. *See supra* note 221 and accompanying text.

386. 563 N.W.2d 154 (Wis. 1997).

387. *See supra* note 221 and accompanying text.

388. *See Jacque*, 563 N.W.2d at 156–58.

389. *See id.* at 161 (citing RESTATEMENT (SECOND) OF TORTS § 163 cmt. e (1965); RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979)). According to the Restatement, “an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort, such as a trespass to land, is committed for an outrageous purpose, but no significant harm has resulted.” RESTATEMENT (SECOND) OF TORTS § 908 cmt. c (1979).

Any argument by a defendant that damages should be limited because the defendant never viewed or overheard the plaintiff must be considered in light of the *Jacque* court's rationale. As this Note has suggested, the harm from an intrusion is the invasion of the plaintiff's private space by any device capable of transforming a private space into one that is no longer private. Just as Mr. and Mrs. *Jacque* had more than a nominal interest in excluding others from trespassing on their land, plaintiffs have more than a nominal interest in keeping out the unwanted eyes and ears of others, and punitive damages may therefore still be appropriate—as they were in *Jacque*—even if the plaintiff was never viewed, overheard, or otherwise observed by the defendant.

*B. A Standard for Intrusion upon Seclusion Claims  
That Adequately Protects Privacy*

Having argued that proof of another person seeing or hearing the plaintiff should not be a required element of an intrusion claim, this section proposes a workable standard that is consistent with the interest protected by this branch of the privacy tort and the rationales attributed to intrusion by both scholars and courts.

In constructing a workable standard, there are several determinations to make. First, must the device be capable of functioning (that is, capable of actually recording the plaintiff), or is it sufficient that the plaintiff reasonably believed that the device worked (even if that belief were mistaken)? The court in *Koeppel* required proof that the device could be operational and noted that a belief by the plaintiff alone that the device was functional, without further proof that it could in fact transmit or record, was not enough.<sup>390</sup> According to the court, if it was not possible for the device to function, then the plaintiff's privacy could not have been invaded.<sup>391</sup> This Note proposes that *Koeppel*'s conclusion concerning the functionality of the device should be the correct standard. If the device could not have worked at all, there could be no invasion of privacy; the private space could never have been made public. As the court in *Koeppel* noted, such conduct might give rise to an action for intentional infliction of emotional distress but should not constitute an intrusion upon seclusion.<sup>392</sup>

Next, must the device be operational when it is discovered, or is it sufficient that the device functioned at any time after being installed? According to the court in *Koeppel*, the device does not need to be working when it is discovered—it only needs to have been capable of recording the plaintiff.<sup>393</sup> This, too, should be the correct view. It should not matter whether the device is functioning at the time it is discovered, as long as it was fully capable of exposing the plaintiff at some point in time after installation.

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390. See *supra* note 332 and accompanying text.

391. See *supra* note 332 and accompanying text.

392. See *supra* note 333 and accompanying text.

393. See *supra* notes 331, 334 and accompanying text.

Furthermore, a defendant who installs a camera or other mechanism that turns a private space into a public one should not get a windfall just because the plaintiff happened to not be physically present when the device was fully operational and activated. Every individual has a reasonable expectation that he or she can go about his or her private affairs without intrusion, and this expectation is violated regardless of whether the plaintiff is present.<sup>394</sup> Consider the following hypothetical: presume that Jackson and Abbey are next-door neighbors. Jackson decides to place a camera in Abbey's living room and breaks into her house to set up the camera. When operated, the camera produces a live stream of Abbey's living room to Jackson's laptop. To his dismay, however, Jackson mistakenly configures the camera such that it only records in the middle of the night, when Abbey is sound asleep in her bedroom. After a week, Abbey sees the camera in her living room and confronts Jackson about it. Jackson sheepishly explains that he installed the camera to spy on her, but that he never viewed her using the camera because it only recorded late at night, when she was in her bedroom.

In this situation, Abbey should be able to recover for invasion of privacy. It should not matter that she was never present when the camera was recording, because Jackson's camera nevertheless provided a window into Abbey's private living room and was completely capable of exposing her. Had Abbey been unable to sleep one night and decided to watch television in her living room, the spy camera would have recorded her and Jackson would have been able to observe Abbey in her private space at his leisure. Jackson should not benefit because Abbey never made any late night excursions into her living room while his camera was set up.

This view is also consistent with that of the Supreme Court of California in *Hernandez*.<sup>395</sup> In that case, the court held that there was an intrusion into the plaintiffs' privacy when the defendant installed surveillance cameras in the plaintiffs' office, even though the cameras were never activated when the plaintiffs were present and were only actively recording when they were absent.<sup>396</sup> As the court noted, "[p]laintiffs presumably would have been caught in the camera's sights if they had returned to work after hours."<sup>397</sup> The exact same is true if Abbey had come home late one night, while the camera was recording, and walked through her living room en route to her bedroom. The fact that a plaintiff is not physically present when the device is functioning (that is, when the device is recording or otherwise providing a window into a private space) should not be determinative in whether an intrusion has occurred.

Lastly, there is the related issue of when the plaintiff must become aware of the presence of the recording device. The fact that the plaintiff is not contemporaneously aware of the presence of the recording device or spy mechanisms should be of no import. If, for example, the defendant tells the

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394. See *supra* note 241 and accompanying text.

395. See *supra* notes 233–41 and accompanying text.

396. See *supra* notes 239–41 and accompanying text.

397. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1077 (Cal. 2009).



plaintiff that he placed a microphone in her bathroom two days ago, but has since removed it, it should not matter that the plaintiff did not know of the existence of the device until after it was removed. The plaintiff's interest in being alone in her bathroom without the unwanted virtual presence of another individual potentially overhearing her still has been violated, even if nothing was ever overheard. It is important to note, however, that the device must have been capable of functioning. It is not sufficient that the defendant tells the plaintiff that he installed a microphone in her bathroom two days ago, has since removed it, but that the microphone was broken and never worked. In that case, the potential for turning a private space into a public space never existed, and thus there is no invasion of privacy.

#### CONCLUSION

The right of privacy is not absolute. One's general right of privacy must be balanced against other interests, and claims for invasion of privacy will succeed only where there is an objectively reasonable expectation of privacy that was violated. A public figure who has willingly made herself an object of the public's interest has a more limited right of privacy than does a recluse who never leaves his apartment. These limitations on the right of privacy are well established in privacy law.

But everyone has a reasonable expectation that private spaces will not be unknowingly intruded upon; the law has long recognized the notion that one's home is one's castle. When a recording device like a spy camera is installed in a private place, be it a workplace bathroom or a home, there is an invasion of privacy. The mere placement of a device that is capable of transforming a private space into a public space intrudes upon seclusion, even if no other human uses that device to view, hear, or observe the plaintiff in that space.

This Note argues that the standard adopted by the Iowa Supreme Court in *Koeppel* provides a workable solution that is consistent with the harm the intrusion tort seeks to avoid. The placement of a camera, microphone, one-way mirror, intercom, or any other mechanism capable of transforming what reasonably appears as a private space into a public one intrudes upon one's solitude, regardless of whether another individual actually sees, hears, or otherwise observes the person whose private space has been invaded.