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Illinois Supreme Court

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A Familiar Tort that May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion

*James W. Hilliard**

I. INTRODUCTION

Plaintiff and her daughter were patrons at defendant's roller-skating rink.¹ On one occasion, they used the women's restroom on the premises that defendant provided for his patrons.² Plaintiff then discovered that defendant had installed see-through panels in the restroom ceiling.³ These see-through panels permitted secret observation from the ceiling, including observation of the restroom stalls.⁴ In her complaint, plaintiff alleged that defendant had personally watched her and her daughter using the restroom.⁵

In another case, plaintiff suffered from cancer of the larynx.⁶ Defendant was his physician and surgeon, who had twice operated on plaintiff.⁷ During the course of treatment, many photographs of plaintiff were taken by defendant or at defendant's direction.⁸ The photos were seen only by defendant's staff and appropriate hospital personnel and were used only for plaintiff's medical file.⁹ According to defendant, plaintiff always consented to being photographed, although there was no evidence of written consent.¹⁰ However, on the day plaintiff died, defendant or a nurse, at the defendant's direction, photographed the dying plaintiff despite several indications that he did

* B.A., Northwestern University, 1980; J.D., University of Illinois College of Law, 1983. The author is currently serving as a judicial clerk to Chief Justice Charles Freeman of the Illinois Supreme Court. The views expressed herein are those of the author alone. The author is grateful for the insight of Cynthia Cobbs and Anthony Swanagan and dedicates this article to the memory of his father, James D. Hilliard.

1. *See Harkey v. Abate*, 346 N.W.2d 74, 75 (Mich. Ct. App. 1983).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See id.*

6. *See Estate of Berthiaume v. Pratt*, 365 A.2d 792, 793 (Me. 1976).

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.*

not want to be photographed.¹¹

In a similar case, plaintiffs were husband and wife who rented a house from defendant.¹² Without plaintiffs' knowledge or consent, defendant installed a hidden listening and recording device in their bedroom near their bed.¹³ The wires from the eavesdropping device ran to the adjacent building where defendant lived.¹⁴

The court in each case held that plaintiff had stated a valid cause of action for intrusion on seclusion.¹⁵ The unreasonable intrusion on another's seclusion is one of the four forms of the tort of "invasion of privacy."¹⁶ The tort consists of "an intentional interference with [another's] 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."¹⁷

The great majority of American jurisdictions recognize this tort.¹⁸ However, it is uncertain whether this tort is viable in Illinois. As of this writing, the Third and Fifth districts of the Illinois Appellate Court have recognized this tort,¹⁹ while the first and fourth districts of the Illinois Appellate Court have not expressly recognized the tort of intrusion on seclusion.²⁰ Further, the Illinois Supreme Court has expressly refrained from recognizing the tort.²¹

11. See *id.* at 793-94.

12. See *Hamberger v. Eastman*, 206 A.2d 239, 239 (N.H. 1964).

13. See *id.* at 239-40.

14. See *id.* at 240.

15. See *Harkey v. Abate*, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983); *Estate of Berthiaume*, 365 A.2d at 794; *Hamberger*, 206 A.2d at 241-42.

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

17. *Id.* § 652B cmt. a.

18. See *Socialist Workers Party v. Attorney Gen. of the United States*, 642 F. Supp. 1357, 1422 (S.D.N.Y. 1986) ("It should be said, however, that the tort of invasion of privacy by intrusion is recognized in almost every state. It is generally accepted common law.").

19. See *Davis v. Temple*, 673 N.E.2d 737, 744 (Ill. App. Ct. 5th Dist. 1996) (recognizing the tort of intrusion on the seclusion of another where plaintiffs sued a police officer in his official capacity on seven different grounds); *Melvin v. Burling*, 490 N.E.2d 1011, 1013 (Ill. App. Ct. 3d Dist. 1986) (holding that a cause of action for invasion of privacy could be stated for unreasonable intrusion upon the seclusion of another where defendant used the mail system to intrude upon plaintiff's seclusion).

20. See *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1355 (Ill. App. Ct. 1st Dist. 1995) ("[W]e hold that the alleged actions here do not constitute an unreasonable intrusion into the seclusion of another. We so hold without expressing a view as to the appellate court conflict regarding the recognition of this cause of action."); *Hall v. InPhoto Surveillance Co.*, 649 N.E.2d 83, 85 (Ill. App. Ct. 4th Dist. 1995) (rejecting intrusion on seclusion as a valid cause of action). As of this writing, the second district of the Illinois Appellate Court has not had the occasion to consider the matter.

21. See *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 989 (Ill. 1989)

This article provides an overview of the privacy tort of unreasonable intrusion on another's seclusion. Part II examines the concept of invasion of privacy.²² Part III briefly discusses the four branches of the tort of invasion of privacy.²³ Part IV outlines the elements of unreasonable intrusion on another's seclusion.²⁴ Part V reviews the seminal Illinois intrusion cases and discusses their consequences.²⁵ Finally, Part VI addresses whether Illinois courts should recognize the tort, and ultimately advises all Illinois courts to recognize the tort of unreasonable intrusion on another's seclusion.²⁶

II. WHAT IS AN "INVASION OF PRIVACY"?

Compared to other areas of the law, the tort of invasion of privacy is a relatively new development. In an 1890 law review article, Samuel Warren and Louis Brandeis proposed the concept of a right to privacy, independent of the commonly recognized rights to property, contract, reputation, and physical integrity.²⁷ They further argued that the invasion of this right justified an independent tort remedy.²⁸ "Warren and Brandeis are credited by most textwriters with seeding the thought for the development of the invasion of the right to privacy as an independent and distinct tort."²⁹

At least two rationales for the tort of invasion of privacy exist. First, an early and leading case, *Pavesich v. New England Life*

(finding it unnecessary to address the split of authority concerning the tort of intrusion into the seclusion of another in this particular case, but concluding that the plaintiff's complaint met the elements of another branch of the tort of invasion of privacy).

22. See *infra* Part II.

23. See *infra* Part III.

24. See *infra* Part IV.

25. See *infra* Part V.

26. See *infra* Part VI.

27. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-95 (1890). "Somewhat paradoxically, although Warren's and Brandeis' primary object was 'to establish that the right of privacy was part of the existing common law; in the process of searching for this right, they succeeded in inventing it.'" *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 82 (W. Va. 1984).

28. See Warren & Brandeis, *supra* note 27, at 205.

29. *Estate of Berthiaume v. Pratt*, 365 A.2d 792, 794 (Me. 1976); accord 8 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS §30:2, at 855-56 (1991) ("[T]he Warren and Brandeis article enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence") (internal quotes omitted). The article has been described as: "classic and famous," *Hamberger v. Eastman*, 206 A.2d 239, 240 (N.H. 1964); "perhaps the most influential article ever published in an American law journal," *Crump*, 320 S.E.2d at 81; and "the outstanding example of the influence of legal periodicals upon the American law," William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 383 (1960).

Insurance Co., described the right of privacy as axiomatic and inherent to humanity.³⁰ A reasonable person “recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned.”³¹

A more utilitarian rationale for the tort also exists. Humanity’s need for privacy has increased as we have become more sensitive to publicity due to the increased complexity and intensity of modern civilization and the development of our spiritual awareness. Technological advances in communication, however, have allowed those who pander to commercialism and prurient, idle curiosity to exploit the intimacies of private life. A legally enforceable right of privacy is a proper protection against this type of encroachment.³²

In 1939, the Restatement of Torts first recognized the right of privacy.³³ By 1952, a majority of American jurisdictions had recognized this right.³⁴ The First District of the Illinois Appellate Court jumped on the bandwagon when it first recognized invasion of privacy as an independent tort in 1952.³⁵ In 1970, the Illinois Supreme Court recognized the tort, noting “[p]rivacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law.”³⁶

Today, only a handful of states fail to recognize a common law cause of action for invasion of privacy. Some of those states recognize the right solely through statutory law. In these states, the statutory cause of action for invasion of privacy is usually more narrow or limited than a common law action.³⁷ Only one state has not

30. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905).

31. *Lawrence v. A.S. Abell Co.*, 475 A.2d 448, 450 (Md. 1984) (quoting *Pavesich*, 50 S.E. at 69).

32. See *Gill v. Curtis Publ'g Co.*, 239 P.2d 630, 633 (Cal. 1952) (quoting 41 AM. JUR. *Privacy* § 9 (1942)); see also *Hill v. National Collegiate Athletic Ass'n*, 865 P.2d 633, 647 (Cal. 1994); Warren & Brandeis, *supra* note 27, at 196.

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

34. See *Gill*, 239 P.2d at 632-33; *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 743 (Ill. App. Ct. 1st Dist. 1952); *Lawrence*, 475 A.2d. at 450 n.1; see also R.T. Kimbrough, Annotation, *Right of Privacy*, 138 A.L.R. 22 *passim* (1942); R.T. Kimbrough, Annotation, *Right of Privacy*, 168 A.L.R. 446 *passim* (1947); W.E. Shipley, Annotation, *Right of Privacy*, 14 A.L.R.2d 750 *passim* (1950).

35. See *Eick*, 106 N.E.2d at 748.

36. *Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970).

37. See, e.g., *Brown v. American Broad. Co.*, 704 F.2d 1296, 1302-03 (4th Cir. 1983) (holding that an action for invasion of privacy was limited to the right created by a Virginia statute so a common-law right of privacy would not be recognized in an action arising from a television broadcast); *Foretich v. Glamour*, 741 F. Supp. 247, 250

yet addressed the issue of a tortious right to privacy.³⁸

Part of understanding what an invasion of privacy is requires first understanding what it is not. While the United States Constitution protects a right to privacy, this right differs from the common law right to privacy recognized by state tort law.³⁹ In tort law, "[t]he right of privacy has been defined as the right to be let alone."⁴⁰ However, this definition does not exist under the Federal Constitution where "there is no broad legal or constitutional 'right to be let alone' by government."⁴¹

(D.D.C. 1990) (holding that Virginia law does not recognize a "false light" invasion of privacy in a defamation suit); *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979) (noting that the right of privacy in Massachusetts has a statutory basis in an action for libel and invasion of privacy); *Schoneweis v. Dando*, 435 N.W.2d 666, 671 (Neb. 1989) (holding that expressions of pure opinion are protected by the First Amendment and do not fall under Nebraska's statutory right of privacy); *Howell v. New York Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993) (recognizing that the right to privacy is governed exclusively by New York statute as there is no common law right of privacy in New York); *Pontbriand v. Sundlun*, 699 A.2d 856, 862-63 (R.I. 1997) (noting that the tort of publication of private facts is governed by Rhode Island statute); *Zinda v. Louisiana Pac. Corp.*, 440 N.W.2d 548, 554-55 (Wis. 1989) (citing the Wisconsin statute which governs all right to privacy claims).

In Oklahoma, the original statutory cause of action for appropriation of name or likeness still exists in addition to the subsequently recognized common law invasion of privacy action. *See LeFlore v. Reflections of Tulsa, Inc.*, 708 P.2d 1068, 1074-75 (Okla. 1985) (recognizing both a statutory and common law right to privacy in a case involving fraud and invasion of privacy in a beauty contest); *McCormack v. Oklahoma Publ'g Co.*, 613 P.2d 737, 739-40 (Okla. 1980) (holding that there is no statutory or common law right to privacy when public records are used).

38. *See Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 816 (N.D. 1998) (refusing to address whether a tort action exists in North Dakota for invasion of privacy).

39. *See McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 76 (8th Cir. 1976); ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 154-55 (1995).

40. RESTATEMENT (SECOND) OF TORTS § 652A cmt. a (1977). Judge Cooley coined the phrase. *See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 117, at 849 (5th ed. 1984).

41. *Picou v. Gillum*, 874 F.2d 1519, 1521 (11th Cir. 1989). The court went on to explain:

In the complex society in which we live, the action and nonaction of citizens are subject to countless local, state, and federal laws and regulations. Bare invocation of a right to be let alone is an appealing rhetorical device, but it seldom advances legal inquiry, as the "right"—to the extent it exists—has no meaning outside its application to specific activities. The Constitution does protect citizens from government interference in many areas—speech, religion, the security of the home. But the unconstrained right asserted by appellant has no discernable bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court.

Id.

Although the right of privacy is not explicit within the text of the United States Constitution, the United States Supreme Court has recognized the existence of “zones of privacy” inherent in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments which deserve federal protection.⁴² The constitutional right to privacy is limited to restricting the government’s power to regulate private conduct in matters relating to marriage, procreation, contraception, family relationships, child rearing, and education.⁴³ As for other areas of privacy, the Court stated that “the protection of a person’s *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”⁴⁴

Article I, Section 6, of the Illinois Constitution recognizes a right to freedom from unreasonable invasions of privacy.⁴⁵ This state constitutional guarantee, however, does not create a private cause of action. Generally, constitutional guarantees, such as those found in Article I, Section 6, only guarantee against abridgment by the government and do not provide protection or redress against private persons.⁴⁶ Specifically, as to the state constitutional right against unreasonable invasions of privacy, the framers of the 1970 Illinois Constitution did not intend the provision to create a private cause of action between individuals for invasions of privacy.⁴⁷ In Illinois, the

42. See *Paul v. Davis*, 424 U.S. 693, 712-13 (1976); see also U.S. CONST. amend. I; IV, V, IX, and XIV.

43. See *Paul*, 424 U.S. at 712-13 (discussing the federal right to privacy guaranteed by the Constitution); *Reilly v. Leonard*, 459 F. Supp. 291, 299-300 (D. Conn. 1978) (dismissing plaintiff’s complaint under the Civil Rights Act of 1871 after a discussion of the federal constitutional protections); see also ALDERMAN & KENNEDY, *supra* note 39, at 55-66; James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. MARSHALL L. REV. 95, 117-18 (1996).

44. *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (concluding that the government’s eavesdropping activities violated the petitioner’s right to privacy) (footnote omitted); *accord Picou*, 874 F.2d at 1521 (holding that a state statute requiring motorcycle riders to wear helmets did not violate the constitutional right to privacy or the right “to be let alone”); *Doe v. Mills*, 536 N.W.2d 824, 830-31 (Mich. Ct. App. 1995) (finding that abortion protestors who publicized the fact that plaintiffs were going to have abortions did violate the plaintiffs’ right of privacy).

45. That section provides in part: “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.” ILL. CONST. art. I, § 6.

46. See *Barr v. Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356-57 (Ill. 1985).

47. See *Kelly v. Franco*, 391 N.E.2d 54, 56-57 (Ill. App. Ct. 1st Dist. 1979) (discussing proceedings of the Sixth Illinois Constitutional Convention). *But see Hill v. National Collegiate Athletic Ass’n*, 865 P.2d 633, 641-44 (Cal. 1994) (stating that in California, a constitutional guaranty of privacy was intended to protect against both

tort of invasion of privacy exists and develops in the common law, rather than by statute or constitutional provision.

III. THE FOUR BRANCHES

Although courts conceived the independent tort of invasion of privacy around 1890, the tort's current formulation did not develop until after 1960. In that year, William Prosser, Dean of the University of California School of Law, published a law review article⁴⁸ "[o]f virtually equal significance in legal development" with the Warren and Brandeis article.⁴⁹ In his article, Prosser examines the tort of invasion of privacy, asking "what interests are we protecting, and against what conduct."⁵⁰ He concludes that the tort is not merely one tort, but an amalgam of four distinct torts.⁵¹

Prosser's four-branch model of invasion of privacy was adopted in Section 652A of the Restatement (Second) of Torts (the "Second Restatement"), and has been "adopted, often verbatim, by the vast majority of American jurisdictions."⁵² Under the four-branch model, a person's right of privacy is invaded by: (1) an "unreasonable intrusion on the seclusion of another"; (2) "appropriation of the other's name or likeness"; (3) "unreasonable publicity" given to another's private life; or (4) "publicity that unreasonably places the other in a false light before the public."⁵³ Under any of the four branches, where a person invades another's right of privacy, he or she is liable for the resulting harm to the interests of the other person.⁵⁴

governmental and nongovernmental conduct and creates a cause of action for an invasion thereof).

48. See Prosser, *supra* note 29, at 383.

49. 8 SPEISER ET AL., *supra* note 29, § 30:2, at 856. Prosser is regarded as the "major influence" on the current formulation of the right to privacy. See *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 82 (W. Va. 1984).

50. Prosser, *supra* note 29, at 388.

51. See *id.* at 389. Prosser explained:

The law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, in the phrase coined by Judge Cooley, "to be let alone."

Id. (footnote omitted).

52. *People for the Ethical Treatment of Animals v. Berosini, Ltd.*, 895 P.2d 1269, 1278 (Nev. 1995), *modified by*, *City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134, 138 (Nev. 1997).

53. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

54. See *id.*

These four types of invasion of privacy form "a complex of four distinct wrongs, whose only relation to one another is that each involves interference with the interest of the individual in leading, to some reasonable extent, a secluded and private life."⁵⁵ Prosser emphasizes that these four types of invasion may be subject to different rules: "[W]hen what is said as to any one of them is carried over to another, it may not be at all applicable, and confusion may follow."⁵⁶

Prior to focusing on the unreasonable intrusion on another's seclusion, brief mention should be made of the other three branches of the tort of invasion of privacy: appropriation, public disclosure of private facts, and false light in the public eye. Regarding appropriation, the Second Restatement formulated: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."⁵⁷ This branch protects the interest of an individual in the exclusive use of his or her own identity, in so far as the individual's name or likeness represents that identity, and insofar as the use may benefit the individual or others.⁵⁸ This tort involves the plaintiff's name as a symbol of identity, and not as a mere name.⁵⁹ No one has an exclusive right to the use of a name; anyone can be given or assume any name he or she likes.⁶⁰ The defendant becomes liable only when he uses a plaintiff's "name to pirate the plaintiff's identity" for his own advantage.⁶¹

Regarding the public disclosure of private facts, the Second Restatement assigns liability if: (1) the matter is disclosed to the public at large and not merely to an individual or a small group,⁶² (2) the matter is composed of private—rather than public—facts,⁶³ (3) the

55. *Id.* § 652A cmt. b.

56. Prosser, *supra* note 29, at 389. Prosser's four-branch model has its critics. At least one scholar has opined that it "overparticularizes common law developments, reducing them . . . to a misleading semblance of statutory precision. This threatens to stultify common law growth. The potential for further generalization from basic principles may be limited by excessive deference to the specific terms of the Restatement provisions." 2 FOWLER V. HARPER ET AL., *THE LAW OF TORTS*, § 9.6, at 633 n.3 (2d ed. 1986).

57. RESTATEMENT (SECOND) OF TORTS § 652C.

58. *See id.* § 652C cmt. a.

59. *See* KEETON ET AL., *supra* note 40, § 117, at 852.

60. *See id.*

61. *Id.* (explaining what constitutes an appropriation of an identity); *see also* Prosser, *supra* note 29, at 401-07; RESTATEMENT (SECOND) OF TORTS § 652C cmts. c, d.

62. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. a.

63. *See id.* § 652D cmt. b.

publicity is highly offensive to the ordinary reasonable person;⁶⁴ and (4) the matter is not of legitimate public concern.⁶⁵

Regarding false light in the public eye, the Second Restatement provides that a defendant who publicizes a matter concerning a plaintiff that places him before the public in a false light is liable to the plaintiff for invasion of privacy if: "(a) the false light in which the [plaintiff] was placed would be highly offensive to a reasonable person, and (b) the [defendant] had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the [plaintiff] would be placed."⁶⁶

This tort protects the interest of an individual in not being made to appear before the public in a false light or false position.⁶⁷ In many cases, a defamation action would also be available.⁶⁸ However, it is not necessary for this privacy tort that the plaintiff be defamed.⁶⁹ Rather, it is sufficient that the plaintiff is given unreasonable and highly objectionable publicity that attributes to the plaintiff characteristics, conduct, or beliefs that are false—placing the plaintiff before the public in a false position.⁷⁰

IV. UNREASONABLE INTRUSION ON ANOTHER'S SECLUSION

The gravamen of the tort of unreasonable intrusion on another's seclusion is the invasion into a private place or a private seclusion that the plaintiff has constructed around himself.⁷¹ Intrusion into one's solitude, seclusion, or private affairs "constitutes a basic and intrinsic infringement and invasion of the right to be let alone, and is a classic example of a tortious violation of the right to privacy."⁷² Indeed, solitude is "the core of true privacy,"⁷³ and the intrusion branch "is at the heart of privacy law."⁷⁴

64. *See id.* § 652D cmt. c.

65. *See id.* § 652D cmt. d

66. *Id.* § 652E. *See generally* KEETON, *supra* note 40, § 117, at 864 (detailing examples of this right of privacy).

67. *See* RESTATEMENT (SECOND) OF TORTS § 652E.

68. *See id.* § 652E cmt. b.

69. *See id.*

70. *See id.*; accord KEETON, *supra* note 40, § 117, at 864.

71. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c.

72. 8 SPEISER, *supra* note 29, § 30:9, at 872.

73. 1 MICHAEL POLELLE & BRUCE OTTLEY, ILLINOIS TORT LAW § 6.07, at 6-15 (2d ed. 1996).

74. *Id.* at 6, 14. "Undoubtedly, the tort of intrusion . . . illustrates more accurately than the other privacy torts the right to be left alone and represents the purest form of invasion." DAVID A. ELDER, THE LAW OF PRIVACY § 2:1, at 16 (1991) (internal quotes omitted).

Liability for intrusion occurs when one intentionally and in an unreasonable and highly offensive manner intrudes on the solitude of another.⁷⁵ The boundaries of this form of invasion of privacy are quite established.⁷⁶ Publicity is irrelevant to this type of invasion.⁷⁷ The intrusion alone subjects the defendant to liability.⁷⁸

Initially, there must be an intrusion, which can take any of several forms.⁷⁹ The defendant can physically intrude into a place where the plaintiff has secluded herself.⁸⁰ The defendant can intrude by spying on plaintiff, such as by peeping, eavesdropping, or wiretapping.⁸¹ The defendant can also intrude into the plaintiff's private matters, such as by opening personal mail, searching wallets or purses, or examining plaintiff's bank accounts and other personal documents.⁸²

Further, the intrusion must be highly offensive to a reasonable person.⁸³ Mere noises, bad manners, harsh names, or insulting gestures in public are not actionable.⁸⁴ To establish that an intrusion was objectively highly offensive, the evidence must show that the intrusion would cause mental suffering, shame, or humiliation to a reasonable person.⁸⁵

The determination of what is highly offensive to a reasonable person is usually a question for the factfinder. A trial court, however, must make a threshold determination of "offensiveness" in discerning the

75. See RESTATEMENT (SECOND) OF TORTS § 652B. As formulated by the Restatement (Second) of Torts: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." *Id.*

76. See 8 SPEISER, *supra* note 29, §30:9, at 874 ("The often quoted, approved and followed Restatement Torts, 2d §652B (as well as numerous Comments and illustrations) furnishes a strong underpinning of the law relating to tortious intrusion.").

77. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. a.

78. See *id.* § 652B cmts. a, b.

79. See *id.*

80. See *id.*

81. See *id.*

82. See *id.* § 652B cmt. b.

83. See *id.* § 652B cmt. d.

84. See *id.*; Prosser, *supra* note 29, at 390-91.

85. See, e.g., *Wolfson v. Lewis*, 924 F. Supp. 1413, 1420-21 (E.D. Pa. 1996) (interpreting Pennsylvania and Florida law); *Froelich v. Werbin*, 548 P.2d 482, 485 (Kan. 1976) (obtaining sample of hair from hospital patient without permission in an unobtrusive manner did not constitute a highly offensive intrusion); *DeAngelo v. Fortney*, 515 A.2d 594, 595 (Pa. Super. Ct. 1986) (finding business solicitations from two contractors inoffensive). The third and fifth districts of the Illinois Appellate Court also require such evidence. See *Davis v. Temple*, 673 N.E.2d 737, 744 (Ill. App. Ct. 5th Dist. 1996) (citing *Melvin v. Burling*, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 3rd Dist. 1986) (explaining that intrusion must cause anguish and suffering)).

existence of a cause of action for intrusion upon seclusion.⁸⁶ In making this determination, the court should consider all of the circumstances, including "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."⁸⁷

In addition, the intrusion must be into something that is considered private.⁸⁸ Thus, there is no liability for examining a public record concerning the plaintiff, or documents that the plaintiff is required to keep and make available for public inspection.⁸⁹ Further, a plaintiff has no general right to be let alone on a public street or in any other public place, since plaintiff is not in seclusion and plaintiff's appearance is open to the public eye.⁹⁰ Therefore, there is no liability for observing or even photographing plaintiff in a public place.⁹¹

However, even in a public place, there may be some matters that a plaintiff does not exhibit to the public, such as the plaintiff's underwear or the lack thereof. Accordingly, an invasion of privacy may result from an intrusion upon such a matter.⁹²

V. INTRUSION BRANCH IN ILLINOIS

The foregoing discussion reveals how the unreasonable intrusion on another's seclusion is a central aspect of invasion of privacy. The great majority of jurisdictions have recognized Prosser's formulation of this tort, which is embodied in Section 652B of the Second Restatement. Despite such overwhelming acceptance of this tort, it is not clear if intrusion on seclusion is recognized in Illinois. This section will first review the seminal invasion of privacy cases in

86. See, e.g., *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668, 678-79 (Cal. Ct. App. 1986) (finding television crew intruding into plaintiff's bedroom at a time of vulnerability and confusion for plaintiff did constitute highly offensive conduct); *Wolf v. Regardie*, 553 A.2d 1213, 1219-20 (D.C. 1989) (holding that using information from public sources was permissible); *People for the Ethical Treatment of Animals v. Berosini, Ltd.*, 895 P.2d 1269, 1281-82 (Nev. 1995) (determining that trespassing into hotel and filming plaintiff's animals without consent was not highly offensive); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 379 (Utah Ct. App. 1997) (finding short video presentation poking fun at sex and shown at Christmas party did not rise to level of highly offensive).

87. *Berosini*, 895 P.2d at 1282 (quoting *Miller*, 232 Cal. Rptr. at 679); see also *Stien*, 944 P.2d at 379.

88. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

89. See *id.*

90. See *id.*

91. See *id.*; see also Prosser, *supra* note 29, at 391-92.

92. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. c.

Illinois involving intrusion on seclusion.⁹³ The section will next discuss the consequences of those cases.⁹⁴

A. *The Intrusion Cases*

In 1970, the Illinois Supreme Court recognized, without delineating, the right to privacy in *Leopold v. Levin*.⁹⁵ Although the case was decided ten years after Prosser developed his four-branch model, the case involved solely the issue of appropriation and did not discuss the other three branches of Prosser's formulation.⁹⁶

In 1976, the Fourth District Illinois Appellate Court decided the first "post-Prosser" case involving unreasonable intrusion. In *Bureau of Credit Control v. Scott*,⁹⁷ the Bureau, a collection agency, sued Scott for payment of a hospital bill.⁹⁸ Scott counterclaimed, stating facts that described abusive debt collection practices through repeated harassing and threatening telephone calls to Scott at home and at work, including telephone calls to each of Scott's parents.⁹⁹ Her counterclaim specifically alleged invasion of privacy by unreasonable intrusion into seclusion, publicity which placed her in a false light, and public disclosure of private facts as well as intentional infliction of emotional distress.¹⁰⁰ The trial court dismissed the entire counterclaim.¹⁰¹

The appellate court reversed in part, holding that the counterclaim stated a cause of action for intentional infliction of emotional distress.¹⁰² The court, however, upheld the dismissal of the invasion of privacy counts with one dissent.¹⁰³ Citing prior cases, the court held that Illinois recognized an invasion of privacy action only for appropriation of a person's name or likeness for commercial purposes.¹⁰⁴ Also, since Scott had a claim for intentional infliction of emotional distress, the court concluded: "[W]e see no need to create

93. See *infra* Part V.A.

94. See *infra* Part V.B.

95. *Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970) (recognizing that even though a right to privacy claim existed in Illinois, no right existed where likeness and name of plaintiff were used in the public eye in association with a crime the plaintiff committed); see *supra* notes 33-38 and accompanying text (discussing common law right to privacy).

96. See *Leopold*, 259 N.E.2d at 253-54.

97. *Bureau of Credit Control v. Scott*, 345 N.E.2d 37 (Ill. App. Ct. 4th Dist. 1976).

98. See *id.* at 38.

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.* at 39.

103. See *id.* at 40.

104. See *id.*

additional remedies."¹⁰⁵

Approximately one year later, the Fifth District Illinois Appellate Court, in *Bank of Indiana v. Tremunde*¹⁰⁶ also refrained from recognizing the tort.¹⁰⁷ The bank brought a replevin suit against Donald Tremunde and Glenn Brown, who were doing business as a partnership.¹⁰⁸ The bank obtained a writ of replevin to recover from the partnership certain chattels in which the bank had a security interest.¹⁰⁹ Some of the partnership property was located on the Brown farm.¹¹⁰ Although Glenn and his wife owned the farm, his elderly parents lived there. One evening a county sheriff went to the Brown farm to serve Glenn with the writ of replevin.¹¹¹ Since Glenn did not live there, the sheriff explained the situation to the elder Brown and left a copy of the writ with him.¹¹² Shortly after, a group of men in trucks arrived and took cattle and equipment pursuant to the writ.¹¹³

The elder Browns intervened in the replevin suit and counterclaimed, alleging an invasion of privacy by intrusion upon seclusion.¹¹⁴ At the close of the evidence, the trial court directed a verdict in favor of the bank, finding that the elder Browns failed to prove an action for invasion of privacy.¹¹⁵

The appellate court affirmed.¹¹⁶ The court speculated that the Illinois Supreme Court would recognize a privacy action for unreasonable intrusion upon seclusion if appropriate facts were "alleged and proved."¹¹⁷ However, the appellate court concluded that the elder Browns had completely failed to provide sufficient evidence for such a cause of action.¹¹⁸ In this case, bank agents were acting under authority of a lawful court order in loading the cattle and equipment from plaintiff's farm onto trucks.¹¹⁹ Even though this process may have been noisy and disruptive, it did not constitute an

105. *Id.*

106. *Bank of Indiana v. Tremunde*, 365 N.E.2d 295 (Ill. App. Ct. 5th Dist. 1977).

107. *See id.* at 298.

108. *See id.* at 296.

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.*

114. *See id.*

115. *See id.* at 296-97.

116. *See id.* at 298.

117. *See id.*

118. *See id.*

119. *See id.*

unreasonable intrusion.¹²⁰

Similarly, in *Kelly v. Franco*,¹²¹ the Illinois Appellate Court in the First District upheld the dismissal of a complaint alleging invasion of privacy by unreasonable intrusion into seclusion.¹²² The court noted that although Illinois "recognizes an action for invasion of privacy . . . courts should proceed with caution in defining the limits of the right to privacy."¹²³ The court cited Prosser's four-branch model but did not acknowledge that Prosser's formulation was embodied in the Second Restatement.¹²⁴ The court noted that the *Tremunde* court did not find an Illinois case that specifically upheld such an action.¹²⁵ The court then relied on *Scott* in affirming the dismissal of the invasion of privacy count of plaintiff's complaint and stated that: "The clear implication in *Scott* is that in Illinois actions for invasions of privacy are limited to use of an individual's name or likeness for commercial purposes."¹²⁶ In *Kelly*, the defendants telephoned the plaintiff's residence many times and hung up when the phone was answered.¹²⁷ Even though the court considered privacy cases from other jurisdictions that enforced the cause of action, it found none similar to the facts in *Kelly*.¹²⁸ As a result, the court chose not to extend the holding in *Scott*.¹²⁹

In 1986, the Third District Illinois Appellate Court became the first court of review in Illinois to recognize the tort of invasion of privacy by intrusion on seclusion. In *Melvin v. Burling*,¹³⁰ the Melvins' complaint alleged that Burling intentionally ordered numerous items in their name without their consent, had the merchandise sent to them, and then made demands for payment for the unordered

120. *See id.*

121. *Kelly v. Franco*, 391 N.E.2d 54 (Ill. App. Ct. 1st Dist. 1979).

122. *See id.* at 59.

123. *Id.* at 57. Prior to discussing the common law tort of invasion of privacy, the court rejected plaintiffs' argument that Article I, Section 6, of the 1970 Illinois Constitution creates a cause of action for invasion of privacy. *See id.* at 56-57; *supra* notes 45-47 and accompanying text (discussing Article I, Section 6, of the Illinois Constitution).

124. *See Kelly*, 391 N.E.2d at 57.

125. *See id.*

126. *Id.* at 57-58. The court also added: "Moreover, we believe that even if we were to recognize a cause of action for unreasonable intrusion into the seclusion of another, we would still conclude that the facts upon which plaintiffs rely are insufficient to support that action." *Id.* at 58.

127. *See id.*

128. *See id.*

129. *See id.*

130. *Melvin v. Burling*, 490 N.E.2d 1011 (Ill. App. Ct. 3d Dist 1986).

merchandise.¹³¹ The Melvins claimed that Burling's acts constituted an invasion of privacy by unreasonable intrusion on their seclusion or solitude.¹³² The trial court granted Burling's motion to dismiss, finding that Illinois law only recognized an invasion of privacy based on the appropriation of a person's name or likeness for commercial purposes.¹³³

The appellate court unanimously reversed.¹³⁴ After reviewing *Scott*, *Tremunde*, and *Kelly*, the court recognized a cause of action based on unreasonable intrusion on the seclusion of another.¹³⁵ The court did not read *Scott* as holding that an invasion of privacy action based on intrusion on seclusion was nonexistent in Illinois.¹³⁶ Rather, the *Scott* court did not reach "a substantive decision on the matter since it had already reversed the trial court on the emotional distress count."¹³⁷ Further, "the *Kelly* case represents only an alternative holding based on an incorrect view of *Scott*."¹³⁸

After acknowledging the existence of a cause of action for invasion of privacy for the intrusion upon the seclusion in Illinois,¹³⁹ the appellate court then considered whether the Melvins pled sufficient facts to support the action.¹⁴⁰ The court first outlined the requirements for a cause of action for invasion of privacy based on intrusion on seclusion.¹⁴¹ The plaintiff must allege: "(1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be

131. *See id.* at 1012.

132. *See id.*

133. *See id.*

134. *See id.* at 1013. The court stated that it "must determine whether a cause of action exists in Illinois for an unreasonable intrusion upon the seclusion of another and, if so, whether the plaintiffs in the instant case have sufficiently stated such a cause of action in their complaint." *Id.* at 1012. Concerning the sufficiency of the complaints, the Illinois Supreme Court has explained:

To pass muster [in state court] a complaint must state a cause of action in two ways. First, it must be legally sufficient; it must set forth a legally recognized claim as its avenue of recovery. When it fails to do this, there is no recourse at law for the injury alleged, and the complaint must be dismissed. (citations omitted). Second and unlike Federal practice, the complaint must be factually sufficient; it must plead facts which bring the claim within the legally recognized cause of action alleged. If it does not, the complaint must be dismissed.

People *ex rel.* Fahner v. Carriage Way West, Inc., 430 N.E.2d 1005, 1009 (Ill. 1982) (citations omitted).

135. *See Melvin*, 490 N.E.2d at 1013.

136. *See id.*

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.*

141. *See id.*

offensive or objectionable to a reasonable man; (3) the matter upon which the intrusion occurs must be private; and (4) the intrusion [must cause] anguish and suffering."¹⁴² The court concluded that the Melvins pled sufficient facts to state a cause of action.¹⁴³

In *Lovgren v. Citizen's First National Bank of Princeton*,¹⁴⁴ the Illinois Supreme Court noted the disagreement within the appellate court but declined to definitively end it.¹⁴⁵ Lovgren obtained a second mortgage on his farm from defendant bank, but then failed to meet his financial obligations. The bank urged Lovgren to sell his farm, but he refused.¹⁴⁶ Advertisements in local newspapers and circulated handbills informed the public that Lovgren was selling his farm at a public auction to be held on a certain date.¹⁴⁷ These advertisements failed to mention that the bank had a mortgage on the property, or that the auction was being held to satisfy Lovgren's debt. Moreover, the bank had not begun mortgage foreclosure proceedings on the property.¹⁴⁸

However, such a sale was never scheduled, and Lovgren neither knew nor consented to the placement of the advertisements.¹⁴⁹ Lovgren alleged that the defendant's advertisements caused him to experience anguish and suffering and made it almost impossible to obtain refinancing of his mortgage loan.¹⁵⁰

Lovgren brought an invasion of privacy action for unreasonable intrusion on seclusion.¹⁵¹ The trial court granted the bank's motion to dismiss.¹⁵² The Third District Illinois Appellate Court reversed and remanded, holding that it recognized the tort in *Melvin*, and that Lovgren had pled sufficient facts to support an action.¹⁵³

Disagreeing with the appellate court, the Illinois Supreme Court found that Lovgren failed to state a cause of action for invasion of privacy based on unreasonable intrusion on seclusion.¹⁵⁴ As a result,

142. *Id.* at 1013-14.

143. *See id.* at 1014.

144. *Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987 (Ill. 1989).

145. *See id.* at 988

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See Lovgren v. Citizens First Nat'l Bank of Princeton*, 520 N.E.2d 91, 92-93 (Ill. App. Ct. 3d Dist. 1988), *vacated*, 534 N.E.2d 987 (Ill. 1989).

154. *See Lovgren*, 534 N.E.2d at 987-88.

the supreme court vacated the appellate court's decision. The supreme court found, however, that Lovgren did state a cause of action for invasion of privacy based on false light.¹⁵⁵

The court reached this conclusion based on Section 652B of the Second Restatement.¹⁵⁶ The court acknowledged Prosser's four-branch model of invasion of privacy, which the Second Restatement embodies.¹⁵⁷ Examining Section 652B and the accompanying comments, the court noted that the gravamen of the privacy tort of intrusion on seclusion is "some type of highly offensive prying into the physical boundaries or affairs of another person. The basis of the tort is not publication or publicity. Rather, the core of this tort is the offensive prying into the private domain of another."¹⁵⁸ Turning to Lovgren's complaint, the court concluded that the offense and the harm caused by the offense were not the result of prying, but of publication.¹⁵⁹

After discussing the legal principles embodied in the Second Restatement, and applying them to Lovgren's complaint, the court expressly refrained from adopting those principles as Illinois law.¹⁶⁰ The supreme court concluded that although Lovgren's complaint did not state a claim for the tort of unreasonable intrusion, it did satisfy the elements of "publicity placing another person in a false light."¹⁶¹ The court then discussed the privacy tort of false light and its elements, as Prosser and the Second Restatement recognize, and adopted invasion of privacy based on false light as Illinois law.¹⁶²

As in *Lovgren*, the First District Illinois Appellate Court has continued to apply to complaints the *Melvin* court's four "elements" of an invasion of privacy action for intrusion on seclusion without first

155. *See id.* at 987.

156. *See id.* at 988-89.

157. *See id.* at 988.

158. *Id.* at 989 (citing RESTATEMENT (SECOND) OF TORTS § 652B, cmts a, b (1977)).

159. *See id.*

160. *See id.* The court stated:

We emphasize that our discussion of the tort of unreasonable intrusion into the seclusion of another, as enunciated by the Restatement and by Prosser, does not imply a recognition by this court of such a cause of action. We note that there is a conflict among the Illinois appellate court districts as to whether this cause of action should be recognized in this State. [citation omitted.] We do not find it necessary, however, to resolve these differences in this case.

Id.

161. *Id.*

162. *See id.* at 989-92.

recognizing the cause of action.¹⁶³ In several cases, the court held that those plaintiffs did not sufficiently allege the first element of that test, which is an unauthorized intrusion or prying into the plaintiff's seclusion. The court in those cases, however, did not specifically hold that the cause of action actually exists in Illinois.¹⁶⁴

B. *The Consequences*

One result of the aforementioned cases is uncertainty as to the very existence of the tort of intrusion on seclusion in Illinois. Local federal courts particularly recognized this uncertainty.¹⁶⁵ Another result of the Illinois intrusion cases is that some Illinois Appellate Courts continue to ascertain the existence of the tort.¹⁶⁶ In any event, local federal courts should conclude that the tort is viable in Illinois.

163. See *Dwyer v. American Express Co.*, 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1st Dist. 1995) ("As a preliminary matter, we note that a cause of action for intrusion into seclusion has never been recognized explicitly by the Illinois Supreme Court."); *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 904 (Ill. App. Ct. 1st Dist. 1990) (stating that the defendant's actions did not "constitute an unreasonable intrusion into the seclusion of another"); *Mucklow v. John Marshall Law Sch.*, 531 N.E.2d 941, 946 (Ill. App. Ct. 1st Dist. 1988) (holding that the student did not show a right to privacy with regard to his student file and that he therefore failed to state a claim of "intrusion into seclusion").

The word "element" implies a recognized test. However, this test is apparently hypothetical since the first district has not yet recognized the cause of action. See *Dwyer*, 652 N.E.2d at 1353-54; *Miller*, 560 N.E.2d at 904; *Mucklow*, 531 N.E.2d at 946.

Indeed, one must remember that the Second Restatement formulation of intrusion on seclusion, standing alone, does not constitute binding authority. Rather, the Restatements of the Law are merely persuasive secondary authority. A restatement on a subject does not have the force of law until a court of appropriate jurisdiction or a legislature adopts it. See J. MYRON JACOBSTEIN ET AL., *FUNDAMENTALS OF LEGAL RESEARCH* 10-11, 428-31 (7th ed. 1998); James F. Byrne, Jr., Comment, *Reevaluation of the Restatement as a Source of Law in Arizona*, 15 ARIZ. L. REV. 1021, 1023-26 (1973).

164. See *Dwyer*, 652 N.E.2d at 1354; *Miller*, 560 N.E.2d at 904; *Mucklow*, 531 N.E.2d at 946. Similarly, in *Hall v. InPhoto Surveillance Co.*, 649 N.E.2d 83, 85 (Ill. App. Ct. 4th Dist. 1995), which was an appeal from the entry of summary judgment in favor of defendant, the court noted that "the supreme court has specifically declined to settle the issue of whether the 'intrusion upon seclusion' tort is actionable in Illinois." *Id.* The court stated that it need not determine whether it would continue to follow *Bureau of Credit Control v. Scott*, which held that the cause is not actionable, "because, even if it is, plaintiffs' claim fails because there is no proof to support the pleadings." *Hall*, 649 N.E.2d at 85.

165. See, e.g., *Kelly v. Mercoid Corp.*, 776 F. Supp. 1246, 1257 (N.D. Ill. 1991); *Owusu v. Grzyb*, 749 F. Supp. 897, 907 (N.D. Ill. 1990) (both cases noting disagreement among Illinois Appellate Court districts as to whether the tort exists).

166. See *supra* notes 131-44, 164-65 and accompanying text.

In several jurisdictional contexts, federal district courts in Illinois must apply Illinois substantive law to cases brought to their courts.¹⁶⁷ Those courts have needed to determine whether the tort of intrusion on seclusion is actionable in Illinois. Illinois state courts' decisions, however, have confused local federal courts in their attempts to find a definitive answer.

In *Ludemo v. Klein*,¹⁶⁸ the federal district court was presented with this question. After discussing *Lovgren*, the court observed that the Illinois Supreme Court's decision was "disquieting."¹⁶⁹ The supreme court expressly declined to decide whether the tort of invasion of privacy based on unreasonable intrusion on seclusion existed in Illinois. Yet, the supreme court held that the specific facts of *Lovgren* did not meet the requirements for an unreasonable intrusion on seclusion.¹⁷⁰ Thus, the district court noted that the supreme court's holding seems to recognize the tort's existence.¹⁷¹ The district court then held "that if forced to resolve this issue, the Illinois Supreme

167. See *Erie v. Tompkins*, 304 U.S. 64, 65 (1938) ("[I]t is settled, beyond question that it is the Pennsylvania law which the federal courts . . . are bound to ascertain and apply."); 19 CHARLES WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4501, at 2 (2d ed. 1996) (discussing the core of the *Erie* doctrine and stating that "the substantive law to be applied by the federal courts in any case is state law . . . ,” subject to qualifications).

168. *Ludemo v. Klein*, 771 F. Supp. 260, 261 (N.D. Ill. 1991).

169. See *id.*

170. See *id.*

171. See *id.* Specifically, the court stated:

It is disquieting that a court can hold that certain acts do not meet the requirements of a given cause of action and also deny that the cause of action exists. If the cause of action does not exist, against what standards can a court measure the party's actions? When the cause of action does not exist, then *no* set of actions can be said to fit within that (uncognizable) claim for relief. The Supreme Court, however, discussed whether the actions of the defendant in *Lovgren* fit into this (hypothetical) cause of action. This is not to say a court may never rule in the subjunctive mode, *i.e.*, "were this to be the law, we would still rule as we do." The problem here is that the "contours" of the tort are simply not so well defined that the application of doctrine can be decided hypothetically The problem here is complicated because the Supreme Court did not speak in a hypothetical or subjunctive mode. It quite clearly *holds* that certain conduct does not constitute unreasonable intrusion on seclusion and then *holds* that it does not decide the question of whether the tort exists. By denying that the court is reaching the issue, after having plainly reached the merits of the issue, the court is coy. There is no principled difference between recognizing the "contours" of the tort and recognizing the tort in the way the Supreme Court did so in *Lovgren*.

Id.; see also 1 POLELLE, *supra* note 74, § 6.07, at 6-13 to 6-14 ("Somewhat surprisingly, the Illinois Supreme Court then added 'We emphasize that our discussion of the tort of unreasonable intrusion into the seclusion of another, as enunciated by the Restatement and by Prosser, does not imply a recognition by this court of such a cause of action.'").

Court would hold that the tort exists.”¹⁷²

In contrast, the federal district court in *Kelly v. Mercoïd Corp.*¹⁷³ could not ascertain whether the cause of action exists in Illinois. The defendant manufacturer required its employees who handle open mercury to submit to periodic physical examinations, including urinalysis testing.¹⁷⁴ The plaintiff refused to submit to urinalysis testing and was discharged.¹⁷⁵ The plaintiff alleged that this requirement constituted an invasion of privacy by intrusion.¹⁷⁶ The court could not conclude that the tort exists in Illinois and did not speculate whether it would be recognized.¹⁷⁷ Since the plaintiff never submitted to a urinalysis test, however, the court reasoned that “she has not, and cannot, demonstrate an unauthorized intrusion.”¹⁷⁸

Although it is unclear whether the tort of intrusion on seclusion exists in Illinois, it is clear that the Illinois Appellate Courts continue to deliberate the issue. The courts’ careful consideration has resulted in their growing recognition of the tort. This evolving jurisprudence should guide local federal courts to conclude that the tort is viable in Illinois.

In 1996, the Fifth District Illinois Appellate Court, the court that decided *Tremunde*,¹⁷⁹ recognized the privacy tort of intrusion into seclusion.¹⁸⁰ In *Davis v. Temple*, Davis’s complaint presented an invasion of privacy based on intrusion into seclusion.¹⁸¹ The appellate court framed its analysis into two separate questions. First, did Davis allege a recognized cause of action? Second, did Davis allege sufficient facts to state the cause of action?¹⁸²

172. *Ludemo*, 771 F. Supp. at 262; accord *Amati v. Woodstock*, 829 F. Supp. 998, 1010-11 (N.D. Ill. 1993) (“The court is of the opinion that if Illinois courts were to adopt [the tort of intrusion upon seclusion], they would also recognize a cause of action as pled in this case”). The court in *Ludemo* concluded that the complaint stated a cause of action for intrusion on seclusion. See *Ludemo*, 771 F. Supp. at 262.

173. *Kelly v. Mercoïd Corp.*, 776 F. Supp. 1246, 1257 (N.D. Ill. 1991).

174. See *id.* at 1249.

175. See *id.* at 1249-50.

176. See *id.* at 1256-57.

177. See *id.* at 1257. The court noted the disagreement between the Illinois Appellate Court Districts as to whether the tort exists in Illinois, and that the Illinois Supreme Court has not resolved the conflict. See *id.*

178. *Id.*

179. See *supra* notes 107-121 and accompanying text (discussing the *Tremunde* court’s reluctance to recognize the “intrusion into seclusion” tort).

180. See *Davis v. Temple*, 673 N.E.2d 737, 742 (Ill. App. Ct. 5th Dist. 1996).

181. See *id.*

182. See *id.* at 742-44.

The *Davis* court examined the Second Restatement, the supreme court's discussion of the tort in *Lovgren*, and the history of the tort in the Illinois Appellate Court.¹⁸³ The *Davis* court concluded that it should adopt the four-prong test outlined in *Melvin* for determining whether a plaintiff states a cause of action for unreasonable intrusion on seclusion.¹⁸⁴ Further, the court noted that nothing in the Illinois Supreme Court decisions precluded this court from recognizing this tort. Thus, the court expressly recognized the tort of unreasonable intrusion on seclusion.¹⁸⁵ Nonetheless, turning to the second issue in its analysis, the *Davis* court held that *Davis* did not allege sufficient facts to state a cause of action.¹⁸⁶

This evolving jurisprudence should guide local federal courts to conclude that the privacy tort of intrusion on seclusion is viable in Illinois. When Illinois substantive law provides the rule of decision for a local federal court, that court must decide the case as the Illinois Supreme Court would decide it if that court were presented with that issue. If no state statute or case law controls the issue, the local federal court must "determine how the case would be decided if presented today to the Supreme Court of Illinois."¹⁸⁷

Further, where the Illinois Supreme Court has not directly confronted an issue, "[i]ntermediate appellate court cases are useful but not binding evidence of what the Illinois Supreme Court would do in a

183. *See id.*

184. *See id.* at 744.

185. *See id.* The court stated:

A review of this area of law leads us to adopt the four-pronged test set forth in *Melvin* for determining whether a cause of action has been properly alleged for intrusion upon seclusion. Nothing written by our supreme court on this area of the law leads us to believe that such a cause of action should not be recognized in Illinois. Therefore, after careful consideration, we expressly recognize a cause of action for unreasonable intrusion into the seclusion of another.

Id.

186. *See id.*

187. *Ross v. Creighton Univ.*, 957 F.2d 410, 413 (7th Cir. 1992). The court's duty has been explained as follows:

In divining and applying the law of the forum state in diversity of citizenship cases, each federal court—whether it be a district court or an appellate court—functions as a proxy for the entire state court system, and therefore must apply the substantive law that it conscientiously believes would have been applied in the state court system, which includes the state appellate tribunals. In other words, the federal court must determine issues of state law as it believes the highest court of the state would determine them, not necessarily (although usually this will be the case) as they have been decided by other state courts in the past.

19 WRIGHT, *supra* note 167, § 4507, at 126-30 (citations omitted).

similar case.”¹⁸⁸ The local federal court must reach its decision based on the decisions of the Illinois Supreme Court, the Illinois Appellate Court, and other state courts on the same issue.¹⁸⁹

Based on these principles, a local federal court, if faced with this question, should conclude that the tort of intrusion on seclusion is viable in Illinois. Initially, the Illinois Supreme Court has expressly recognized both the general tort right to privacy¹⁹⁰ and the Second Restatement branch of false light.¹⁹¹ Additionally, examining the four appellate court decisions on the question, the two decisions that refused to recognize the tort are older (at least twenty years),¹⁹² while the two decisions that recognize the tort are more recent.¹⁹³ Also, most American jurisdictions have adopted Prosser’s four-branch model formulated in the Second Restatement.¹⁹⁴ From this weight of authority, it is logical to conclude that the Illinois Supreme Court

188. *Green v. J.C. Penney Auto Ins. Co.*, 806 F.2d 759, 761 (7th Cir. 1986). When a case involves unresolved questions of state law, the court is forced to look elsewhere to resolve the issue. For example, the *Green* court stated:

If the forum state’s highest court has not ruled on a particular issue, the decisions of the intermediate appellate court or courts of that state constitute the next best indicia of what state law is and normally should be followed by a federal court sitting in that state Although these decisions must be given proper respect and cannot be disregarded simply because the federal court finds them unsound, state intermediate appellate courts can be wrong in a sense in which the highest court of a state cannot be in error. And, it must be remembered, a federal court has a duty to determine state law as it believes the state high court would. Thus, intermediate appellate court decisions may be disregarded if the federal court is convinced by other persuasive data that the highest court of the forum state would decide the matter in a different fashion.

19 WRIGHT, *supra* note 168, § 4507, at 150-57 (citations omitted).

189. *See Ross*, 957 F.2d at 413 (quoting *Brooks v. Chicago Downs Ass’n*, 791 F.2d 512, 514 (7th Cir. 1986)).

190. *See Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970) (holding that privacy is a value that should enjoy the law’s protection); *see supra* Part V.A and accompanying text (discussing the evolution of the intrusion tort).

191. *See Lovgren v. Citizens First Nat’l Bank of Princeton*, 534 N.E.2d 987, 989-90, 992 (Ill. 1989) (declining to end the debate over the existence of the intrusion into seclusion tort, but finding a cause of action for invasion of privacy based on false light); *see supra* notes 155-63 and accompanying text (discussing how the tort invasion of privacy based on false light sustains the argument that a tort exists for intrusion into seclusion).

192. *See Kelly v. Franco*, 391 N.E.2d 54, 58 (Ill. App. Ct. 1st Dist. 1979); *Bureau of Credit Control v. Scott*, 345 N.E.2d 37, 40 (Ill. App. Ct. 4th Dist. 1976).

193. *See Davis v. Temple*, 673 N.E.2d 737, 744 (Ill. App. Ct. 5th Dist. 1996); *Melvin v. Burling*, 490 N.E.2d 1011, 1013 (Ill. App. Ct. 3d Dist. 1986).

194. *See People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269, 1278 (Nev. 1995), *modified by City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 940 P.2d 134 (Nev. 1997).

should recognize the tort of inclusion into seclusion.¹⁹⁵

VI. SHOULD THE TORT BE RECOGNIZED?

In appropriate cases, Illinois state courts should recognize the tort of unreasonable intrusion on the seclusion of another. Courts in other jurisdictions have recognized at least two justifications for the tort. These rationales mirror those for the general concept of invasion of privacy.

Some courts have declared as self-evident that the facts of particular cases entitled plaintiffs to seclusion.¹⁹⁶ To some courts, the axiomatic right to privacy in the form of intrusion on seclusion is "derived from natural law."¹⁹⁷

In other cases, courts found this axiomatic right by way of analogy. In those cases, after discussing the general right to privacy, courts noted that the defendants' conduct constituted criminal offenses. Thus, it was self-evident that such conduct can be the grounds of a civil suit.¹⁹⁸

Another justification for the tort of intrusion on seclusion is that it is more utilitarian. For example, in a case involving a physical intrusion into plaintiff's home with the intruder wearing a hidden microphone, the court explained why the tort should be available:

195. See *Ludemo v. Klein*, 771 F. Supp. 260, 262 (N.D. Ill. 1991) ("We find that if forced to resolve this issue, the Illinois Supreme Court would hold that the tort exists."); accord *Amati v. Woodstock*, 829 F. Supp. 998, 1009 (N.D. Ill. 1993) (discussing reasons why the court should adopt the tort of intrusion upon seclusion).

196. See *De May v. Roberts*, 9 N.W. 146, 149 (Mich. 1881) (holding that the plaintiff had a legal right to privacy).

197. *Pritchett v. Board of Comm'rs of Knox County*, 85 N.E. 32, 35 (Ind. 1908). As one court explained:

We approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should "protect people, not places."

Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969) (footnotes omitted) (interpreting District of Columbia law).

198. See, e.g., *Rhodes v. Graham*, 37 S.W.2d 46, 47 (Ky. 1931) (discussing how common-law eavesdropping gives rise to a cause of action for invasion of privacy); *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716, 718 (La. Ct. App. 1956) (discussing how a plaintiff has a cause of action for invasion of privacy when he or she shows that a defendant may have violated a "Peeping Tom" statute).

To maintain the right of privacy and the right to be let alone is rapidly becoming more difficult. Already there are devices which may record the most secret and confidential conversations from substantial distances without entry on the premises and without any kind of equipment on such premises. There can be no peace if neighbors and friends, as well as enemies, vicariously join in the confidential discussions occurring in home, office, and places not open to the public. Merely knowing what your neighbor thinks about you may generate thoughts of mayhem, if not murder.¹⁹⁹

As Prosser recognized, the privacy tort of unreasonable intrusion on another's seclusion protects a primarily mental interest. "It has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights."²⁰⁰ Since Illinois law clearly recognizes the other three branches of the tort of invasion of privacy,²⁰¹ Illinois courts should recognize the branch of intrusion on seclusion. "The desire for privacy illustrated by these examples is a mysterious but deep fact about human personality. It deserves and in our society receives legal protection."²⁰²

VII. CONCLUSION

There are relatively few reported decisions in which plaintiffs successfully asserted claims based on unreasonable intrusion on seclusion.²⁰³ Nonetheless, the bench and the bar should be familiar with this form of invasion of privacy. The interest that this tort protects runs deep in the human heart and resides at the core of the tort

199. *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968), *aff'd*, 449 F.2d 245 (9th Cir. 1971). Speaking of such electronic eavesdropping, a local federal court similarly reasoned: "In plain language, it ruins the privacy. One would never obtain the full benefits accorded to a private place if he or she reasonably believed someone would or could be listening." *Amati*, 829 F. Supp. at 1010.

200. Prosser, *supra* note 29, at 392.

201. See *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 990 (Ill. 1989) (discussing invasion of privacy based on false light); *Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970) (recognizing privacy generally); *Beverly v. Reinert*, 606 N.E.2d 621, 624-25 (Ill. App. 2d Dist. 1992) (discussing public disclosure of private facts); *Eick v. Perk Dog Food Co.*, 106 N.E.2d 742, 745 (Ill. App. Ct. 1st Dist. 1952) (holding the right of privacy can be violated by the appropriation of name or likeness).

202. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (interpreting Illinois law).

203. "[M]ost individuals not acting in some clearly identified official capacity do not go into private homes without the consent of those living there; not only do widely held notions of decency preclude it, but most individuals understand that to do so is either a tort, a crime, or both." *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668, 678-79 (Cal. Ct. App. 2d Dist. 1986).

right to privacy. In appropriate cases, Illinois courts should recognize this cause of action.