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Intrusion upon Seclusion: Bringing an "Otherwise" Valid Cause of Action into the 21st Century

Adam J. Tutaj

INTRUSION UPON SECLUSION: BRINGING AN "OTHERWISE" VALID CAUSE OF ACTION INTO THE 21ST CENTURY

> The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbors. To this invention must be opposed general principles, calculated to meet and punish them.[1]

I. INTRODUCTION

In 1890, Samuel D. Warren and Louis D. Brandeis introduced America's jurisprudence to the notion of the "right to privacy."[2] In so doing, they also pointed out the dangers of "numerous mechanical devices [that] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"[3] Although courts have been mindful of this prediction, and have tried to anticipate the coming of these devices,[4] our nation's privacy jurisprudence is struggling to keep pace with technology.

The vast majority of cases dealing with the privacy implications of modern surveillance technologies have arisen in the context of fourth amendment search and seizure law.[5] The common law, on the other hand, has had little opportunity to address such issues. One reason for this may be, as Justice Powell observed, dissenting in *Dow Chemical Co. v. U.S.*,[6] that "members of the public" are not likely to use such surveillance equipment because of the cost.[7] But based on the competitive

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1. Commonwealth v. Taylor, 5 Binn. 277, 281 (Pa. 1812).

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

3. *Id.* at 195 (source of internal quotation not cited in original).

4. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 138 (1984) (Brennan, J. dissenting) (pondering the Fourth Amendment ramifications "if a device were developed that, when aimed at a person, would detect instantaneously whether the person is carrying cocaine . . . [or] that could detect, from the outside of a building, the presence of cocaine inside.").

5. *See generally*, Merrick D. Bernstein, *"Intimate Details": A Troubling New Fourth Amendment Standard for Government Surveillance Techniques*, 46 DUKE L.J. 575 (1996) (citing and discussing cases dealing with the fourth amendment implications of such modern surveillance techniques as satellite photography and thermographic imaging).

6. 476 U.S. 227 (1986).

7. *Id.* at 251 n.13. The particular surveillance technology at issue in *Dow* was a sophisticated "mapping camera" mounted to an airplane. *Id.* at 242. The cost of the camera was approximately $22,000. *Id.* at n.4.

market that exists today for such technology,[8] this reasoning seems suspect. However, there is another more likely explanation for this disparity: criminal defendants *know* they have been surveyed—because that is what usually leads to their arrest—and *can*, therefore, complain of it.

One of the more insidious aspects of modern surveillance technology is its passivity. Those who do not know that they are being spied on cannot complain of it. Furthermore, even if they do learn of it, the common law remedy for such an invasion, intrusion upon seclusion, may not be prepared to deal with the technology involved.

Intrusion upon seclusion has long been the problem child of tort law. Ever since its birth in 1960,[9] courts have struggled to strike a balance between protecting an individual's seclusion and protecting "the freedom of action and expression of those who threaten the seclusion of others."[10] To this end, the tort has limited its protection of privacy interests by requiring that a plaintiff show the following: (1) that he or she had an actual expectation of privacy and that such expectation was objectively reasonable;[11] and (2) that the intrusion into this private sphere was highly offensive.[12] Modern technology, however, makes this difficult in a number of ways.

First, some technologies are capable of divining information from facts and conditions which people broadcast unknowingly.[13] As such, it can be argued that there is no *actual* expectation of privacy in such information. Additionally, some technologies are capable of legitimately gathering private information in such an unobtrusive way that it is hard to categorize it as "highly offensive." As a result, many intrusion victims will have a difficult task in meeting their burden of proof. If these in-

8. *See infra* Part III.C.

9. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). "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." RESTATEMENT (SECOND) OF TORTS § 652B (1977).

10. PETA v. Bobby Berosini, Ltd., 895 P.2d 1269, 1279 (Nev. 1995) (quoting 2 FOWLER V. HARPER ET. AL., THE LAW OF TORTS, § 9.6, at 636 (2d ed. 1986)).

11. *See Bobby Berosini, Ltd.*, 895 P.2d at 1279; N.O.C., Inc. v. Schaefer, 484 A.2d 729, 732 (N.J. Super. Ct. Law Div. 1984); Prosser, *supra* note 9, at 391-92.

12. *See, e.g.*, Miller v. National Broad. Co., 232 Cal. Rptr. 668 (Cal. App. 2 Dist. 1986). The Court in *Miller* laid out the following factors when determining the offensiveness of an intrusion: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motive and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *Id.* at 679. *See also*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 855 (5th ed. 1984).

13. See *infra* Part III.C.2 for a discussion of such devices.

consistencies are not addressed, modern technology will eviscerate many objectively reasonable expectations of privacy.[14]

That the unique issues raised by technological surveillance devices are currently beyond the intrusion tort's ken is apparent from the Restatement's crude categorization of the forms of intrusion as "physically or otherwise." This Comment posits that a better reasoned conceptual framework would more precisely delineate the actionable forms of intrusion, especially with respect to those non-physical forms of intrusion committed by the use of the senses. Any meaningful reconception in this regard, however, must be premised on an understanding of the nature of sensory intrusion in general.

Part II of this Comment will explore the development of the intrusion tort—from its conception one stormy night in Michigan to its incorporation into the Restatement (Second) of Torts. Part III discusses that category of intrusions based solely on the use of the senses. It begins by explaining the distinction between "appreciating" and "discerning" with the senses. This section goes on to show how the tort of intrusion has recognized this distinction, and how technology has expanded and collapsed this distinction. Finally, Part IV of this Comment will consider the application of the intrusion tort to claims of intrusion by technological means, both real and academic.

II. INTRUSION UPON SECLUSION: A BIOGRAPHY

A. Conception

It was a dark and stormy night.[15] Dr. DeMay, a physician, had been summoned to visit one Mrs. Roberts, who was expected to give birth at any time. Unfortunately, the roads to her house were so bad that no horse could traverse them.[16] Dr. DeMay, sick and fatigued from overwork, urgently requested a young man named Scattergood to assist him by carrying a lantern, an umbrella, and certain medical equipment. Scattergood—who was unmarried and had no medical training—was reluctant to go but eventually agreed.[17]

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14. *See* Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 1173 (1998) ("There are more ways to conduct surveillance than ever before.... This new technology therefore gives the media the power to invade privacy in ways that current [intrusion] doctrine does not fully apprehend.").

15. DeMay v. Roberts, 9 N.W. 146 (Mich. 1881).

16. *See id.* at 146-47.

17. *See id.*

Upon arriving at Mrs. Roberts' house, Dr. DeMay knocked on the door and was met by her husband. The doctor told Mr. Roberts that he had brought "a friend along to help carry [his] things."[18] Mr. Roberts, assuming that Scattergood was either a physician or medical student, was satisfied with Dr. DeMay's recommendation and invited the men to enter.[19]

When it came time for Mrs. Roberts to give birth, Scattergood sat in a corner and faced a wall.[20] However, Dr. DeMay soon ordered Scattergood to assist him by holding Mrs. Roberts' hand during a particularly pronounced paroxysm of parturient pain.[21] Though Scattergood's assistance was brief, and the child was born without incident, Mr. and Mrs. Roberts were mortified when they later learned the true character of Dr. DeMay's companion. Demanding satisfaction for this deceit, they brought suit against Dr. DeMay and Scattergood.[22]

The Supreme Court of Michigan upheld a judgment in favor of the couple but did not specify the precise ground for recovery.[23] Although trespass and battery were certainly good candidates,[24] the court seemed to take particular issue with Scattergood's act of bearing witness to something he should not have, holding:

> To the plaintiff, the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring

18. DeMay v. Roberts, 9 N.W. 146, 147 (Mich. 1881).

19. *See id.*

20. *See id.* at 148.

21. *See id.* Originally, Mrs. Roberts was being tended to by her husband, Dr. DeMay, and one Mrs. Parks. However, during the pains of labor, Mrs. Roberts kicked Mrs. Parks in the stomach, forcing her to go outside for the air. While Mrs. Parks was away, Mrs. Roberts began thrashing, at which point Dr. DeMay told Scattergood to "catch her." *Id.*

22. *See id.* at 149.

23. *See id.* The court simply stated that "both parties [DeMay and Scattergood] were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants." *Id.*

24. *See id.* at 146. The court began its decision by indicating that Dr. DeMay "intending to deceive [Mrs. Roberts] wrongfully, etc., introduced and caused to be present at the house . . . the said Scattergood . . . ." *Id.* Likewise, the court indicated that "the defendant Scattergood . . . indecently, wrongfully and unlawfully laid hands upon and assaulted [Mrs. Roberts] . . . ." *Id.*

others to observe it, and abstain from its violation.[25]

And thus, on that dark and stormy night, a new cause of action was conceived.[26]

B. Birth

In 1960, Dean William Prosser undertook an analysis of the law of privacy, as it had developed in legal writing and case law.[27] Prosser concluded that invasion of privacy was not *one* tort, but a complex of four.[28] He described these four distinct torts as follows: (1) intrusion upon a plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about a plaintiff; (3) publicity which places a plaintiff in a false light in the public eye; and (4) appropriation, for a defendant's advantage, of a plaintiff's name or likeness.[29]

Prosser divined the tort of intrusion—ex post—from the case of *DeMay v. Roberts*[30] and numerous other cases in which there was some form of wrongful search or surveillance.[31] From an analysis of these cases, he distilled three prerequisites for maintaining a successful intrusion action: (1) "there must be something in the nature of prying or intrusion";[32] (2) "the thing into which there is prying or intrusion must be,

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25. *Id.* at 149.

26. For an example of how the *DeMay* case would turn out today, see *Knight v. Penobscot Bay Medical Center*, 420 A.2d 915 (Me. 1980). In the *Knight* case, the supreme court of Maine applied the Restatement definition of intrusion upon seclusion to a fact pattern roughly analogous to that in *DeMay*. In so doing, the court upheld a jury verdict for the defendant on the ground that the jury could reasonably infer that the defendant had no intent to intrude. *See id.*

27. *See* Prosser, *supra* note 9, at 388-89 ("It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today with something over three hundred cases in the books, the holes in the jigsaw puzzle have been largely filled in, and some rather definite conclusions are possible.").

28. *See id.* at 389.

29. *See id.* Prosser emphasized that these were four *distinct* kinds of invasions of four *different* interests of a plaintiff. Despite their common name—invasion of privacy—they have almost nothing in common. *See id.*

30. 9 N.W. 146 (Mich. 1881).

31. *See* Prosser, *supra* note 9, at 389-90. Prosser observed that there were two types of intrusions: physical (which overlapped trespass to land or chattels) and non-physical (encompassing eavesdropping by means of wire tapping and microphones and peering into the windows of a home). *See id.* at 390.

32. *Id.* at 390 (observing that mere noises, bad manners, harsh names, and insulting gestures are not sufficient).

and be entitled to be, private";[33] and (3) "the intrusion must be something which would be offensive or objectionable to a reasonable man."[34]

C. Baptism

The Restatement (Second) of Torts, of which Dean Prosser served as Reporter until June, 1970, incorporated the tort of "intrusion upon seclusion."[35] The Restatement's definition, which has since been adopted by the vast majority of American jurisdictions, echoes the prerequisites articulated by Dean Prosser earlier, providing: "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."[36] Comment (b) to the Restatement explicates the definition of intrusion by distinguishing those intrusions described as "physical" and those lumped together as "otherwise."[37]

A "physical" intrusion is one which involves some trespass to land.[38] The *DeMay* case is an example of such an intrusion.[39] On the other

33. *Id.* at 391-92. (observing that it is not an invasion of privacy to do no more than follow a plaintiff about in public. Likewise, it is no invasion of privacy to take the plaintiff's photograph in public, because it amounts to nothing more than making a record of a public sight which any one present would be free to see). An astute scholar of Fourth Amendment jurisprudence should instantly recognize the similarity between Prosser's two-part privacy requirement and the two-prong "expectation of privacy" analysis articulated by Justice Harlan, seven years later, concurring in *Katz v. U.S.*, 389 U.S. 347, 361 (1967).

34. Prosser, *supra* note 9, at 390-91.

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

36. *Id.*

37. *Id.*

38. *Id.* at cmt. b.

39. *See* discussion *supra* Part II.A. The Restatement's illustration of such an intrusion presents the scenario of a newspaper reporter who sought to interview a woman in the hospital with a rare disease. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 1 (1977). The reporter was denied an interview, but showed up at the woman's hospital room anyway and took her picture – over the woman's objection. *See id.* The Restatement concluded that this action constituted an invasion of privacy. *See id.* Today, however, these kinds of cases generally arise in the context of trespass by deceit, rather than overt, forcible entry. *See, e.g.*, Desnick v. American Broad. Cos., Inc., 44 F.3d 1345 (7th Cir. 1995) (Trespass action brought against television network for engaging in undercover investigation of the plaintiff's business on the theory of consent obtained by fraud; citing numerous intrusion upon seclusion cases); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (Intrusion action brought by practitioner of "simple quackery" against magazine reporters who did an undercover investigation of his home "medical" practice; premised on the trespatory nature of the surreptitious introduction of recording devices); Miller v. National Broad. Co., 232 Cal. Rptr. 668 (Ct. App. 1986) (Intrusion action brought against television camera crew who accompanied paramedics into plaintiff's home and recorded efforts to rescue plaintiff's husband, who was having a heart attack; camera crew's defense of First Amendment privilege to enter rejected).

hand, those intrusions lumped together under the broad appellation "otherwise" appear to fall into three separate categories: (1) those involving some trespass to chattels;[40] (2) those involving a purely sensory invasion;[41] and (3) those involving some sort of harassment.[42] In recent years, however, there have been numerous attempts to include information gathering and dissemination as a form of intrusion upon seclusion[43]—no doubt in response to the exponential growth of the information industry in this computerized age.[44] However, only recently has a plaintiff alleging intrusion through information gathering succeeded in court.[45] As such, the viability of such a species of intrusion is speculative

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40. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977). Comment (b) cites the following examples: "opening [a plaintiff's] private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents." *Id.*

41. *See id.* Comment (b) observes that an intrusion may be committed "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars. . . ." *Id.* The Comment also makes reference to the use of wiretapping. *See id.* However, because surreptitious recording devices generally require that some sort of technical trespass to land or chattels be committed, through either their installation or introduction, they are more properly viewed as belonging to that category of intrusions involving a trespass. *See, e.g.*, Shulman v. Group W Prod., Inc., 955 P.2d 469, 492 (Cal. 1998) (analogizing mechanical recording devices to an "unannounced second auditor" in concluding that a reporter's act of attaching a microphone to a paramedic might constitute an actionable intrusion upon seclusion).

42. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b illus. 5 (1977) ("A . . . telephones B . . . every day for a month, insisting that [B] come to his [A's] studio and be photographed. The calls are made at meal times, late at night and at other inconvenient times, and A ignores B's requests to desist. A has invaded B's privacy."). *See also* Tompkins v. Cyr, 995 F. Supp. 664 (N.D. Tex. 1998) (abortion protestors held liable for intrusion upon seclusion where they conspicuously shadowed an abortion doctor, made repeated and harassing phone calls to his home, and used a bull-horn to preach at demonstrations held outside the doctor's home); Phillips v. Smalley Maintenance Servs., Inc., 435 So. 2d 705 (Ala. 1983) (Title VII sexual harassment claimant could also sustain an action for intrusion upon seclusion against her employer based on the employer's "intrusive and coercive sexual demands" and "improper inquiries into [the claimant's] sexual proclivities and personality.").

43. *See, e.g.*, Wolf v. Regardie, 553 A.2d 1213 (D.C. 1989) (rejecting intrusion action brought by an attorney against a magazine alleging the garnering of information from third parties and the culling of facts from public records); Dwyer v. American Express Co., 652 N.E.2d 1351 (Ill. App. Ct. 1995) (American Express cardholders brought intrusion action against American Express alleging that American Express's practice of categorizing cardholder spending behavior and then renting this information to participating merchants constituted an intrusion; court rejected claimants' theory); Shibley v. Time, Inc., 341 N.E.2d 337 (Ohio Ct. App. 1975) (rejecting claimant's intrusion theory in action brought to enjoin publishers and credit card company from selling subscription lists to direct mail advertisers).

44. For a discussion of the modern information industry, and the danger it poses to personal privacy, see Sandra Byrd Petersen, Note, *Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?*, 48 FED. COMM. L. J. 163 (1995).

45. *See* Alexander v. Federal Bureau of Investigation, 971 F. Supp. 603 (D.D.C. 1997)

at best.[46] In any event, it is the category of purely sensory invasions with which this Comment is primarily concerned.

III. PURELY SENSORY INVASIONS AND THE RISE OF HIGH-TECH SURVEILLANCE DEVICES

A. "Appreciating" v. "Discerning"

People unknowingly broadcast volumes of personal information to the public just by making themselves visible. No one knew this better than Sherlock Holmes.[47] Just by looking at a person, Sherlock Holmes could tell where a person had been and what he had been doing—even though he had never seen the person before.[48] Likewise, Holmes could deduce a great deal about a person from simply examining his personal effects—such as a hat,[49] watch,[50] or pipe.[51] He could even read a person's

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(holding that claimant made a prima facie case for intrusion against the First Lady, Hillary Clinton, and others based on the gathering of personal information about the claimant from FBI files, distinguishing *Wolf v. Regardie*, 553 A.2d 1213 (D.C. 1989)).

46. *Cf.* Petersen, *supra* note 44, at 176 (arguing that the tort of intrusion is unhelpful in protecting privacy from the gathering and dissemination of information in light of: (1) the tort's historic application as a gap-filler for trespass law; and (2) the difficulty in assessing the offensiveness of such an intrusion).

47. The legendary detective Sherlock Holmes is, of course, merely a product of Arthur Conan Doyle's imagination. Sherlock Holmes first appeared in *A Study in Scarlet*, published in *Beeton's Christmas Annual for 1887*. *See* S.C. ROBERTS, INTRODUCTION TO ARTHUR CONAN DOYLE, SHERLOCK HOLMES: SELECTED STORIES vii, viii (Oxford University Press 1990). However, as he has taken on a life of his own in popular media over the years, he is sufficiently "real" for the purposes of illustrating amorphous legal concepts. *See* Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 434 (observing that a character such as Sherlock Holmes "may live in the public imagination, beyond the reach of any individual work").

48. For example, in the case of *The Red-Headed League*, Holmes deduced, after a cursory glance, that his new client "ha[d] at some time done manual labour, that he [took] snuff, that he [was] a Freemason, that he [had] been in China, and that he [had] done a considerable amount of writing. . . ." ARTHUR CONAN DOYLE, SHERLOCK HOLMES: SELECTED STORIES 331 (1990).

49. From *The Blue Carbuncle*:

> That the man was highly intellectual is of course obvious upon the face of it, and also that he was fairly well-to-do within the last three years, although he has now fallen upon evil days. He had foresight, but has less now than formerly, pointing to a moral retrogression, which, when taken with the decline of his fortunes, seems to indicate some evil influence, probably drink, at work upon him. This may account also for the obvious fact that his wife has ceased to love him. . . . He has, however, retained some degree of self-respect. . . . He is a man who leads a sedentary life, goes out little, is out of training entirely, is middle-aged, has grizzled hair which he has had cut within the last few days, and which he anoints with lime-cream. These are

mind by looking at his face.[52]

Holmes' hapless sidekick, Dr. Watson, dumbstruck at the seemingly psychic nature of Holmes' deductive prowess, once remarked:

> When I hear you give your reasons, . . . the thing always appears to me to be so ridiculously simple that I could easily do it myself, though at each successive instance of your reasoning I am baffled, until you explain your process. And yet I believe that my eyes are as good as yours.[53]

Holmes conceded that his own vision was not extraordinary, and then replied, "You see, but you do not observe. The distinction is clear."[54]

In order to illustrate for Dr. Watson the difference between "seeing" and "observing," Sherlock Holmes engaged in the following examination:

> Holmes: "For example, you have frequently seen the steps which lead up from the hall to this room."
> Watson: "Frequently."
> Holmes: "How often?"
> Watson: "Well, some hundreds of times."

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the more patent facts which are to be deduced from his hat. Also, by the way, that it is extremely improbable that he has gas laid on in his house.

Id. at 282-83.

50. From *The Sign of Four*: "He was a man of untidy habits—very untidy and careless. He was left with good prospects, but he threw away his chances, lived for some time in poverty with occasional short intervals of prosperity, and, finally, taking to drink, he died. That is all I can gather." DOYLE, *supra* note 49, at 74.

51. From *The Yellow Face*: "The owner is obviously a muscular man, left-handed, with an excellent set of teeth, careless in his habits, and with no need to practise economy." 3 ARTHUR CONAN DOYLE, MEMOIRS OF SHERLOCK HOLMES 31 (1904).

52. From *The Resident Patient*:

> Watson: "Do you mean to say that you read my train of thoughts from my features?"
> Holmes: "Your features, and especially your eyes. . . . It was very superficial, my dear Watson, I assure you."

DOYLE, *supra* note 49, at 159-60.

53. DOYLE, *supra* note 49, at 209.

54. *Id.*

> Holmes: "Then how many are there?"
> Watson: "How many? I don't know."
> Holmes: "Quite so! You have not observed. And yet you have seen. That is just my point. Now, I know that there are seventeen steps, because I have both seen and observed."[55]

The distinction to which Holmes is alluding applies to all five senses. It is the distinction between "appreciating" and "discerning." When one "appreciates" something, he is fully aware of or sensitive to it.[56] However, when one "discerns" something, he is actually perceiving or detecting it from something else which he his appreciating.[57] In this respect, appreciating is a purely physiological function, while discerning is a combination of both physiology and cognition.

B. The Appreciating/Discerning Distinction in Intrusion

One general principle that can be gleaned from the Restatement definition of intrusion, and the cases construing it, is that discerning something is not an intrusion if the discerning individual is properly in a position to appreciate it with his own senses.[58] The rationale behind this principle is that it would "place too great a strain on human weakness" to require a person to "play the nobler part and shut his [senses]" to readily discernible facts.[59] Therefore, the law of intrusion only imposes liability for the use of one's senses if that person is using them in a place where he or she should not be. However, this general principle should not be understood to mean that all things that transpire in public are fair

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55. Doyle, *supra* note 49, at 209-10.

56. THE AMERICAN HERITAGE DICTIONARY 121 (2d ed. 1982) (defining "appreciate" as "[t]o be fully aware of or sensitive to; realize").

57. *Id.* at 402 (defining "discern" as "[t]o perceive (something obscure or concealed); detect.... To recognize or comprehend mentally.").

58. *See, e.g.*, Schulman v. Group W Prod., Inc., 955 P.2d 469, 491 (Cal. 1998) (holding that journalist at accident scene "did not intrude into [a] zone of privacy merely by being present at a place where he could hear [] conversations with unaided ears."). *See also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (There is no liability for observing a person, or even taking his photograph, while he is walking on the public highway, because "he is not then in seclusion, and his appearance is public and open to the public eye."); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 855 & n.68 (5th ed. 1984) ("On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there.").

59. Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) (declining to extend liability for intrusion upon seclusion to the passive recipient of information known to have been gathered through eavesdropping).

game for inquiry.

In *Nader v. General Motors*,[60] consumer advocate Ralph Nader brought suit against General Motors, alleging that the car manufacturer had "authorized and directed [its agents] to engage in a series of activities which . . . violated his right to privacy."[61] Nader alleged, among other things, that GM agents followed Nader into a bank and got "sufficiently close to him to see the denomination of the bills he was withdrawing from his account."[62] In upholding this claim against GM's motion to dismiss, the New York Court of Appeals acknowledged that "the mere observation of [Nader] in a public place [did] not amount to an invasion of his privacy."[63] But the court went on to hold that "under certain circumstances, surveillance may be so 'overzealous' as to render it actionable."[64]

Whether a purely sensory surveillance falls into the category of "mere observation" or "overzealous," however, depends on the surrounding circumstances.[65] If Nader were conspicuously attempting to shield the bank transaction from prying eyes, and GM's agents moved unreasonably close to Nader so as to defeat this attempt and discover the amount of money he was withdrawing, it may be said that the agents were no longer in a proper position to "appreciate" the transaction—because their being in that position, (*i.e.*, breathing down Nader's neck) was offensive. If GM's agents were not in a proper position to appreciate Nader's banking transaction, then any attempt to "discern" it may be an actionable intrusion.

The court in *Nader* established that "[a] person does not automatically make public everything he does merely by being in a public

60. 255 N.E.2d 765 (N.Y. 1970).

61. *Id.* at 767. Specifically, Nader alleged that GM's agents: (1) interviewed his acquaintances, "questioning them about, and casting aspersions upon his political, social, racial and religious views; his integrity; his sexual proclivities and inclinations; and his . . . personal habits"; (2) "kept him under surveillance in public places for an unreasonable length of time"; (3) "caused him to be accosted by girls for the purpose of entrapping him into illicit relationships"; (4) "made threatening, harassing and obnoxious telephone calls to him"; (5) "tapped his telephone and eavesdropped, by means of mechanical and electronic equipment, on his private conversations with others"; and (6) "conducted a 'continuing' and harassing investigation of him." *Id.* (citations to Complaint omitted).

62. *Id.* at 771.

63. *Id.*

64. *Id.* (citing Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969); Pinkerton Nat'l Detective Agency, Inc. v. Stevens, 132 S.E.2d 119 (1963)).

65. *Id*; *see also* McLain v. Boise Cascade Corp., 533 P.2d 343, 346 (Or. 1975) (holding that surveillance of a workers compensation claimant by investigators is non-actionable "if the surveillance is conducted in a reasonable and unobtrusive manner").

place."[66] Indeed, it is only when a person acts in such a way as to reveal some fact to any casual viewer that it may be said that observation of that fact is *not* an intrusion.[67] Under this reasoning, Sherlock Holmes' deductions about people would *not* be actionable intrusions—even though the information he gathered was often more personal than that at issue in *Nader*[68]—because the facts he discerned were revealed (albeit unwittingly) by the people themselves and were appreciable to any casual viewer. The fact that Holmes was not just any casual viewer, but an exceptionally perceptive detective, makes no difference for the purposes of determining his liability for intrusion—and herein lies the danger of high-tech surveillance equipment.

C. *The Technological Threat to Privacy: Collapsing the Distinction Between Appreciating and Discerning*

Today, there are a multitude of devices which are capable of expanding and collapsing the notions of appreciating and discerning by allowing their user to discern conditions beyond the appreciation of his natural senses. These devices are best viewed as belonging to two distinct categories: (1) technologies that enhance our own natural senses; and (2) artificial senses.[69]

1. Sensory Enhancement Devices

A *sensory enhancement device* is one that enables its user to see or hear something that *could* be viewed or heard by our unaided senses but

66. *Nader*, 225 N.E.2d at 771. ("[T]he mere fact that Nader was in a bank did not give anyone the right to try to discover the amount of money he was withdrawing." *Id.*). *See also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c ("Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters."). One commentator has posited that the current formulation of the tort of intrusion does not extend protection to intrusions in public places, and that no case has ever expressly held otherwise. *See* 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, 1085-86 (1995). However, this commentator neither mentions nor cites the *Nader* case anywhere in his article.

67. *See Nader*, 225 N.E.2d at 771.

68. *See, e.g., supra* notes 47-51.

69. *See* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J. L. & TECH. 383, 395 (1997) (noting that some courts, when dealing with the question of whether the use of surveillance technology constitutes a "search" for Fourth Amendment purposes, "have distinguished between devices that 'improve' human senses and devices that 'replace' them.").

for some impediment.[70] These devices expand the effective ranges of a person's ability to appreciate with his senses, allowing him to overcome impediments that prevent him from discerning something. When such devices are simply used to help a person overcome a physiological impediment to appreciating things in the first instance, as in the case of eyeglasses and hearing aides, they are very good things. However, when such devices are used to overcome a fear of detection, or another's efforts at seclusion, they become offensive.[71]

A sensory enhancing device can be used for both proper and improper purposes. For example, the same pair of binoculars that a ship's captain uses for navigating can be used by a peeping-tom to watch someone across the street changing his or her clothes. However, many devices have been developed *especially* for surveillance purposes, and are now available as a result of "the 'peace dividend' associated with the end of the Cold War."[72] And, for whatever reason, there is a burgeoning marketplace for these goods.[73]

2. Artificial Senses

A device is properly called an *artificial sense* when it is capable of appreciating things that a person could *never* appreciate without it.[74] Unlike sensory enhancement devices, which extend the user's ability to appreciate, but leave it to the user to actually discern things for himself, *artificial senses* both appreciate *and* discern conditions, and merely report what has been discerned to the user. In this respect artificial senses collapse the distinction between appreciating and discerning. One example of an artificial sense would be the use of a dog to sniff out contra-

70. *See id.* at 396 (citing "fear of detection" as such an impediment).

71. *See, e.g., Shoe-camera Peeping Tom Spied on 30 Women at CNE*, MONTREAL GAZETTE, Sep. 8, 1996, at E8 ("Police said a camera had been hidden in a pouch and was connected by wires to a pinpoint fibre-optic lens attached to the tip of a size 12 brogue. Police say the man stepped close to women and aimed the camera lens between their legs.").

72. *Id.* at 386. *See also* Thomas Investigative Publications, Inc., *The Spy Exchange and Security Center* (visited Dec. 22, 1998) <http://www.pimall.com/nais/35cam.html> (Order form for the *Photosniper* Surveillance 35mm Still Camera: "Besides the GREAT functions found in this surveillance photography system, you'll also be owning a piece of KGB history. This unit is direct from Russia, the same standard issues used by Russian KGB agents!").

73. *See, e.g., 007-Eleven* (visited Dec. 22, 1998) <http://www.007eleven.com/index.htm>; *The Surveillance Team* (visited Dec. 22, 1998) <http://www.i-spy.net/home.htm>; Thomas Investigative Publications, Inc., *The Spy Exchange and Security Center* (visited Dec. 22, 1998) <http://www.pimall.com/nais>. These sites offer the latest in high-tech surveillance equipment at competitive prices.

74. *See* Slobogin, *supra* note 69, at 396.

band.[75]

The handler of a dog trained to sniff out contraband does not have the ability to appreciate the scent of contraband himself, and, therefore, cannot himself discern, or "smell," the contraband. The dog, on the other hand, *can* appreciate the scent of contraband, and has been trained to alert its handler when it smells it. Therefore, when the dog alerts its handler that it smells contraband it is merely relaying what *it* has discerned.

In recent years, a number of artificial *electronic* senses have been developed. While these electronic devices are far more sophisticated than a trained dog, they too collapse the appreciating/discerning distinction in much the same way.

a. Millivision

Millivision is a purely passive imaging device that can see the millimeter wave portion of the electromagnetic radiation that naturally radiates from persons and objects with a temperature above absolute zero.[76] The device's "internal image processing algorithms" then distinguishes the emitting persons and objects based on the character of their emissivity.[77] The device can then display an image of the objects discerned.[78] Because millimeter wave emissions can penetrate many common building materials, Millivision can also observe people within a room from outside of that room.[79]

b. Truster Software

Truster is a new lie-detecting software program which purports to determine truthfulness by measuring the inaudible low-frequency waves of the voice.[80] The theory is that, "[w]hen lying, the amount of blood in

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75. *See id.* at 395 (citing United States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985)).

76. *See Reducing Gun Violence: Testimony to the Crime and Criminal Justice Subcommittee of the House Judiciary Committee*, 104th Cong. (1994) (Statement of Dr. G. Richard Huguenin, Millitech Corporation), available at 1994 WL 14190555. "Millivision" is the tradename for Millitech Corporation's passive millimeter wave imager. The device is intended for law enforcement application in the remote detection of weapons. *See id.*

77. *Id.*

78. *See id.* However, "[i]n order to protect a persons right to privacy," the device can be programmed to display a person's image only if a suspicious object is detected by the device's internal image processing algorithms. *Id.*

79. *See id.* "The resulting 'live' video images of people will indicate their location, posture, and activity within a room." *Id.*

80. *See* Irene R. Prusher, *A Sixth Sense About Who's Lying: A New Program Surreptitiously Tests Voices on the Phone*, NEWSDAY, Jan. 27, 1998, at C3.

the vocal cords drops as a result of the stress, producing a distorted sound wave."[81] By using complex algorithms and a number of parameters, the software can determine whether the stress in a person's voice is caused by lying, excitement, exaggeration or an emotional conflict.[82]

Unlike polygraph tests, which use electrodes to measure a subject's physiological reaction to the stress of lying, the voice stress analysis of the Truster program can be done without the subject's knowledge.[83] The test can be performed on live, recorded, or telephonic statements.[84] The creators claim that the software is eighty-five percent accurate in identifying stress that is indicative of a lie.[85]

c. Transient Electromagnetic Pulse Emanation Surveillance Technology

Transient electromagnetic pulse emanation surveillance technology (TEMPEST) is the term that has been applied to devices capable of observing the output on computer monitors by reading and reconstructing the electromagnetic signals that monitors emit.[86] These devices, which are purely passive,[87] can be built with relative ease and little cost,[88] yet the information they reveal could be invaluable.[89]

IV. THE INTRUSION TORT'S RESPONSE TO HIGH-TECH INVASIONS OF PRIVACY

Claims of intrusion based on the use of the natural senses require a showing that the alleged intruder was somehow not in a proper position to appreciate the thing claimed to have been intruded on—either because of some trespass or "overzealous" conduct. Modern surveillance

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81. *Id.*

82. *See id.*

83. *See* Prusher, *supra* note 80; Matt Richtel, *Some Doubts on Lie Detection by Phone*, N.Y. TIMES, Jan. 26, 1998, at D4.

84. *See* Prusher, *supra* note 80; Richtel, *supra* note 83.

85. *See* Richtel, *supra* note 83.

86. *See* Christopher J. Seline, *Eavesdropping on the Compromising Emanations of Electronic Equipment: The Laws of England and the United States*, 23 CASE W. RES. J. INT'L L. 359, 361; Sarah Ellerman, *Rise of the Tempest* (visited Dec. 22, 1998) <http://www.thecodex.com/rise.html>; Frank Jones, *Nowhere to Run... Nowhere to Hide.... The Vulnerability of CRTs, CPUs and peripherals to TEMPEST Monitoring in the Real World* (visited Dec. 22, 1998) <http://www.thecodex.com/c_tempest.html>.

87. *See* Jones, *supra* note 86.

88. *See* Seline, *supra* note 86, at 359 (estimating the minimum cost for a TEMPEST device at less than two-hundred dollars); Jones, *supra* note 86 (identifying the components necessary to make a TEMPEST device at home).

89. *See* Jones, *supra* note 86 (identifying potential users of TEMPEST monitoring).

technology, however, is capable of eliminating the need to trespass or engage in "overzealous" conduct in order to appreciate and discern things. This section examines how the tort of intrusion has been applied in those instances where the intrusion claimed has been perpetrated unobtrusively by mechanical means.[90]

A. Intrusion Through the Use of Sensory Enhancement Devices

"That's him right there. Bedroom door, far right. See him?"
"You sure?"
"Blue shirt."
"All I see is a . . . (unintelligible)."
"See what we're talking about."
"The door."
"The white door on the other side now."
"On the right side of the house."
"See that door on the right side . . . on the far right."
"Well, I got a great look at it."
"Pull up . . . now he's on the other side, see him?"
"All I see is . . ."
"Pan that shot."
"Binoculars."
"He's also got a badge on his belt."
"Yes he does."
"Sh, Sh."
"He's staring out the window."
"Yeah, I see her. Are you watching her?"
"They think this thing can hear every whisper."
"Yeah. (Laugh)."
"Look at him peaking out the window again, John. See him over there?"
"Did you get the drapes closing then just now?"
"Yep."
"Good."[91]

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90. Because devices like wiretaps, microphonic "bugs," and hidden cameras generally involve in their installation or introduction some sort of technical trespass—either to land or chattels—they are not really "unobtrusive." Therefore cases addressing these devices are not discussed.

91. Wolfson v. Lewis, 924 F. Supp. 1413, 1429-30 (E.D. Pa. 1996). This conversation, between the members of an *Inside Edition* news crew, was recorded by a microphone being

February 18, 1996. It was a bright and sunny day in Jupiter, Florida, but Nancy Wolfson and her children were indoors, huddled in her father's living room with all the curtains drawn.[92] An *Inside Edition* news crew, anchored on a public waterway fifty to sixty yards away, was carefully monitoring the home with binoculars, a television camera equipped with zoom lenses, and a Sennheiser "shotgun mike," hoping to capture the Wolfson family's activities on film and audio tape.[93] Nancy felt like a prisoner.[94]

Nancy and her husband, Richard, went to Florida to get away from the reporters that lurked outside. The reporters were producing a story on executive salaries at U.S. Healthcare. Earlier in the week, they had followed the Wolfsons around in their home state of Pennsylvania, attempting to get an "ambush interview."[95] This surveillance caused the Wolfsons extreme concern because Nancy's father, Leonard Abramson, the Chairman and C.E.O. of U.S. Healthcare, had recently received anonymous threats targeted at him and his family.[96] The security agents Mr. Abramson had employed to guard the Wolfsons were also concerned, and even mistook an ambush interview attempt for an attempted ambush of a more violent nature.[97] After this incident, the Wolfson's filed a complaint against the reporters[98] and left Pennsylvania,

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employed by the crew to record conversations sixty yards away. *See id.* at 1429. Accompanying video footage shows that the crew was using binoculars and cameras with zoom lenses to observe the occupants of a house. *See id.* at 1430.

92. *See id.* at 1428-29.

93. *See id.* at 1428. The Sennheiser MKH60 unidirectional microphone, a.k.a. "shotgun mike," is capable of picking up conversations up to sixty yards away. *See id.* at 1424. In this case, the "shotgun mike" was attached to a long stick called a "boom," in order to increase its range. *See id.* at 1428. It was also equipped with a "wind screen" to reduce peripheral noise, enhancing clarity. *See id.*

94. *See id.* at 1431.

95. *See id.* at 1423-24. According to the defendant reporters, and their expert witness, an "ambush interview" refers to "a confrontational, surprise interview with an unwilling subject, generally a person who has previously refused to be interviewed." *Id.* at 1424. The T.V. journalist approaches the subject surreptitiously with cameras and sound rolling and asks a question calculated to embarrass the subject. *See id.*

96. *See id.* at 1422-23. The precise nature of these threats was not indicated in the record of the case, but they raised serious concerns about the safety of Mr. Abramson and his family. *See id.* at 1423.

97. *See id.* at 1425. On February 14th, 1996, one of the reporters followed Mrs. Wolfson to work in a jeep with tinted windows. Mrs. Wolfson was also being followed by one of her security guards. When her guard saw that she was being followed by the jeep, he "felt that the family must have been being set up for kidnaping or murder or something." *Id.* He felt that the danger was so imminent that he readied his weapon. *See id.*

98. *See id.* at 1415-16. The Wolfsons filed their complaint in the Montgomery County Court of Common Pleas and the defendants removed the action to federal court the next day.

seeking refuge at the Abramson family home in Florida. But refuge would be brief—the *Inside Edition* crew followed two days later.[99]

The Abramson family home in Florida was in an exclusive community called "Admiral's Cove," located on the Intracoastal Waterway, a public boating "highway."[100] The rear of the Abramson home, described as "nothing but windows," faced this waterway.[101] However, boaters were not permitted to cross a rope that divided the home from the public waterway.[102] The *Inside Edition* crew's boat was anchored just a few feet from this rope.[103] Because the *Inside Edition* crew's boat was on a public waterway, the Wolfsons could not have them removed by police.[104]

When the Wolfsons returned home, a hearing was held regarding their request for injunctive relief.[105] The alleged invasion that the court found to be "[o]ne of the more serious" was the reporters' attempts to intercept and record conversations at the Abramson home with the "shotgun mike," because the state of Florida, where the attempt was made, had a statute criminalizing such conduct and allowing a civil cause of action for its violation.[106] However, this was not the sole grounds for

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The Plaintiffs' complaint alleged that the defendants had engaged in "tortious stalking, harassment, trespass, intrusions upon seclusion and invasions of privacy." *Id.* at 1415.

99. *Id.* at 1428.

100. *See id.*

101. *Id.* at 1428, 1429.

102. *See id.* at 1428.

103. *See id.*

104. *See id.* at 1430-31. A deputy sheriff marine patrol from Palm Beach County approached the *Inside Edition* crew's boat in response to a call that the boat's occupants were engaging in suspicious conduct. The following conversation, picked up by the shotgun mike, transpired:

> Police: "We thought that maybe people were videotaping boats and were going to come back and break into some of them."
> Boat: "No, no we are a television news crew and we are not here for any illegal purpose. We have been told and, of course we'll stay out of the area that's marked no trespassing. Otherwise, our intentions are to spend a day and soak up some sun and keep an eye on the place."
> Police: "Okay, not a problem."

Id. at 1431.

105. *See id.* at 1416. The hearing on the complaint filed February 14th, 1996, was heard on February 27th. However, pursuant to F.R.C.P. 15(b), the court permitted testimony at the hearing concerning the defendants' conduct in Florida on the weekend of February 17th. *See id.*

106. *Id.* at 1433-34 (citing FLA. STAT. ANN ch. 934).

determining that use of the shotgun mike was a likely intrusion. The court found further that the use of the "shotgun mike" was "a significant part of [a] harassing course of conduct . . . which greatly intruded upon the solitude and privacy of [the Wolfsons]."[107]

Based on what the court found to be a "reasonable likelihood of success on the merits of [the Wolfson's] claim for invasion of privacy based on intrusion upon seclusion," a preliminary injunction was issued.[108] The court order enjoined the *Inside Edition* crew from "engaging in conduct, with or without the use of cameras and sound equipment, which invades the privacy of [the Wolfsons] . . . until such time as the jury demanded by the parties shall return a verdict on the merits."[109] The Wolfsons settled their suit on January 24, 1997.[110]

Although the *Wolfson* case involved a unique intrusion in terms of the method employed—the use of a shotgun mike—the decision to hold the reporters liable for this act was not at all surprising, for two reasons: (1) the intrusive act, while committed in public, was directly targeted at the most protected area of privacy—the home; and (2) the intruders were anything but unobtrusive. But what if the use of a sensory enhancement device were targeted at something in public, and in a completely unobtrusive manner? Would that render the act non-actionable as intrusion?

Suppose the *Nader* case had occurred today. If Mr. Nader had used an outdoor ATM, instead of going inside a bank, and the alleged GM agents had used a high-powered telescopic device to view what Mr. Nader was doing from several yards away, instead of looking over his shoulder, how could this still be an actionable intrusion? The *Nader* court was quite clear in stating that "the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy," and only "overzealous" public surveillance may be actionable.[111] The court found that getting unreasonably close to a person could constitute such overzealousness, but in the telescope example there is no such physical

107. *Id.* at 1434.

108. *Id.* at 1432.

109. *Id.* at 1435.

110. *See* Associated Press, *Settlement Reached in Lawsuit Against "Inside Edition"* (Monday, Jan. 27, 1997) (available at 1997 WL 4853649). The settlement included no payment, and did not restrict King World Productions, *Inside Edition*'s producer, from rebroadcasting the program featuring the Wolfsons, but the reporters agreed not to follow or go to the home of the Wolfsons or certain family members. *See id.* King World's vice president remarked, "This is an extremely positive outcome." *Id.*

111. Nader v. General Motors, 225 N.E.2d 765, 771 (N.Y. 1970).

proximity. Therefore, the only way to properly fix liability for such conduct would be to consider the use of the sensory enhancement device to *be* the overzealous act. This was essentially the conclusion of Fifth Circuit in *E.I. duPont de Nemours & Co., Inc. v. Christopher.*[112]

Christopher was an industrial espionage case wherein "an airplane [was] the cloak and a camera the dagger."[113] The defendants were photographers who were hired by an unknown third party to take aerial photographs of construction taking place at one of DuPont's plants in Texas.[114] DuPont brought suit against the defendants alleging that they had wrongfully obtained photographs revealing DuPont's trade secrets and sold them to the undisclosed third party.[115] Under Texas law, liability for the disclosure of trade secrets only attached where such secrets are discovered by "improper means."[116] The defendants contended that their actions were not improper "because they conducted all of their activities in public airspace, violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct."[117] However, the court of appeals disagreed.

Even though DuPont's facility was exposed to view from the air, the court in *Christopher* found that DuPont had taken every reasonable step to seclude their new facility from view.[118] In the court's view, it would be unreasonable to require DuPont to build "an impenetrable fortress" to "prevent nothing more than a school boy's trick."[119] As such, the court concluded: "Perhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available."[120]

While the precise value of an individual's interest in privacy is less easy to ascertain than that of trade secrets, it is no less worthy of protection. As such, it would be most incongruent to require individuals to repair themselves to some "impenetrable fortress" to protect this interest in personal privacy when such extreme measures are not required to preserve trade secret protection. The holding in *Wolfson* suggests that

112. 431 F.2d 1012 (5th Cir. 1970).
113. *Id.* at 1013.
114. *See id.*
115. *See id.* at 1014.
116. *Id.*
117. *Id.*
118. *See id.* at 1016.
119. *Id.* at 1016-17.
120. *Id.* at 1016.

courts may be starting to recognize this.[121]

B. Intrusion Through the Use of Artificial Senses

Legal challenges to the use of artificial senses for surveillance purposes have, thus far, arisen solely in Fourth Amendment contexts.[122] To date, the question of civil liability for intrusion based on the use of artificial senses has only been addressed in the academic world. However, an examination of this debate is quite insightful.

In 1993, the John Marshall National Moot Court Competition in Information and Privacy Law considered the issue of whether the use of TEMPEST equipment by the proprietor of a mail-order company to obtain a copy of a competitor's customer lists could be actionable as an intrusion upon seclusion.[123] The fictional petitioner, "Longshore Cosmetics," alleged that the fictional respondent, "Harry Hackner," used a TEMPEST device[124] called "CRT Microspy" to receive the electromagnetic radiation emanating from the video display terminal (VDT) of Longshore's computer.[125] Hackner was then able to reconstruct images of what was displayed on Longshore's VDT, thereby allowing him to

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121. *But cf.* Deteresa v. American Broad. Cos., Inc., 121 F.3d 460 (9th Cir. 1997). In *Deteresa*, a woman brought an intrusion action against a television network and producer alleging that they surreptitiously recorded and videotaped a conversation she had with a reporter outsider her home and broadcast it—after she expressly refused to grant them an on-air interview. *See id.* at 462-63. With respect to the videotaping, the court held that the plaintiff could not sustain an intrusion action because she was videotaped in public view, from a public place, and there was no specific evidence that the plaintiff could only be seen with a "high-powered lens." *Id.* at 466 & n.3. However, citing the case of *Aisenson v. American Broad. Co.*, 269 Cal. Rptr. 379 (Ct. App. 1990), the court in *Deteresa* seemed to suggest that, even if the plaintiff could only have been seen by the reporters with a high-powered lens, such intrusion would only be *de minimus* (and thus, non-actionable) where the plaintiff was otherwise within public view. *See id.*

122. *See generally* Bernstein, *supra* note 5 (discussing the approach of America's Fourth Amendment jurisprudence to thermographic imaging, and speculating about its likely response to Millivision).

123. *See* Timothy R. Rabel, *1993 John Marshall National Moot Court Competition in Information and Privacy Law: Bench Memorandum*, 12 J. MARSHALL J. COMPUTER & INFO. L. 627, 629-30 (1994). The moot court combatants also considered the issue of whether TEMPEST assisted surveillance violated the Electronic Communications Privacy Act of 1986. *Id.* (citing Pub. L. No. 99-508, 100 Stat. 1848). Under the fictional posture of this case, the petitioner brought the statutory violation and intrusion claims in circuit court, both of which were dismissed on respondent's motion for failure to state a claim. *Id.* The petitioner appealed to the appellate court, which affirmed the decision below. *Id.* at 630-31. The case was then appealed to the Supreme Court of the State of Marshall. *Id.* at 631.

124. For a discussion about TEMPEST technology, see *supra* Part III.C.2.c.

125. *See* Rabel, *supra* note 123, at 627-29.

copy customer names and addresses that had appeared on the screen.[126] This surveillance occurred over a period of twenty-three days.[127]

The first part of the petitioner's argument, that respondent's conduct constituted an actionable intrusion, focused on the Restatement principle that a physical invasion or technical trespass should not be required for the purpose of establishing liability.[128] To this end, the petitioner also discussed the shift in America's Fourth Amendment jurisprudence from a property-based notion of privacy to one based on reasonable expectations.[129] The petitioner then cited the case of *Pearson v. Dodd*, for the proposition that "[t]he common law, like the Fourth Amendment, should 'protect people, not places.'"[130]

In the second part of its argument, the petitioner relied on the *Nader* case for its position that the essential question was whether [the] petitioner had a reasonable expectation that his mailing list would remain confidential.[131] The petitioner then argued that it had such an expectation because "a reasonable person would not expect that the impulses of light from his video display terminal could go through solid walls and be intercepted. . . ."[132] The petitioner concluded by arguing that the respondent's conduct in defeating that expectation was unreasonably intrusive and, therefore, actionable.[133]

The respondent conceded that "[a] number of courts have dispensed with the requirement that an intrusion plaintiff must show a physical trespatory invasion,"[134] but noted that many cases still look for the "utili-

126. *See id.* at 629.

127. *See id.*

128. *See* Marie-Louise R. Samuels et al., *1993 John Marshall National Moot Court Competition in Information and Privacy Law: Brief for the Petitioner*, 12 J. MARSHALL J. COMPUTER & INFO. L. 645, 667-69 (1994).

129. *See* Samuels, *supra* note 128, at 669-70 (citing Katz v. United States, 389 U.S. 347 (1967), Olmstead v. United States, 277 U.S. 438 (1928), and Boyd v. United States, 116 U.S. 616 (1886)).

130. *Id.* at 671 (quoting Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969)). The petitioner failed, however, to note the fact that Dean Prosser, in his original articulation of the intrusion tort, used a similar two-prong analysis—seven years before the *Katz* decision. *See* Prosser, *supra* note 9.

131. *See* Samuels, *supra* note 128, at 673 (citing Nader v. General Motors Corp., 255 N.E.2d 765, 770).

132. *Id.*

133. *See id.*

134. Spiro P. Fotopoulos et al., *1993 John Marshall National Moot Court Competition in Information and Privacy Law: Brief for the Respondent*, 12 J. MARSHALL J. COMPUTER & INFO. L. 679, 702 (1994).

zation of an intruding or prying device."[135] The respondent then argued that the CRT Microspy was not such a device, because "[i]nstead of prying into the sights or sounds of a person's private world, the CRT Microspy picks up the signals that another person is freely projecting. . . ."[136] As such, the respondent concluded that the petitioner's claim was not actionable.

The respondent's argument is very persuasive, making it appear as if Hackner's actions were nothing more than what Sherlock Holmes does when he views a person: simply discerning facts from information that people reveal unwittingly. As previously mentioned, it would make no difference for the purpose of fixing liability for intrusion that Holmes was especially perceptive—discerning where others merely appreciated—because he was properly in a position to appreciate that from which he discerned some fact.[137] The rationale for this outcome is that it would "place too great a strain on human weakness" of a casual viewer or listener to require him to "play the nobler part and shut his [eyes or ears]" to readily discernible facts.[138] However, upon closer examination, it is clear that this rationale does not support the respondent's contention in this fictitious case.

Unlike Sherlock Holmes, the respondent in this fictitious case employed an *artificial sense.* Sherlock Holmes' powers of observation are natural, therefore it would indeed be a strain on his "human weakness" to require him to keep it in check by consciously disregarding readily discernible facts. On the other hand, one has total control over whether or not to employ an artificial sense. Therefore, it does not offend the general principle of intrusion law to impose liability for the use of such devices. However, time will only tell if this reasoning will find acceptance in the courts.

V. CONCLUSION

The tort of intrusion is most properly viewed in terms of the four distinct categories of intrusion originally contemplated by the Restatement definition: (1) those involving some trespass to land; (2) those involving some trespass to chattels; (3) those solely involving the use of the senses;

135. *Id.*

136. *Id.* at 703.

137. *See supra* Part III.B.

138. Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969) (declining to extend liability for intrusion upon seclusion to the passive recipient of information known to have been gathered through eavesdropping).

and (4) those involving some form of harassment. This third category, as we have seen, can be divided into three distinct sub-categories of sensory intrusion: (1) those using the natural senses; (2) those using sensory enhancement devices; and (3) those using artificial senses.

By keeping these intrusions separate and distinct from one another, courts will be better able to adopt and apply varying standards for assessing the actionability of the different categories of intrusion—both in terms of "expectation of privacy" and offensiveness. Due to the ability of modern surveillance devices to both collapse and expand the notions of appreciating and discerning, and do so in a most unobtrusive manner, such varying standards will be necessary if claims of invasion of privacy by mechanical means are to remain viable.

ADAM J. TUTAJ*

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