By Neal F. Eggeson

'Intrusion' into privacy – how Indiana veered off course, and how it can get back on track

"Be less curious about people and more curious about ideas."

In a world of limitless voyeurism – from Facebook to GPS tracking to Google searches – Marie Curie's century-old admonition seems to have fallen upon deaf ears. To be "curious about people" is today's norm, and satisfying one's curiosity has never been easier. With only a few keystrokes, we can learn almost anything about almost anyone. The sphere of privacy – the inviolable realm of the truly personal – has all but evaporated under technology's harsh spotlight.

Perhaps because of its diminishing scope, many of us find ourselves jealously guarding what little privacy we have left. As such, it feels almost intuitive that certain facets of our lives should be shielded from prying eyes. Our medical history, our bedroom habits, our personal finances – each of us guards *something* in life that we feel is nobody's business but our own. Privacy has value.

Now imagine someone satisfying his curiosity about you by rummaging through your medical history, your wallet or your bank statements. Is the violation any less significant if the offender keeps his newfound knowledge to himself? What if the rummaging occurs at your doctor's office or bank instead of in your home? What if you are not present when the rummaging occurs and you do not learn about it until later? For most of us, the violation feels equally significant under each hypothetical. If privacy has value, then the mere act of intruding into our personal affairs deprives us; something of value is lost when our private sphere is invaded even if done solely out of curiosity, outside of our homes or without our immediate knowledge.[1] Accordingly, in almost every jurisdiction in this country, tort law affords the victim recompense against the intruder for intrusions into privacy – every jurisdiction, that is, except for Indiana.

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The tort of "intrusion" in Indiana law is a fascinating exercise in what happens when a principle of law evolves by way of *dicta* rather than trenchant analysis. As illustrated in 2011 by a Court of Appeals decision in *Curry v. Whitaker*,[2] Indiana imposes certain constraints on "intrusion" claims – constraints that (arguably) would preclude recovery for the privacy violations described above. Yet when traced back to its origins, invasion of privacy clearly includes intrusion into one's private affairs and emotional solace such that unauthorized rummaging through one's personal documents, bank statements or health care records should qualify. This article will explore the origins of "intrusion," how and why Indiana diverged from most other states in its treatment of this tort, and how Indiana courts are subtly returning to a more inclusive (and more defensible) version of "intrusion."

The original version of 'intrusion'

In what has been called "the most famous of all law review articles,"[3] Samuel Warren and Louis Brandeis first conceived of tort remedies for invasion of the "right to be let alone" in their 1890 article "The Right To Privacy."[4] Though Warren and Brandeis were concerned primarily with the tort of "public disclosure of private facts,"[5] their article laid the groundwork for Dean William Prosser to investigate privacy torts more thoroughly. In his famous 1960 article, Prosser opined that privacy torts come in four distinct varieties: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[6]

As Prosser's four categories gained wider recognition and acceptance, they were adopted by the Restatement (Second) of Torts in 1977.[7] Giving greater shape to the "intrusion" subcategory, the Second Restatement declared: "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."[8] Under this iteration, an intrusion did not need to be physical ("physically ***or otherwise***");[9] nor was an intrusion limited to invasions of a physical space such as one's home ("upon the solitude or seclusion of another ***or his private affairs or concerns***").[10] Thus, examination of one's private bank account – a violation that would involve neither physical invasion nor implicate an actual physical location – was listed as an explicit example of an actionable "intrusion."[11]

The following decade, Prosser and Keeton confirmed this broad interpretation of the tort in their seminal treatise: *Prosser and Keeton on the Law of Torts*. First, Prosser and Keeton confirmed that an "intrusion" need not be physical:

> One form [of intrusion] consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag in a store. **The principle has, however, been carried beyond such physical intrusion**, and extended to eavesdropping upon private conversations by means of wiretapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls.
>
> It is clear, however, that there must be something in the nature of prying or intrusion, and that mere noises, which disturb a church congregation or bad manners, harsh names and insulting gestures in public, are not enough.[12]

Next, Prosser and Keeton confirmed that an "intrusion" might also include invasion of one's psychological or emotional affairs (as opposed to invasion of purely physical spaces), suggesting that "highly personal questions or demands by a person in authority may be regarded as an intrusion on psychological solitude or integrity and hence an invasion of privacy."[13]

Indiana enters the fray

Against this backdrop, Indiana first recognized "invasion of privacy" as an actionable tort in *Continental Optical Co. v. Reed*,[14] defining it as "[t]he unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or **the wrongful intrusion into one's private activities**, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibility."[15] Though included in its list of actionable torts, *Reed* did not explore "intrusion." Rather, *Reed* focused on "appropriation," holding that a lens grinder had a viable cause of action against a lens manufacturer for the unauthorized use of the grinder's photograph in an advertisement.[16]

Though Indiana courts continued to dip into the "invasion of privacy" waters in the years following *Reed*, Dean Prosser's article and the Restatement (Second) of Torts,[17] Indiana did not revisit the subcategory of "intrusion" until the early 1990s. In *Cullison v. Medley*,[18] the Supreme Court offered the following analysis of "intrusion":

> When the invasion of a plaintiff's right to privacy takes the form of intrusion, it consists of an intrusion upon the plaintiff's physical solitude or seclusion as by invading his home or conducting an illegal search. Here, the evidence, according to Cullison's testimony, was that he did not invite any of the Medleys into his home and was apprehensive to discover all five of them standing in his darkened living room when he turned on the light. This may constitute an intrusive invasion of Cullison's right of privacy. The allegations that Ernest harassed Cullison in the Hardee's restaurant or that Sandy and her mother harassed Cullison by walking past his home in a taunting manner would not constitute an actionable claim for invasion of privacy because plaintiff has no legal right to be left alone on a public street or in a public place.[19]

Cullison offers no further explanation or analysis of "intrusion," fails to interpret or opine on the outer boundaries of the tort, and cites no authority beyond Prosser and Keeton's seminal treatise.

Without further guidance from the Supreme Court, Indiana litigants were left with two possible interpretations of *Cullison*. On one hand, one might read *Cullison* as announcing two narrow (and inexplicable) constraints on "intrusion," namely that the tort is limited to invasions of a plaintiff's physical solitude or seclusion and that intrusions outside of one's home are *per se* not actionable. On the other hand, *Cullison* stopped short of stating that intrusion upon physical solitude or seclusion is the ***only*** manner in which an intrusion might occur and, further, *Cullison* relied upon the specific section of *Prosser and Keeton on the Law of Torts* which states that (1) an intrusion need not be physical, and (2) intrusion on psychological solitude or integrity is equally actionable. From this, an Indiana litigant might conclude that *Cullison* merely highlighted the language from Prosser and Keeton necessary for purposes of the case and was *not* trying to provide a detailed overview of the entire tort in that single paragraph.[20]

Implicitly concluding that *Cullison* did not mean for its *dicta* to define the outer boundaries of "intrusion," the Court of Appeals in 1994 reaffirmed the understanding of "intrusion" used by the Restatement (Second) of Torts and by Prosser and Keeton. In *Watters v. Dinn*,[21] the Court of Appeals declared that:

> Invasion of privacy by intrusion consists of an intrusion upon the plaintiff's physical solitude or seclusion, either as to his person **or to his private affairs or concerns.** *Cullison*, 570 N.E.2d at 31; *Prosser and Keeton on Torts*, §117, at 854 (5th ed. 1984). To constitute tortious conduct, the intrusion must be something that would be offensive or objectionable to a reasonable person. *Prosser and Keeton*, §117 at 855. In determining whether an intrusion into private information is actionable, we consider whether the means used is abnormal and the defendant's purpose for obtaining the information. *Id.* §117, at 856.[22]

Based on this standard, *Watters* concluded that improperly obtaining the plaintiff's mental health records from a third-party provider "could well be offensive or objectionable to a reasonable person"[23]

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– an "intrusion" that would involve neither physical contact with the plaintiff nor invasion of a physical space.

Indiana's federal courts likewise read this state's case law as recognizing the Second Restatement's (and Prosser and Keeton's) broader understanding of "intrusion." For example, in *Garus v. Rose Acre Farms, Inc.*,[24] the Northern District court, discussing the tort's "undefined parameters," noted that Prosser and Keeton included "intrusion on psychological solitude or integrity" within the definition of "intrusion" and that *Cullison* relied upon Prosser and Keeton in defining the tort.[25] As such, the Northern District court held that intrusion upon an employee's seclusion at work by way of sexual harassment (conduct that would include verbal conduct and which would not be confined to a private physical space such as one's home) was actionable under Indiana law. Likewise, in *Moffett v. Gene B. Glick Co., Inc.*,[26] the Northern District court found that intrusion includes interference with one's "private affairs or concerns" in holding that: "Because the comments and harassment were based on [plaintiff's] race and her personal relationship with a man of a different race, these intrusions are even more serious and grievous, and as such can be viewed as highly offensive to a reasonable man."[27] As for the Southern District's reading of Indiana "intrusion" law, *Van Jelgerhuis v. Mercury Fin. Co.*[28] denied summary judgment to a defendant employer where "Johnson could be found to have invaded [the plaintiffs'] privacy. Although his questions and comments to them occurred in a work environment, plaintiffs' 'psychological solitude or integrity' and 'private affairs' were intruded upon by Johnson."[29]

Indiana veers off course

Nevertheless, several post-*Cullison* decisions by the Court of Appeals have used *Cullison* to build nearly insurmountable hurdles for non-physical "intrusion" claims. For example, just one year after *Watters v. Dinn*, the Court of Appeals in *Terrell v. Rowsey*[30] affirmed summary judgment in favor of a defendant employer on an "intrusion" claim. In that case, the defendant opened the plaintiff's car door while plaintiff sat in the car, reached behind the driver's seat, and grabbed a bottle on the car floor without making physical contact with the plaintiff. In a 2-1 decision, the Court of Appeals held only that:

> as a matter of law, Rowsey's actions do not offend a person of ordinary sensibility. Terrell was on his employer's property, and he admitted to drinking alcohol, despite Red Giant's policy against drinking. Furthermore, Rowsey acted out of responsibility for the safety of Terrell and his fellow employees, and the intrusion was minimal.[31]

While that holding alone might not warrant surprise or disagreement from Prosser or the authors of the Second Restatement, nevertheless, *Terrell* is now cited in support of the proposition that "intrusion" must include physical contact or invasion of a personal physical space such as one's home (but apparently ***not*** including one's vehicle).[32]

Similarly, in *Ledbetter v. Ross*,[33] the Court of Appeals held that "a single telephone call, involving no threats or abusive language, cannot be the basis for invasion of privacy by intrusion." Again, while that holding alone might be consistent with Prosser and the Second Restatement, the *Ledbetter* opinion

sprinkled ample *dicta* along the path to its holding, including an inexplicable citation to *Prosser and Keeton on the Law of Torts* (but not to *Cullison*) for the proposition that "one **must** demonstrate that there was an intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters."[34] Moreover, *Ledbetter* also mentioned the lack of Indiana decisions "in which a claim of intrusion was proven without physical contact or invasion of a physical space such as the plaintiff's home"[35] – an observation which quickly found its way into most subsequent "intrusion" opinions.[36]

With *Ledbetter*'s off-handed misreading of *Prosser and Keeton on the Law of Torts* (by crafting a mandatory condition out of the authors' discussion of just "one form" of intrusion), it took little time for subsequent courts to build additional obstacles from that dubious foundation. The following year, the Court of Appeals in *Branham v. Celadon Trucking Servs., Inc.*[37] held that sexually suggestive photographs taken of the plaintiff while he slept in his employer's break room were not actionable "intrusions" because the break room was not plaintiff's "private physical space."[38] In reaching its holding, *Branham* parroted *Ledbetter*'s misreading of Prosser and Keeton that "a plaintiff must demonstrate that there was an 'intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters.'"[39] Then, while entertaining the possibility of claims for intrusion into one's "emotional privacy," the Court of Appeals found that the plaintiff could not have suffered any emotional disturbance from the photographs because he was asleep when they were taken;[40] in so ruling, *Branham* appears to create an additional requirement that a plaintiff know about the intrusion as it occurs.

The following year, the Court of Appeals in *Creel v. I.C.E. Assocs., Inc.*[41] held that a private investigator did not intrude into the plaintiffs' privacy by surreptitiously videotaping them during a church service. In reaching its decision, the *Creel* court first repeated *Ledbetter*'s misreading of *Prosser and Keeton on the Law of Torts*, attributing the requirement not only to *Ledbetter* but also (for the first time) to *Cullison*.[42] Then, after citing *Cullison* for the proposition that "intrusion requires intrusion into the plaintiff's private 'physical' space," the *Creel* court concluded that because the investigator had no physical contact with the plaintiffs and that the plaintiffs were neither alone nor secluded in the open-to-the-public church services where the videotaping occurred, therefore no actionable "intrusion" occurred.[43] Rejecting a possible claim for intrusion into emotional solace (or "emotional intrusion" as the court termed it), *Creel* relied on *Branham* for its newly minted restriction that emotional disturbance cannot occur where a victim is not aware of an intrusion until after it happens.[44]

Just three months later, in October 2002, a nearly identical analysis appeared in *Munsell v. Hambright*[45] wherein the Court of Appeals concluded that a counselor's phone calls to her patient's employer regarding the patient's psychological diagnosis did not constitute an actionable "intrusion." After first reciting the mandatory "intrusion upon his or her physical solitude or seclusion, as by invading his or her home or other quarters" language, the *Munsell* court upheld summary judgment for the defendant where "no such intrusion into [plaintiff]'s physical space occurred here."[46] Then, almost as an afterthought, the *Munsell* court chose to expand *Ledbetter*'s actual holding; whereas *Ledbetter* "held that a single telephone call, involving no threats or abusive language, cannot be the basis for invasion of privacy by

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intrusion," *Munsell* held that even where multiple telephone calls are involved, "the result is the same."[47]

In 2011, the Court of Appeals authored the latest chapter in this confusing saga. In *Curry v. Whitaker*,[48] the Court of Appeals discussed *inter alia* whether surveillance cameras directed at the exterior of the plaintiffs' home could form the basis for a claim of "intrusion." After opening with a citation to *Cullison* requiring invasion of a "physical space," *Curry* announced an apparent expansion of the tort by acknowledging the possibility of intrusion into one's "private affairs":

> A defendant may be liable for intrusion into private affairs if he or she has engaged in conduct that resembles watching, spying, prying, besetting, or overhearing, *and* the intrusion has invaded an area which one normally expects will be free from exposure to the defendant.[49]

Yet what *Curry* gave with one hand, it took away with the other. Following this apparent expansion, the *Curry* opinion proceeded to explain the latter clause (*i.e.*, "an area which one normally expects will be free from exposure to the defendant") with examples of invasions of private physical spaces, eventually concluding that no actionable intrusion occurred because "[t]he surveillance cameras did not intrude into the Currys' private physical space."[50]

Trying to get back on track – 'emotional intrusion' gains a foothold?

Regardless of whether *Cullison* is to blame (for using imprecise language) or subsequent panels of the Court of Appeals are to blame (for misinterpreting *Cullison* and misreading *Prosser and Keeton*), Indiana has now developed a reputation as one of the very few states that cleaves to the notion of limiting "intrusion" to physical invasion of a personal physical space such as one's home.[51]

Perhaps recognizing the lack of reasoned support for this limitation, several Indiana decisions appear to back away (subtly) from this interpretation. In so doing, these courts have analyzed claims for "intrusion into emotional solace" (or "emotional intrusion") without explicitly acknowledging the viability of the tort. For example, in *Munsell v. Hambright*, the Court of Appeals noted that "[t]he tort [of intrusion] also arguably embraces intrusion into emotional solace."[52] Likewise, in *Creel v. I.C.E. Assocs., Inc.*, the Court of Appeals engaged in an "emotional intrusion" analysis prefaced with a caveat: "Thus, even if intrusion upon one's emotional privacy would suffice to establish the tort of invasion of privacy by intrusion, we would not find such intrusion in this instance."[53] The Court of Appeals did exactly the same thing in *Branham v. Celadon*, noting that "[t]he parties debate whether such intrusion must be into the plaintiff's private physical space, or whether an intrusion into a person's emotional solace will suffice. ... We need not resolve the parties' dispute, however, because under either analysis Branham's claim fails."[54] In *Newman v. Jewish Cmty. Ctr. Ass'n. of Indianapolis*, the Court of Appeals acknowledged that intrusion "arguably embraces intrusion into emotional solace."[55] Moreover, in *Mills v. Kimbley*, the Court of Appeals analyzed intrusive surveillance as a claim for "intrusion into emotional solace" without explicitly acknowledging as much.[56] Even the *Curry* decision flirted with the issue before declining to recognize "emotional intrusion" explicitly:

> To the extent that the Currys argue that there was an emotional intrusion into their solitude, we note that they do not develop the issue until their reply brief. In addition, no Indiana court has yet to officially recognize it. ... The Currys have not provided us with cogent reasoning as to why Indiana should now recognize intrusion into a plaintiff's emotional solace.[57]

* * *

Indiana now stands at a crossroads. Down one path, our courts could recognize that "intrusion" should include both invasions into one's private physical space **and** intrusion into one's private affairs. On that same path, our courts might acknowledge that one's private affairs sometimes include matters outside the confines of one's home insofar as our bank statements, medical records and other personal data are "area[s] which one normally expects will be free from exposure. ..." Or Indiana could remain on its current path, limiting "intrusion" to physical contact or invasions of "private physical space" such that the tortuously curious are free to invade our bank records, our medical records and any other personal data we might treasure as long as those inspections occur somewhere other than our residence.[58]

As the *Cullison* snowball continues to careen down the slopes of Indiana jurisprudence, it is building into an avalanche that threatens to bury decades-old principles of privacy protection. The time for Indiana to come into line with the Restatement (Second) of Torts, *Prosser and Keeton on the Law of Torts* and nearly every other jurisdiction in this country[59] is long overdue. Indiana must recognize "emotional intrusion" as a viable, actionable tort.

1. As Judge Sullivan explained in his dissent in *Terrell v. Rowsey*, 647 N.E.2d 662 (Ind. Ct. App. 1995), *trans. denied*:

   [T]he legal wrong in itself constitutes an invasion of plaintiff's right and gives rise to damages. The damage flows from the wrongful act, itself injurious to another's right, even though no perceptible loss or harm accrues therefrom.

   Id. at 669 (quoting *Sutherland v. Kroger Co.*, 110 S.E.2d 716, 724 (W. Va. 1959)). *See also Schuchart v. La Taberna Del Alabardero, Inc.*, 365 F.3d 33, 37 (D.C. Cir. 2004) ("[A] plaintiff's legal injury is not limited to harm suffered indirectly as a result of an intrusion but also includes the intrusion itself. ...").
2. 943 N.E.2d 354 (Ind. Ct. App. 2011).
3. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 80 (1971) (Marshall, J., dissenting).
4. Samuel D. Warren & Louis D. Brandeis, "The Right To Privacy," 4 *Harv. L. Rev.* 193, 195 (1890).
5. *Id.* at 196, 215-16.
6. William L. Prosser, "Privacy," 48 *Cal. L. Rev.* 383, 389 (1960).
7. Restatement (Second) of Torts §§652A-652E (1977). As one commentator notes, "For all practical purposes, there is no separate identity between Prosser's observations concerning the tort of intrusion in his law review article and the text of the Restatement (Second) of Torts pertaining to intrusion." Andrew Jay McClurg, "Bringing Privacy Law Out Of The Closet: A Tort Theory Of Liability For Intrusions In Public Places," 73 *N. Carolina L. Rev.* 989, 998 n.40 (1995).
8. Restatement (Second) of Torts §652B.
9. *See also id.* at §652B, comment b: "[The invasion] may be by some other form of investigation or examination into his private concerns, as by opening his 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." (Emphasis added.)
10. *See also id.* at §652B, comment c: "Even in a public space, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public faze; and there may still be invasion of privacy when there is intrusion upon these matters."
11. *Id.*
12. W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* §117, at 854-55 (5th ed. 1984) (footnotes omitted) (emphasis added).
13. W. Prosser & J. Keeton, *Prosser and Keeton on Torts* §117 (Supp. 1988), citing with approval *Phillips v. Smalley Maintenance Svcs.*, 435 So.2d 705, 711 (Ala. 1983) ("One's emotional sanctum is certainly due the same expectations of privacy as one's physical environment.").
14. 119 Ind. Ct. App. 643, 86 N.E.2d 306 (1949).
15. *Id.* at 648, 86 N.E.2d at 308 (quoting Annotation, "Right of Privacy," 138 *A.L.R.* 22, 25 (1942)) (emphasis added).
16. *Id.* at 649, 86 N.E.2d at 309-10.
17. *See, e.g., Indiana Nat'l Bank v. Chapman*, 482 N.E.2d 474, 477-79 (Ind. Ct. App. 1985) (addressing "legitimate public concern" element of "public disclosure of private facts," holding that bank's answers to legitimate inquiry by law enforcement qualified as "legitimate public concern"); *Near East Side Cmty. Org. v. Hair*, 555 N.E.2d 1324, 1334-36 (Ind. Ct. App. 1990) (addressing "legitimate public concern" element of "public disclosure of private facts," holding that factual statements about landlord's net worth and holdings were of "legitimate public concern").
18. 570 N.E.2d 27 (Ind. 1991).
19. *Id.* at 31 (citing *Prosser and Keeton on the Law of Torts* §117 (5th ed. 1984)).
20. At least one court has eschewed reading *Cullison* as a comprehensive pronouncement on "intrusion":

    The *Cullison* court concluded that Cullison's privacy was not invaded by the "harassment" in public places in that case. In this respect, however, *Cullison* may have presented a different case than the one here before the court. The "harassment" in *Cullison* involved one of the defendants "glaring" at Cullison "in a menacing manner while armed with a handgun at a restaurant" and standing near Cullison "while wearing a pistol and a holster approximately one foot from Cullison's face." It is not clear whether more invasive harassing activity might constitute an invasion of privacy under Indiana law.

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Garus v. Rose Acre Farms, Inc., 839 F.Supp. 563, 570 (N.D. Ind. 1993).

21. 633 N.E.2d 280 (Ind. Ct. App. 1994).
22. *Id.* at 290 (emphasis added).
23. *Id.*
24. 839 F. Supp. 563.
25. *Id.* at 570 (quoting W. Prosser & J. Keeton, *Prosser and Keeton on Torts* §117 (Supp. 1988)).
26. 604 F. Supp. 229 (N.D. Ind. 1984).
27. *Id.* at 236.
28. 940 F.Supp. 1344 (S.D. Ind. 1996).
29. *Id.* at 1368.
30. 647 N.E.2d 662 (Ind. Ct. App. 1995), *trans. denied.*
31. *Id.* at 667.
32. *See Ledbetter v. Ross*, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000). *See also Creel v. I.C.E. Assocs., Inc.*, 771 N.E.2d 1276, 1280 (Ind. Ct. App. 2002) (referencing *Terrell* and *Cullison* for proposition that "[t]here have been no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff's physical space such as the plaintiff's home").
33. 725 N.E.2d at 123.
34. *Id.* (quotation omitted) (emphasis added).
35. *Id.*
36. *See, e.g., Curry v. Whitaker*, 943 N.E.2d 354, 357-58 (Ind. Ct. App. 2011); *Mills v. Kimbley*, 909 N.E.2d 1068 (Ind. Ct. App. 2009); *Newman v. Jewish Cmty. Ctr. Ass'n of Indianapolis*, 875 N.E.2d 729 (Ind. Ct. App. 2007), *trans. denied*; *Creel*, 771 N.E.2d at 1280.
37. 744 N.E.2d 514 (Ind. Ct. App. 2001), *trans. denied.*
38. *Id.* at 524.
39. *Id.*
40. *Id.*
41. 771 N.E.2d 1276.
42. *Id.* at 1280.
43. *Id. cf. Mills*, 909 N.E.2d 1068 (reversing summary judgment to defendant where genuine issue of material fact as to whether videotaping intruded into areas not visible to the public).
44. *Creel*, 771 N.E.2d at 1280.
45. 776 N.E.2d 1272 (Ind. Ct. App. 2002).
46. *Id.* at 1283. *See also Newman*, 875 N.E.2d at 737 (upholding dismissal of intrusion claim into emotional solace where plaintiff did not allege that defendants "invaded her physical personal space").
47. *Munsell*, 776 N.E.2d at 1283.
48. 943 N.E.2d 354.
49. *Id.* at 358 (citing 62A Am.Jur. 2d *Privacy*, §44 (2005)) (emphasis in original).
50. *Id.* at 358-59.
51. 62A AmJur.2d *Privacy*, §40 (2005). In fairness, Indiana is not entirely alone in its narrow interpretation of "intrusion" – though of those jurisdictions that share Indiana's approach, most reach their narrow interpretations through explicit legislation rather than misreadings of precedent and secondary sources. For example, Wisconsin statutorily limits intrusions to invasions of an actual physical space. Wis. Stat. §995.50(2); *Hillman v. Columbia Cnty.*, 474 N.W.2d 913 (Wis. Ct. App. 1991). Rhode Island statutorily limits the tort to physical invasions. *Swerdlick v. Koch*, 721 A.2d 849, 858 (R.I. 1998).

    Moreover, other jurisdictions are seldom consistent in their own treatment of these issues. For example, a Texas litigant must wrestle with conflicting precedents suggesting that intrusion includes invasion of one's "private affairs or concerns" while simultaneously requiring "a physical invasion of a person's property ... ." *Fields v. Keith*, 174 F. Supp. 2d 464, 478 (N.D. Tex. 2001) (internal quotations and citations omitted), *aff'd*, 273 F.3d 1099 (5th Cir. 2001). Similarly, Iowa has held that there will be no intrusion where a plaintiff is in public view yet, in the same case, also holding that "the mere fact a person can be seen by others does not mean that person cannot legally be 'secluded.'" *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 687 (Iowa 1987). Georgia requires a physical intrusion analogous to a trespass, *Davis v. Emmis Pub. Corp.*, 536 S.E.2d 809 (Ga. Ct. Ct. App. 2000), though the "physical" element can include surveillance or monitoring. *Sitton v. Print Direction, Inc.*, 718 S.E.2d 532, 537 (Ga. Ct. App. 2011).
52. 776 N.E.2d at 1283.
53. 771 N.E.2d at 1281.
54. 744 N.E.2d at 524.
55. 875 N.E.2d at 729.
56. 909 N.E.2d at 1068.
57. 943 N.E.2d at 359 n.2 (citing *Branham* and *Creel*).
58. Admittedly, to say that Indiana tortfeasors are "free" to engage in these types of privacy invasions is an overstatement. One's confidential health information, for example, is protected from disclosure by the Health Insurance Portability & Accountability Act ("HIPAA"), whereas one's personal financial information is protected from disclosure by Ind. Code §27-2-20-2. Of course, neither of these protections prohibits the initial invasion of one's privacy (as opposed to the subsequent disclosure), and neither affords the victim a private cause of action. *See, e.g., Acara v. Banks*, 470 F.3d 569 (5th Cir. 2006) (no private cause of action under HIPAA); Ind. Code §27-2-20-4 (no private cause of action). Nor will most victims feel vindicated by administrative proceedings or criminal prosecutions that punish the wrongdoer yet leave the victim uncompensated for the loss of her privacy. Similarly, the requirement of actual pecuniary loss renders existing tort mechanisms (*e.g.*, trespass or fraud) – to the extent they would even apply in a given situation – inadequate to compensate for a harm as amorphous as loss of one's privacy.
59. For a sampling of extra-jurisdictional cases where examination of private records qualified as intrusion, *see, e.g., Birnbaum v. U.S.*, 588 F.2d 319 (2d Cir. 1978) (opening and reading sealed mail); *Johnson v. Stewart*, 854 So.2d 544 (Ala. 2002) (examining a private bank account); *Taus v. Loftus*, 151 P.3d 1185 (Cal. 2007) (data sources); *Broughton v. McClatchy Newspapers, Inc.*, 588 S.E.2d 20 (N.C. Ct. Ct. App. 2003) (prying into confidential personal records). *See also Doe v. High-Tech Institute, Inc.*, 972 P.2d 1060 (Colo. Ct. App. 1998) (unauthorized HIV test on a blood sample is an "offensive intrusion").

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