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Looking out for Your Employees: Employers' Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy

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Looking out for Your Employees: Employers’ Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy

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I. INTRODUCTION

Occasionally Charles Jones urinated in his front yard.¹ This probably went unnoticed by his only neighbor; Jones lived on forty-one acres of land, and the neighbor lived 250 yards away.² It also probably went unnoticed by distant passerbys. Although a highway and a county road intersected nearby, and his front yard was visible from both roads,³ the speed of drivers (and the fact they would not be focusing on Jones) likely made it difficult for them and their passengers to discern what he was doing.⁴

Unfortunately for Jones, his comings and goings (and in particular, his physical activities) became of interest to his employer after he filed a workers’ compensation claim.⁵ His employer hired an investigation

1. See *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 687 (Ala. 2000).
2. *Id.* at 690 (Cook, J., dissenting).
3. *Id.* at 687.
4. This conclusion is supported by the fact that of the four occasions on which the investigator videotaped Jones urinating (discussed below), only once did the investigator (who was stationary), through the use of the naked eye, suspect what Jones was doing. See *id.*
5. *Id.*

firm (aptly named "I.C.U. Investigations, Inc.") to watch his daily activities, and an investigator, using a telephoto video camera, videotaped Jones from the shoulder of the highway or the county road near Jones's home.⁶ Four times the investigator videotaped Jones urinating in his front yard.⁷ At the end of each day's surveillance, the investigator copied the tapes and sent them to the attorney for Jones's employer.⁸ When Jones learned he had been videotaped urinating, he filed suit against his employer, the investigation firm, and the investigator, asserting, among other things, a claim based on the tort of invasion of privacy.⁹ The case went to trial against only the investigation firm, and the jury returned a verdict in Jones's favor for \$100,000.¹⁰

The investigation firm appealed the verdict to the Alabama Supreme Court. The case divided the justices six to three, with each of the three dissenting justices writing a separate opinion.¹¹ The majority held that the jury verdict in Jones's favor could not stand. They held that the investigation's purpose was legitimate,¹² and that "[b]ecause the activities Jones carried on in his front yard could have been observed by any passerby, . . . any intrusion [by the investigation firm] into Jones's privacy was not 'wrongful' and, therefore, was not actionable."¹³

A dissenting justice felt that "a videotape of Jones urinating in his yard served no legitimate purpose in [his] workers' compensation case," and "[a]lthough Jones was in his front yard, the matter was clearly personal in nature."¹⁴ This justice also felt that "given the distance [of Jones] from the highway, and the layout of his property, a disputed issue existed as to whether Jones's activities were public."¹⁵ This justice believed that "a factual issue existed as to whether the means used to videotape Jones was improper, offensive, and unreasonable."¹⁶ Another dissenting justice felt that although "the investigator was free to film Jones while he was in his front yard," the investigator still invaded Jones's privacy "because he filmed an act 'not exhibited to the public gaze.'"¹⁷ The third dissenting justice believed that "the issue of whether telephoto surveillance is offensive or improper enough to constitute invasion of privacy is a jury ques-

6. *Id.*

7. *Id.*

8. *Id.* at 687-88.

9. *Id.* at 688.

10. *Id.* at 687.

11. One of the dissenting opinions was written on the application for rehearing. *See id.* at 693 (Johnstone, J., dissenting).

12. *Id.* at 689 (majority opinion).

13. *Id.* at 689-90.

14. *Id.* at 690 (Cook, J., dissenting).

15. *Id.*

16. *Id.*

17. *Id.* at 693 (England, J., dissenting).

tion.”¹⁸ This justice also felt it noteworthy that “the name of the [investigation firm]—ICU Investigations, Inc.—obviously intends a pun on ‘I see you’ and implies prurient Peeping Tomism.”¹⁹

The justices’ disagreement was not surprising. The case included many of the classic issues involving the tort of invasion of privacy, such as: In which places does a person have a right of privacy? If a person is in an area that can be viewed by others, does he or she at least have the right to not be photographed or videotaped under certain circumstances? Does it matter that image-enhancing equipment, such as a telephoto lens, is used? Is the purpose of the surveillance relevant?

This Article addresses such issues with respect to employers conducting surreptitious physical surveillance of employees.²⁰ Although such surveillance might, under certain circumstances, be prohibited by any one of a hodgepodge of non-tort sources,²¹ including the Fourth Amendment to the United States Constitution,²² federal legislation,²³ state constitutions,²⁴ state legislation,²⁵ and contract law,²⁶ such

18. *Id.* (Johnstone, J., dissenting).

19. *Id.*

20. This Article is limited to physical surveillance and does not address monitoring employee computer use (including electronic mail) or telephone conversations. Such surveillance has already received considerable attention from other commentators. This Article also does not address surveillance that is not surreptitious, including surveillance that is performed in a physically intrusive or harassing manner. *See, e.g.,* Wolfson v. Lewis, 924 F. Supp. 1413, 1433–34 (E.D. Pa. 1996) (holding that plaintiffs stated a claim for invasion of privacy when defendants’ surveillance constituted “a course of hounding, harassing, intimidating, and frightening conduct”); Tucker v. Am. Employers’ Ins. Co., 171 So. 2d 437, 437–39 (Fla. Dist. Ct. App. 1965) (holding that genuine issue of fact existed as to whether plaintiff could establish a claim for invasion of privacy when plaintiff alleged that surveillance was done “in such a manner as to make the plaintiff and the general public aware that she was being followed”).

21. It has been correctly noted that “[p]rivacy law is confusing because its sources stem from tort law, constitutional law, criminal procedure, civil procedure, family law, and contracts.” Quentin Burrows, *Scowl Because You’re on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1086 (1997).

22. The Fourth Amendment to the United States Constitution, which prohibits the government from undertaking “unreasonable searches and seizures,” U.S. CONST. amend. IV, is implicated when an employer conducts physical surveillance of its employees. *See, e.g.,* Thompson v. Johnson County Cmty. Coll., 930 F. Supp. 501, 507 (D. Kan. 1996) (“Domestic silent video surveillance is subject to Fourth Amendment prohibitions against unreasonable searches.”), *aff’d*, No. 96-3223, 1997 WL 139760 (10th Cir. Mar. 25, 1997) (unpublished table decision).

23. For example, surreptitious surveillance of employees’ union activities violates section 8(a)(1) of the National Labor Relations Act. *Wallace Press, Inc.*, 146 N.L.R.B. 1236, 1239 (1964).

24. Some state constitutions have an explicit right to privacy. *See, e.g.,* CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness,

and privacy.”); FLA. CONST. art. I, § 23 (“Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life . . .”).

25. Some states have enacted legislation prohibiting certain surveillance of employees by employers. For example, California has enacted a law prohibiting both public and private employers (but not the federal government) from making a video recording “of an employee in a restroom, locker room, or room designated by an employer for changing clothes, unless authorized by court order.” CAL. LAB. CODE § 435(a) (West 1998). Another California statute prohibits any person from attempt[ing] to capture, in a manner that is offensive to a reasonable person, any type of visual image . . . of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual . . . enhancing device, regardless of whether there is a physical trespass, if this image . . . could not have been achieved without a trespass unless the visual . . . enhancing device was used.
- CAL. CIV. CODE § 1708.8(b) (West 2006). *See also* CAL. PENAL CODE § 653 (West 1995) (prohibiting two-way mirrors in washrooms and similar facilities). West Virginia has enacted a law prohibiting an employer or any agent or representative of an employer from operating a surveillance device “for the purpose of recording or monitoring the activities of the employees in areas designed for the health or personal comfort of the employees or for safeguarding of their possessions, such as rest rooms, shower rooms, locker rooms, dressing rooms and employee lounges.” W. VA. CODE ANN. § 21-3-20 (West 1999). Connecticut has also enacted a law prohibiting an employer or any agent or representative of an employer from operating any electronic surveillance device “for the purpose of recording or monitoring the activities of the employees in areas designed for the health or personal comfort of the employees or for safeguarding of their possessions, such as restrooms, locker rooms or lounges.” CONN. GEN. STAT. ANN. § 31-48b (West 1980). Michigan has enacted a law that prohibits any person from installing, placing, or using in any private place, without the consent of the person or persons entitled to privacy in that place, any surveillance device. MICH. COMP. LAWS ANN. § 750.539d (West 2004). “Private place” is defined as “a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access.” *Id.* § 750.539a(1). New York has enacted a law that prohibits any person from installing or maintaining a two-way mirror or other viewing device for the purpose of surreptitiously observing or recording a visual image “of the interior of any fitting room, restroom, toilet, bathroom, washroom, shower, or any other room assigned to guests or patrons in a motel, hotel or inn.” N.Y. GEN. BUS. LAW § 395-b (McKinney 2005). Additionally, if surveillance violates a criminal law, the conduct might thereby also be tortious. *See, e.g.,* Galella v. Onassis, 487 F.2d 986, 994 (2d Cir. 1973) (affirming finding of invasion of privacy when conduct constituted harassment under New York’s penal law); Souder v. Pendleton Detectives, Inc., 88 So. 2d 716, 718 (La. Ct. App. 1956) (holding that invasion-of-privacy claim would be stated if defendant’s activities violated state’s criminal Peeping Tom statute).
26. Although it would be unusual for an employment contract between an employer and an individual employee to prohibit surreptitious physical surveillance, some collective bargaining agreements between employers and unions might include such a prohibition. The use of hidden surveillance cameras by an employer is a mandatory subject of collective bargaining with a union. *See* Colgate-Palmolive Co., 323 N.L.R.B. 515 (1997).

sources usually do not apply.²⁷ The Fourth Amendment restricts only government actors,²⁸ federal legislation prohibits only surveillance that interferes with employees' self-organizing efforts and activities,²⁹ state constitutional privacy provisions usually restrain only government actors,³⁰ few states have enacted legislation prohibiting surveillance,³¹ and contract law offers little protection because most employees are employed on an at-will basis without employment con-

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27. See, e.g., Robert G. Boehmer, *Artificial Monitoring and Surveillance of Employees: The Fine Line Dividing the Prudently Managed Enterprise from the Modern Sweatshop*, 41 DEPAUL L. REV. 739, 773-95 (1992) (concluding that constitutional and statutory provisions are generally not sufficient to protect employees' privacy interests); Kurt H. Decker, *Employment Privacy Law for the 1990s*, 15 PEPP. L. REV. 551, 556-57 (1988) ("Federal and state legislation has been primarily focused on promoting unionization as a countervailing force against employer power and control, and establishing a minimum level of economic entitlement for employees." (footnotes omitted)).
28. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). For an article advocating eliminating the distinction between public employees and private employees as to invasions of privacy, see S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 853 (1998).
29. See *supra* note 23; see also David N. King, Note, *Privacy Issues in the Private-Sector Workplace: Protection from Electronic Surveillance and the Emerging 'Privacy Gap'*, 67 S. CAL. L. REV. 441, 443 n.13 (1994) ("Federal legislation has never directly addressed the concept of *employee* privacy."). An attempt to pass federal legislation restricting the physical surveillance of employees failed. See The Privacy for Consumers and Workers Act (PWCA), S. 984, H.R. 1900, 103d Cong. (1993) (failed bill that sought to impose restrictions on the monitoring of employees). On the PCWA and its fate, see generally Jill Yung, *Big Brother IS Watching: How Employee Monitoring in 2004 Brought Orwell's 1984 to Life and What the Law Should Do About It*, 36 SETON HALL L. REV. 163, 205-07 (2005). Professor Wilborn has argued for federal legislation establishing uniform privacy rights for both public-sector and private-sector employees. See Wilborn, *supra* note 28. I consider it questionable whether such legislation is within Congress's power to enact. See generally *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (stating that Congress's power to enact legislation under the Commerce Clause is limited to regulating the use of channels of interstate commerce; regulating and protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce; and regulating activities having a substantial relation to interstate commerce).
30. Kevin J. Conlon, *Privacy in the Workplace*, 72 CHI-KENT L. REV. 285, 286 (1996) ("Several states have incorporated specific privacy guarantees into their constitutions. With the exception of California, these constitutional provisions do not extend to employees in the private sector.").
31. See, e.g., King, *supra* note 29, at 442-43 ("[S]tate legislative action has . . . been sluggish . . ."); Jeremy Friedman, Note, *Prying Eyes in the Sky: Visual Aerial Surveillance of Private Residences as a Tort*, 4 COLUM. SCI. & TECH. L. REV. 1, 23, (2003), available at <http://www.stlr.org/html/volume4/friedman.pdf> ("Privacy legislation extending beyond the bounds of the common law is relatively sparse . . ."); Wilborn, *supra* note 28, at 843 ("State governments have not addressed the issue of workplace privacy comprehensively or uniformly, and in many cases they have not addressed it at all.").

tracts prohibiting surveillance.³² Thus, the tort of invasion of privacy “remains the bedrock protection against unwarranted surveillance.”³³

In Part II of this Article, I address why an employer might want to conduct surreptitious physical surveillance of its employees. In Part III, I provide a brief history of the tort of invasion of privacy. In Part IV, I review cases involving the tort as applied to employers' surreptitious physical surveillance of employees and distill bright-line rules from such cases.³⁴ In Part V, in response to critics of existing law who seek to expand privacy rights (and, in particular, employee privacy rights), I argue that there are insufficient reasons for judicially modi-

32. An employee will not be able to rely on contract law unless he or she (or his or her union) has a contract with the employer prohibiting such surveillance. See Jeff Kray & Pamela Robertson, Note, *Enhanced Monitoring of White Collar Employees: Should Employers Be Required to Disclose?*, 15 U. PUGET SOUND L. REV. 131, 134 (1991) (“In the case of enhanced monitoring, strict application of the employment at will doctrine means that if the current employment contract does not limit the employer’s right to utilize enhanced monitoring [and it usually never does], then an employee has no basis for a breach of contract action when the employer implements such monitoring.”).

33. Friedman, *supra* note 31, at 24. See also Frank J. Cavico, *Invasion of Privacy in the Private Employment Sector: Tortious and Ethical Aspects*, 30 HOUS. L. REV. 1263, 1266 (1993) (“The basic legal bulwark for private sector employee privacy protection is the common law of torts, most often through the tort of invasion of privacy.”); Wilborn, *supra* note 28, at 829, 844 (“For the typical private-sector employee, the only source of legal protection against intrusive employer surveillance are claims brought under various state statutes or the common law tort of invasion of privacy,” and “[t]he tort that most plaintiffs use to challenge employer monitoring and surveillance is the intrusion on seclusion tort.”); Boehmer, *supra* note 27, at 801 (“Still photographs or videos of employees without sound will generally be analyzed under common law privacy principles.”); King, *supra* note 29, at 442 (“[E]mployees most frequently turn to the common law of torts to safeguard their privacy rights”); Conlon, *supra* note 30, at 289 (“Since constitutional and statutory law provide limited privacy protection to individuals at work, the discussion of worker privacy rights has largely focused on common law privacy claims.”). Although surveillance might be tortious as an intentional infliction of emotional distress, that tort is difficult to establish, particularly in the employment setting. See generally Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988).

34. Many commentators have criticized the failure of the courts to state a clear rule with respect to employee privacy rights. See, e.g., Cavico, *supra* note 33, at 1266 (“Failure to address the issue of employee privacy in the workplace and to develop fair and clear principles will beget perplexity, mistrust, acrimony, recrimination, and of course, litigation between employees and their employers.”); *id.* at 1345 (“[U]ntil a settled body of privacy tort law develops for the use of modern business technologies, it will be difficult to demarcate the line between acceptable business practices and tortious invasions of employees’ privacy.”); Boehmer, *supra* note 27, at 739 (“[T]he law provides employers with little guidance concerning the permissible depths of their intrusions. . . .”); King, *supra* note 29, at 459 (“Courts have created numerous tests in conjunction with the invasion-into-seclusion concept.”).

fyng the rules currently being applied by the courts with respect to employers' surreptitious physical surveillance of employees.

II. WHY AN EMPLOYER MIGHT CONDUCT SURREPTITIOUS PHYSICAL SURVEILLANCE OF EMPLOYEES

There are many reasons why an employer might conduct surreptitious physical surveillance of its employees.³⁵ For example, an employer might want to monitor employees' work activities for performance issues³⁶ or to help establish efficient manufacturing methods and procedures.³⁷ An employer might want to determine whether employees are stealing³⁸ or violating other company poli-

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35. The United States Supreme Court has noted that "it is important to recognize the plethora of contexts in which employers will have an occasion to intrude to some extent on an employee's expectation of privacy." *O'Connor v. Ortega*, 480 U.S. 709, 723 (1987). *See also* Cavico, *supra* note 33, at 1289 ("[E]mployers have many persuasive and justifiable reasons to engage in surveillance."); Wilborn, *supra* note 28, at 836-37 ("Employers provide a variety of justifications for maintaining these invasive practices: to improve employee productivity, to better evaluate work performance, to deter or uncover employee wrongdoing or dishonesty, even to limit tort liability under the respondeat superior doctrine." (footnotes omitted)).
 36. *See* AM. MGMT. ASS'N, *WORKPLACE MONITORING & SURVEILLANCE* (2001), available at http://www.amanet.org/research/pdfs/ems_short2001.pdf (finding that from 1997 to 2001, between 14% and 16% of major United States firms engaged in video recording of employee job performance); *see also* Wilborn, *supra* note 28, at 831 (acknowledging "validity of the employer's interest in maintaining an efficient and productive workplace"); Cavico, *supra* note 33, at 1288 ("Employers may use surveillance technology to improve employee performance"); Boehmer, *supra* note 27, at 745 ("[E]mployers naturally seek to use technology to increase employee productivity."); Shefali N. Baxi & Alisa A. Nickel, *Big Brother or Better Business: Striking a Balance in the Workplace*, KAN. J.L. & PUB. POL'Y, Fall 1994, at 137, 138 ("Monitoring, especially electronic monitoring, is important to many employers for numerous reasons. These reasons include promoting efficiency and quality in their employees' performance").
 37. *See, e.g.*, *Thomas v. Gen. Elec. Co.*, 207 F. Supp. 792, 799 (W.D. Ky. 1962) (employer photographed employee as part of studies to, among other things, increase efficiency of employer's operations); Cavico, *supra* note 33, at 1289 ("Employers may also implement a surveillance scheme in order to assess the organization's performance and to ascertain how best to achieve business objectives and augment the bottom line. For example, by visually chronicling a production process in order to create time and production routines, an employer can more efficiently schedule employees, inventory, and equipment. Efficiencies developed by means of surveillance may also help employers meet prime cost-control and cost-effective goals." (footnotes omitted)).
 38. *See, e.g.*, *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914 (C.D. Ill. 1999) (employer installed camera in ceiling tiles of office in response to items disappearing from office); *Thompson v. Johnson County Cmty. Coll.*, 930 F. Supp. 501 (D. Kan. 1996) (employer installed video surveillance camera to investigate allegation of theft), *aff'd*, No. 96-3223, 1997 WL 139760 (10th Cir. Mar. 25, 1997) (unpublished table decision); *Sacramento County Deputy Sheriffs' Ass'n v. County of Sacramento*, 59 Cal. Rptr. 2d 834 (Ct. App. 1996) (employer installed concealed video surveillance

cies.³⁹ An employer might want to monitor work areas for safety⁴⁰ or determine whether employees are having clandestine meetings.⁴¹ Or, an employer might simply want to find out why the office coffee tastes so bad.⁴²

An employer might even want to conduct surveillance of an employee's activities outside the workplace. For example, an employer might want to determine whether an employee is disclosing confidential company information,⁴³ or an employer might suspect that an employee on medical leave or who is seeking or receiving workers' compensation or disability benefits, is malingering.⁴⁴ An employer

camera in ceiling overlooking cashier's register and safe in cashier's office in response to incidents of theft); *see also* Boehmer, *supra* note 27, at 744 ("The efforts of employers to reduce losses caused by the shocking levels of employee theft in the United States provide a persuasive example of one legitimate reason for the artificial monitoring and surveillance of employees." (footnote omitted)).

39. *See, e.g.*, *Munson v. Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266 (7th Cir. 1992) (employer conducted surveillance of employee to determine if employee was violating policy requiring that he reside within city limits); *Fayard v. Guardsmark, Inc.*, Civ. A. No. 89-0108, 1989 WL 145958 (E.D. La. Nov. 29, 1989) (employer conducted surveillance of employee to determine if employee was fraternizing with an employee of client in violation of company policy); *DeLury v. Kretchmer*, 322 N.Y.S.2d 517 (Sup. Ct. 1971) (employer took employee's photograph at work as part of investigation into employee wrongdoing); *Brannen v. Kings Local Sch. Dist. Bd. of Educ.*, 761 N.E.2d 84 (Ohio Ct. App. 2001) (employer installed video camera in break room to determine if employees were taking excessive, unauthorized breaks).
40. *See, e.g.*, *Thomas*, 207 F. Supp. at 799 (employer photographed employee as part of studies to, among other things, promote safety of employees); *Cavico*, *supra* note 33, at 1288 ("Employers have a responsibility to, and legitimate interest in, providing a safe work environment. Calculated observation of employees can lead to the development of safer production routines. Thus, surveillance can serve the appropriate objective of protecting both employees and property." (footnotes omitted)); *Boehmer*, *supra* note 27, at 747 ("In an era of soaring insurance premiums, consider the additional potential savings derived through monitoring worker safety.").
41. *See* *Wilborn*, *supra* note 28, at 827 n.10 ("In one case, a company, after receiving reports of employees having clandestine meetings, installed a camera at the entrance hallway to the women's locker room." (citing *Courts Apply Broad Preemption Test to Emotional Distress, Privacy Claims*, WASH. INSIDER (BNA), July 14, 1992, at 30)).
42. *See* *Chris Kelly*, *War Ends, Alliance Dismantles, Leaving Coffee for Everyone*, TIMES-TRIBUNE (Scranton, Pa.), Apr. 16, 2005, http://www.thetimes-tribune.com/site/news.cfm?newsid=14360071&BRD=2185&PAG=461&dept_id=422126&rfti=6 (employee allegedly caught on videotape urinating into office coffee pot).
43. *Cavico*, *supra* note 33, at 1287; *see also* *Boehmer*, *supra* note 27, at 744 ("In addition to the efforts of employers to protect their tangible property and time, employers increasingly must take affirmative steps to protect their interests in intangible property, such as trade secrets.").
44. *See, e.g.*, *Stonum v. U.S. Airways, Inc.*, 83 F. Supp. 2d 894 (S.D. Ohio 1999) (employer hired private investigator to conduct surveillance of employee who was taking leave to allegedly care for her sick mother to determine if employee was abusing her leave); *Brady v. Wal-Mart Stores, Inc.*, 43 F. Supp. 2d 652 (S.D. Miss.

might want to investigate allegations that an employee is using illegal drugs.⁴⁵

The expense of defending employment lawsuits is a particularly good reason for employers to conduct surreptitious physical surveillance, especially when the surveillance involves videotaping or photographing the employee. As employers are faced with employees who can assert more employment rights than ever,⁴⁶ many employers are beginning to consider physical surveillance, and in particular, surreptitious video surveillance, a potential equalizer. Employees are in-

1998) (employer suspected that employee on medical leave of absence and who was receiving workers' compensation benefits was working for another employer, and conducted surveillance that revealed plaintiff performing normally and without apparent medical conditions); *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685 (Ala. 2000) (employer hired private investigator to conduct surveillance of employee in preparation for workers' compensation trial); *Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385 (Ala. 1992) (defendant conducted video surveillance of plaintiff while investigating plaintiff's workers' compensation claim); *Fiorillo v. Berkley Adm'rs*, No. CV010458400S, 2004 WL 1153678 (Conn. Super. Ct. May 5, 2004) (third-party administrator retained by employer conducted surveillance of employee who was seeking workers' compensation benefits to determine if she had obtained other employment and to determine extent of her disabilities); *Creel v. I.C.E. & Assocs.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002) (employer conducted surveillance of employee seeking long-term disability benefits to determine if she was working for another company and if she was disabled); *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. Ct. App. 1956) (employer's insurance company hired detectives to conduct surveillance of employee who had filed workers' compensation claim); *York v. Gen. Elec. Co.*, 759 N.E.2d 865 (Ohio Ct. App. 2001) (employer conducted video surveillance of employee who was seeking to increase his workers' compensation benefits); *McLain v. Boise Cascade Corp.*, 533 P.2d 343 (Or. 1975) (employer hired company to conduct surveillance of employee who had requested hearing with the workers' compensation board asking that his disability payments be reinstated); *Turner v. Gen. Adjustment Bureau, Inc.*, 832 P.2d 62 (Utah Ct. App. 1992) (investigators masqueraded as representatives of product marketing research committee to gain access to home of person who had filed workers' compensation claim), *overruled on other grounds by Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev'd on other grounds*, 538 U.S. 408 (2003); Susan Ward, *Muni Workers' Comp Bills May Face Ax*, S.F. CHRON., Sept. 22, 1999, at A17 (discussing mayor airing surveillance videos of supposedly injured municipal workers doing heavy physical work to demonstrate city's efforts to cut workers' compensation bills).

45. See, e.g., *Salazar v. Golden State Warriors*, No. C-99-4825 CRB, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000) (employer hired private investigator to conduct surveillance of employee in response to allegation employee was using illegal drugs).

46. For example, in the 1990s Congress enacted two monumental laws providing for additional employee rights—the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000), and the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000). See also Wilborn, *supra* note 28, at 865 n.153 (“Scholars have noted that th[e] decline in the influence of collective bargaining has accompanied an increase in the legally enforceable rights for individual employees.”).

creasingly filing lawsuits against their employers,⁴⁷ and the cost of defending such lawsuits can be considerable.⁴⁸ Employers understandably view the litigation process as expensive and risky (even when they have violated no laws), leading them to settle most cases.⁴⁹

Surreptitious video surveillance can greatly reduce the expense and risk of litigation, and can often prevent lawsuits from ever being filed. For example, through the use of surreptitious video surveillance, an employer might obtain conclusive evidence of an employee violating a particular work rule, which it can later use to respond to any wrongful discharge claim. Without such evidence, the employer might spend considerable money defending a baseless lawsuit.

Surreptitious video surveillance can also enable an employer to safely terminate a malingering employee whom the employer would not otherwise terminate for fear of a lawsuit alleging retaliation under a workers' compensation law,⁵⁰ a violation of the Family and Medical Leave Act of 1993,⁵¹ or discrimination or retaliation under the Americans with Disabilities Act of 1990.⁵² Employers interested in avoiding lawsuits, and winning those already filed, are realizing what insurance companies defending workers' compensation and personal injury cases discovered long ago—surveillance is often a cost effective way to reduce expenses and losses.⁵³

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47. See generally Gregory Todd Jones, *Testing for Structural Change in Legal Doctrine: An Empirical Look at the Plaintiff's Decision to Litigate Employment Disputes a Decade After the Civil Rights Act of 1991*, 18 GA. ST. U. L. REV. 997, 1028 (2002) (discussing increase in employment-related litigation).
 48. See, e.g., Timothy S. Bland, *EEOC Brings Mediation to the Table: Is it Right for Your Client?*, FED. LAW., July 2000, at 44, 44 ("The costs of defending employment discrimination lawsuits can run well into six figures.").
 49. See Labor Dep., Gibson, Dunn & Crutcher, *A Guide to Employment Discrimination Litigation*, C779 ALI-ABA 457, 525 (1992) ("Most employment discrimination suits are settled rather than litigated to judgment.").
 50. See, e.g., FLA. STAT. § 440.205 (2005) ("No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law.").
 51. See 29 U.S.C. § 2614(a)(1) (2000) (requiring reinstatement of employee on family or medical leave); *id.* § 2615 (prohibiting employer from retaliating against employee for asserting rights under the Act).
 52. See 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination against employee because of disability); *id.* § 12203(a) (prohibiting retaliation against employee for exercising rights under Act).
 53. Commentators have recognized the increase in employer surveillance of employees. See, e.g., Wilborn, *supra* note 28, at 826; ("Employees . . . are increasingly subject to monitoring, including . . . video surveillance . . ."); Jonathan J. Green, Note, *Electronic Monitoring in the Workplace: The Need for Standards*, 52 GEO. WASH. L. REV. 438, 438 (1984) ("Electronic surveillance of employees in the workplace has become increasingly common in recent years."). Other factors, in addition to increased lawsuits, might be contributing to an increase in employer monitoring of employees. For example, the cost of conducting such surveillance is

Employers who engage in surreptitious physical surveillance of employees, however, must consider when such surveillance violates employees' privacy rights under the common law. Before addressing this question, though, a brief history of the tort of invasion of privacy is in order.

III. A BRIEF HISTORY OF THE TORT OF INVASION OF PRIVACY

In 1890, Samuel D. Warren and Louis D. Brandeis wrote an article entitled *The Right to Privacy*.⁵⁴ The authors asserted that certain court decisions based on defamation, the invasion of some property right, or a breach of a confidence or an implied contract were actually based on the broader concept of a right to privacy.⁵⁵ The authors argued that invasion of privacy should be recognized as a distinct cause of action, and that a remedy should be provided for a breach.⁵⁶ Their article is considered the first time an independent tort for invasion of privacy was suggested.⁵⁷ "Warren and Brandeis were not presenting a picture of the law as it was, but of the law as they believed (or hoped) it should be."⁵⁸

Although courts were slow to adopt Warren's and Brandeis's invasion-of-privacy tort, by the 1930s "the tide set in strongly in favor of recognition, and the rejecting decisions began to be overruled."⁵⁹ In

decreasing. Wilborn, *supra* note 28, at 886 n.220; see also Cavico, *supra* note 33, at 1265 ("A greater number of employers have at their disposal the instruments necessary to engage in surveillance . . ."); Boehmer, *supra* note 27, at 765 ("The relatively low purchase cost of artificial monitoring and surveillance systems may well be the largest factor [in their increased use]."). Also, "an immense new array of sophisticated technology is available to the employer." Cavico, *supra* note 33, at 1265. Increased market competitiveness might also be a contributor. Boehmer, *supra* note 27, at 765 ("[I]ncreasing market competitiveness correspondingly increases the incentive to use artificial monitoring and surveillance.").

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

55. *Id.*

56. *Id.*

57. See *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1127 (Alaska 1989) ("The right to privacy is a recent creation of American law. The inception of this right is generally credited to a law review article published in 1890 by Louis Brandeis and his law partner, Samuel Warren."); Decker, *supra* note 27, at 558 ("The concept of privacy within the United States is generally traced to the Harvard Law Review article written by Samuel D. Warren and Louis D. Brandeis in 1890. . . . [P]rior to 1890 no cause of action for invasion of privacy could be brought in America."); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 958 (1989) ("The origins of the tort of invasion of privacy lie in a famous article on *The Right to Privacy* published in 1890 by Samuel Warren and Louis Brandeis.").

58. Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1347-48.

59. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 386 (1960).

1960, William L. Prosser, then dean of the University of California School of Law at Berkeley, announced that “[a]t the present time the right of privacy, in one form or another, is declared to exist by the overwhelming majority of the American courts.”⁶⁰

Prosser, in a law review article “that significantly influenced the development of the common law,”⁶¹ surveyed the legal landscape, and concluded that what had emerged from the decisions recognizing and applying a right to privacy was not one tort, but “a complex of four.”⁶² Prosser asserted that “[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . ‘to be let alone.’”⁶³ Prosser identified these four torts (or “sub-torts”) as follows: (1) “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs”; (2) “[p]ublic disclosure of embarrassing private facts about the plaintiff”; (3) “[p]ublicity which places the plaintiff in a false light in the public eye”; and (4) “[a]ppropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”⁶⁴

With respect to the tort of intrusion upon the plaintiff’s seclusion or solitude, or into his or her private affairs (the tort with which we are concerned),⁶⁵ Prosser stated that “there must be something in the nature of prying or intrusion.”⁶⁶ Prosser described the tort as including physical intrusions, such as intruding into the plaintiff’s home or hotel room, or searching the plaintiff’s shopping bag in a store.⁶⁷

60. *Id.*

61. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHICAGO L. REV. 221, 257 (1996) [hereinafter Finkin, *Employee Privacy*]. Professor Finkin disputes whether Prosser’s article was an accurate restatement of Warren and Brandeis’s work, arguing that Prosser focused on “intrusion into seclusion” as the tort’s cohesive element, and incorrectly “ignored the legal concept of ‘personality’ employed by Warren and Brandeis in 1890 and developed more fully by [Roscoe] Pound in 1915.” *Id.* at 258.

62. Prosser, *supra* note 59, at 389.

63. *Id.* (quoting THOMAS M. COOLEY, TORTS 29 (2d ed. 1888)).

64. *Id.*

65. See Wilborn, *supra* note 28, at 846 n.81 (“Although the Restatement identifies four possible categories of invasion of privacy, employee monitoring claims would fall only under the category ‘intrusion upon seclusion’ unless the employer engages in publication of the information obtained.”); Kenneth A. Jenero & Lynne D. Mapes-Riordan, *Electronic Monitoring of Employees and the Elusive “Right to Privacy,”* EMP. REL. L.J., Summer 1992, at 71, 81 (recognizing that of the four categories of common law invasion of privacy, “[t]he privacy claim most likely to be asserted in response to electronic surveillance of employees is intrusion upon seclusion”). Interestingly, “Warren and Brandeis, who were concerned with the evils of publication, do not appear to have had in mind any such thing as intrusion upon the plaintiff’s seclusion or solitude.” Prosser, *supra* note 59, at 389.

66. Prosser, *supra* note 59, at 390.

67. *Id.* at 389.

Prosser noted, however, that the principle protecting this branch of the right to privacy was "soon carried beyond such physical intrusion," and was extended to such things as peering through the windows of a home.⁶⁸

Prosser also observed that "the thing into which there is prying or intrusion must be, and be entitled to be, private."⁶⁹ Thus, for example,

[o]n the public street, or in any other public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.⁷⁰

But, "when he is confined to a hospital bed, and in all probability when he is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain."⁷¹

Prosser further observed that "the intrusion must be something which would be offensive or objectionable to a reasonable man."⁷² Prosser concluded his discussion of the tort of intrusion by stating that "[i]t appears obvious that the interest protected by this branch of the tort is primarily a mental one."⁷³

Prosser's identification of four distinct torts was accepted by the American Law Institute and incorporated into the *Restatement (Sec-*

68. *Id.* at 390.

69. *Id.* at 391.

70. *Id.* at 391-92.

71. *Id.* at 392 (footnote omitted).

72. *Id.* at 390-91.

73. *Id.* at 392. See also Finkin, *Employee Privacy*, *supra* note 61, at 221-28 (asserting that tort regulates outrage, rather than privacy, and that tort is designed to protect persons from emotional distress); Post, *supra* note 57, at 958 ("The stated purpose of the tort is to provide redress for 'injury to [a] plaintiff's emotions and his mental suffering.'). But see Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 974 (1964) ("I contend that the gist of the wrong in the intrusion cases is not the intentional infliction of mental distress but rather a blow to human dignity, an assault on human personality. Eavesdropping and wire-tapping, unwanted entry into another's home, may be the occasion and cause of distress and embarrassment but that is not what makes these acts of intrusion wrongful. They are wrongful because they are demeaning of individuality, and they are such whether or not they cause emotional trauma."); Post, *supra* note 57, at 961 (arguing that the relevant issue is whether a reasonable person would suffer and that "the pain or displeasure at issue cannot be understood as actual sensations or emotions"); *id.* at 964 ("[T]he injury at issue is logically entailed by, rather than merely contingently caused by, the improper conduct. An intrusion of privacy is *intrinsically* harmful because it is defined as that which injures social personality."); *id.* at 968 ("The underlying structure of the privacy tort is as much oriented toward safeguarding rules of civility . . . as it is toward protecting the emotional well-being of individuals.").

ond) of Torts,⁷⁴ and courts in a majority of the states have accepted the torts, usually relying on each of the *Restatement's* definitions.⁷⁵ With respect to the tort of intrusion, the *Restatement*, following Prosser's lead, provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."⁷⁶ Accordingly, to establish this tort under the *Restatement's* definition, the plaintiff must prove: (1) an intrusion; (2) the intrusion was intentional; (3) the intrusion was upon the plaintiff's solitude or seclusion, or his or her private affairs or concerns; and (4) the intrusion would be highly offensive to a reasonable person.⁷⁷ Some courts also require that the intrusion cause mental anguish,⁷⁸ which is consistent with Prosser's belief that the interest protected by the tort is primarily a mental one.⁷⁹

74. See RESTATEMENT (SECOND) OF TORTS § 652A (1977). It has been noted that the American Law Institute's acceptance of Prosser's theory was not surprising because Prosser served as "reporter" for the project, and the reporter is perhaps the project's most important person. See Andrew J. McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusion in Public Places*, 73 N.C. L. REV. 989, 998 n.40 (1995). The *Restatement (First) of Torts* recognized the tort of invasion of privacy as follows: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." RESTATEMENT (FIRST) OF TORTS § 867 (1939).

75. McClurg, *supra* note 74, at 998; see also Finkin, *Employee Privacy*, *supra* note 61, at 223-24 ("With some exceptions . . . most states apply the formulation of the Restatement (Second) of Torts."); Wilborn, *supra* note 28, at 844 (noting that tort of intrusion is "[r]ecognized in virtually every state").

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

77. *Id.*; see also *Jensen v. State*, 72 P.3d 897, 902 (Idaho 2003) ("Liability for a claim of invasion of privacy by intrusion requires: (1) an intentional intrusion by the defendant; (2) into a matter, which the plaintiff has a right to keep private; (3) by the use of a method, which is objectionable to the reasonable person."); *Jenero & Mapes-Riordan*, *supra* note 65, at 81 (noting that under the *Restatement's* definition of intrusion upon seclusion, "proof of three essential elements is required to state a valid claim of intrusion upon seclusion: (1) an intrusion, (2) into a private matter (3) that is highly offensive to a reasonable person."). Professor Finkin has summarized the elements as follows: "[A] particular invasive action that exceeds one's reasonable expectation of privacy and is highly objectionable to a reasonable person." Finkin, *Employee Privacy*, *supra* note 61, at 239.

78. See, e.g., *Hoth v. Am. States Ins. Co.*, 735 F. Supp. 290, 293 (N.D. Ill. 1990); *Melvin v. Burling*, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986); see also *King*, *supra* note 29, at 459 ("Most courts have followed the Illinois approach."). But see RESTATEMENT (SECOND) OF TORTS § 652H (1977) (entitling plaintiff to recover damages for "the harm to his interest in privacy resulting from the invasion" or for "his mental distress"); *Post*, *supra* note 57, at 964-65 (arguing that emotional distress is not necessary to establish invasion-of-privacy tort).

79. Prosser, *supra* note 59, at 392.

Having surveyed the background of the tort of intrusion, we can now turn to how courts have responded to claims by an employee that an employer's surreptitious physical surveillance of him or her constituted such a tort. I will review cases involving surveillance outside the workplace as well as inside the workplace. As will be seen, courts have been reluctant to treat surreptitious physical surveillance of employees as tortious, except in limited circumstances.⁸⁰

IV. CASE LAW INVOLVING EMPLOYERS' SURREPTITIOUS PHYSICAL SURVEILLANCE OF EMPLOYEES AND THE TORT OF INTRUSION

Of the four torts of invasion of privacy identified by Prosser and the *Restatement*, the first—intrusion upon the plaintiff's seclusion or solitude, or into his or her private affairs or concerns—is implicated by an employer's surreptitious physical surveillance of its employees.⁸¹ “Surveillance, depending on how it is conducted, may constitute such an intrusion.”⁸²

Such surveillance, however, even video surveillance, “does not in itself violate a reasonable expectation of privacy. The intrusiveness of [the surveillance] depends on the circumstances.”⁸³ As one court stated, “[E]very controversy (on invasion of privacy) must necessarily turn upon its own peculiar facts.”⁸⁴ Generally, “[i]f conducted in a reasonable and non-obtrusive manner, it is not actionable.”⁸⁵ “It is only where the intrusion has gone beyond the limits of decency that liability accrues.”⁸⁶

Thus, a review of the cases involving employers' surreptitious physical surveillance of employees is necessary to identify when such surveillance is an invasion of privacy. The cases are discussed below in the context of each of the four *Restatement* factors involved in an invasion-of-privacy claim based on intrusion. It is my hope to distill

80. For example, one commentator has stated, with respect to surveillance within the workplace: “[T]hose states that recognize [the tort of invasion of privacy] do not extend its protection to employees in the workplace beyond the most egregious of invasions.” Jeremy E. Gruber, *Re: Electronic Monitoring in the Workplace: Common Law & Federal Statutory Protection*, PLI LITIG., Mar.–Apr. 2001, at 351, 353.

81. *See, e.g., King, supra* note 29, at 459 (“[I]nvasion into seclusion is most adaptable to electronic-monitoring cases . . .”).

82. *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1117 (Md. Ct. Spec. App. 1986). *See also Decker supra* note 27, at 560–61 (“Privacy interests are . . . implicated where an employer conducts routine surveillance and monitoring.”).

83. *Salazar v. Golden State Warriors*, No. C-99-4825 CRB, 2000 WL 246586, at *3 (N.D. Cal. Feb. 29, 2000) (footnote omitted).

84. *Earp v. City of Detroit*, 167 N.W.2d 841, 845 (Mich. Ct. App. 1969) (quoting *Gill v. Curtis Publ'g Co.*, 231 P.2d 565, 568 (Cal. Ct. App. 1951), *aff'd*, 239 P.2d 630 (Cal. 1952)).

85. *Pemberton*, 502 A.2d at 1117.

86. *Aquino v. Bulletin Co.*, 154 A.2d 422, 426 (Pa. Super. Ct. 1959).

from such cases bright-line rules and to give content to the vague standard of whether the limits of decency have been passed.

A. Intrusion

To establish the tort of invasion of privacy based on intrusion there must, of course, be an intrusion. Any surreptitious physical surveillance, and in particular any such surveillance that uses electronic devices, is presumably sufficient to be an intrusion as that term is used in the *Restatement*.⁸⁷ Whether, however, there has been an intrusion when there is an attempted, but not accomplished, surveillance, is a more difficult question. The few courts that have addressed this issue have reached conflicting results. As discussed below, this division perhaps reveals a fundamental disagreement over the tort's very nature.

87. See Jenero & Mapes-Riordan, *supra* note 65, at 81 ("Electronic surveillance . . . generally is viewed as an 'intrusion' sufficient to establish the first element of the prima facie case."). Whether surreptitious physical surveillance is, in fact, an "intrusion," is an issue beyond the scope of this Article, if for no other reason than because no one seems to be suggesting it is not. It is worth noting, however, that it is arguable that surreptitious physical surveillance is not an intrusion. The dictionary definition of "intrude" is "to thrust oneself in without invitation, permission, or welcome," MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 657 (11th ed. 2003), which suggests surreptitious physical surveillance is an intrusion under, at best, a weak sense of the word. The dictionary definition of "intrusion," while simply noting that it is the "act of intruding or the state of being intruded," then states that it especially means "the act of wrongfully entering upon, seizing, or taking possession of the property of another," *id.*, further supporting the belief that surreptitious physical surveillance is an intrusion under, at best, a weak sense of the word. Unfortunately, the *Restatement* does not define "intrusion." Under the definition of "intrusion" provided in the sixth edition of *Black's Law Dictionary* (essentially a definition of "trespass"), it would seem as though surreptitious physical surveillance is not an intrusion. See BLACK'S LAW DICTIONARY 823 (6th ed. 1990) (defining "intrusion" as the "[a]ct of wrongfully entering upon or taking possession of property of another"). The current edition, though, has added an additional meaning taken directly from the tort of invasion of privacy. See BLACK'S LAW DICTIONARY 842 (8th ed. 2004) (defining "intrusion" as follows: "In an action for invasion of privacy, a highly offensive invasion of another person's seclusion or private life."). Under the definition provided in the current edition, if surreptitious physical surveillance is an "intrusion" under the tort of invasion of privacy, then it is an intrusion according to *Black's Law Dictionary*. In other words, if the courts define it as an "intrusion," then it is an "intrusion." While perhaps *Black's Law Dictionary* cannot be faulted for taking this approach (because it is defining words in their legal context), the definition provides no guidance for determining when an intrusion has occurred for purposes of the tort of invasion of privacy. One of the difficulties encountered in attempting to define intrusion is that the word itself connotes wrongdoing, but whether the defendant's conduct was wrongful is more easily addressed in the tort's other factors. For ease of analysis, it is better to simply assume that any surreptitious physical surveillance is an "intrusion," and to address the issue of whether it was wrongful when analyzing the tort's other factors.

In the employment context, courts have held that an attempted surveillance by an employer is not an intrusion.⁸⁸ Thus, according to these courts, if an employer places a video camera in the ceiling of an employee restroom to catch a thief, but no footage is taken, there is at most an attempted invasion of privacy, for which there is no cause of action.⁸⁹ Even when an employer operates a video camera in an area in which employees have a reasonable expectation of privacy, it is the employee's burden to demonstrate that he or she was in that area during the time footage was taken.⁹⁰ The holdings in these cases are consistent with the notion that there is no cause of action for an attempted tort.⁹¹

One court, however, in a non-employment context, has accepted the argument that an intrusion occurs as a result of an attempted surveillance.⁹² In *Harkey v. Abate*,⁹³ the court reversed a summary judgment in the defendant's favor even though there was no proof the defendant viewed the plaintiff and her daughter (on whose behalf the plaintiff was also suing).

88. California, however, has enacted a statute that makes it a tort for a person to "attempt[] to capture" an image under certain circumstances. See CAL. CIV. CODE § 1708.8(b) (West 2006).

89. *Meche v. Wal-Mart Stores, Inc.*, 692 So. 2d 544, 547 (La. Ct. App. 1997).

90. See *Brazinski v. Amoco Petrol. Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993) (applying Illinois law and affirming district court's grant of summary judgment to defendant on plaintiff's invasion-of-privacy claim when plaintiff failed to introduce evidence she frequented company locker room that was placed under video surveillance).

91. See *United States v. Stefonek*, 179 F.3d 1030, 1036 (7th Cir. 1999) (noting that there are no "attempted torts"); Anthony J. Sebok, *Deterrence or Disgorgement? Reading Ciralo After Campbell*, 64 MD. L. REV. 541, 565 (2005) ("[U]nlike in criminal law, there is no cause of action for attempted tort[]."); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 91 n.99 (2003) ("[T]here are attempted crimes but not attempted torts.").

92. In addition to the case discussed below, the decision in *Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991) (applying Missouri law), a case involving the surreptitious videotaping of models in a dressing area, has been characterized as finding that "the act of placing the video cameras in the dressing area was an unreasonable intrusion in and of itself." *Thomas v. Kan. City Police Dep't*, No. 04-0626-CV-W-RED, 2006 WL 27117, at *13 (W.D. Mo. Jan. 5, 2006). I am not convinced this is a proper reading of *Doe*. In *Doe*, some of the plaintiffs could not prove they had been videotaped in a state of undress, and the defendant argued that the invasion-of-privacy claim for those plaintiffs failed as a result. See *Doe*, 945 F.2d at 1427. The court, without much discussion, rejected this argument, simply stating that "[s]o long as there was an objectionable intrusion into the plaintiffs' enjoyment of an area in which the plaintiffs had a right and expectation of privacy, it is not necessary to the plaintiffs' cause of action that they be viewed in a state of undress." *Id.* It appears, however, that all of the plaintiffs were at least subjected to surveillance, even if they were not seen in a state of undress. See *id.* at 1424 (security guards "focused the camera on the plaintiffs and taped them as they were changing clothes for the fashion show").

93. 346 N.W.2d 74 (Mich. Ct. App. 1983).

In *Harkey*, the defendant, who owned a roller-skating rink, installed see-through panels in the ceiling of the women's restroom, allowing surreptitious observation of the restroom's interior, including the separately partitioned stalls.⁹⁴ The plaintiff and her daughter were patrons of the roller-skating rink, and at some point after using the restroom, discovered the see-through panels.⁹⁵

The plaintiff, individually and as next friend of her daughter, filed suit against the defendant, alleging the defendant viewed her and her daughter while they used the restroom.⁹⁶ The defendant contended, however, that he did not view the plaintiff or her daughter, and the plaintiff conceded that there appeared to be no proof he had.⁹⁷ The plaintiff argued, though, that such proof was unnecessary to establish a claim for invasion of privacy,⁹⁸ and the appellate court agreed.⁹⁹ The court held that "the installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly offensive."¹⁰⁰

In reaching this conclusion, the court relied on *Hamberger v. Eastman*,¹⁰¹ in which the New Hampshire Supreme Court held that an invasion-of-privacy tort occurred when the defendant landlord installed an eavesdropping device in the plaintiffs' bedroom, even though the plaintiffs could not prove the defendant listened to or overheard any sounds or voices from the bedroom.¹⁰² The court in *Harkey* also relied on a Michigan statute that made the defendant's conduct criminal, stating that the statute showed there existed "a legislative expression of public policy opposed to such conduct."¹⁰³ The court thus concluded that the absence of proof that the see-through panels were used did not preclude an invasion-of-privacy claim, though it might affect the plaintiff's damages.¹⁰⁴ One judge dissented on the grounds that the plaintiff and her daughter were never viewed and therefore could not have been injured.¹⁰⁵

The holding in *Harkey* is hard to reconcile with the cases that rejected claims based on attempted surveillances. The holdings could perhaps be reconciled if we knew that the plaintiff and her daughter in *Harkey* had discovered the see-through panels while in the rest-

94. *Id.* at 75.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 76.

100. *Id.*

101. 206 A.2d 239 (N.H. 1964).

102. *Id.* at 242.

103. 346 N.W.2d at 76.

104. *Id.*

105. *Id.* at 77 (Gillis, J., dissenting).

room. If so, the case could arguably be explained as one involving a defendant engaging in an activity that disturbs the plaintiff's solitude, irrespective of whether the defendant obtained private information about the plaintiff.¹⁰⁶ This was possibly the basis for the court's holding in *Eastman*; in that case, the plaintiffs discovered the listening devices while in their bedroom.¹⁰⁷

Unfortunately, the court in *Harkey* simply states that the plaintiff "thereafter discovered that the defendant had installed see-through panels,"¹⁰⁸ leaving it unclear as to when the discovery was made (though the court's language suggests it was after the plaintiff left the restroom). If the discovery was made after they left the restroom, it seems that no claim for the tort of intrusion should have existed. A person who learns after the fact of a surveillance device that was not used could not have had his or her solitude or seclusion disturbed.

The holding in *Harkey* might be distinguished from the cases that have not recognized a claim for an attempted surveillance on the basis that the Michigan legislature enacted a law criminalizing the conduct engaged in by the defendant. Such a law demonstrates a public policy in Michigan to prevent this type of conduct, and one could argue that courts should rely on a community's articulation of a moral norm through the legislature to determine when conduct is tortious.¹⁰⁹

I believe, however, that a hair-splitting effort to reconcile *Harkey* with the cases that have rejected claims based on an attempted surveillance is ultimately unavailing. I suspect the holding in *Harkey* was based on one of two factors, or both, neither of which enables its holding to be reconciled with the cases holding that an attempted surveillance is not actionable.

First, I suspect the court was troubled by the difficulty a plaintiff faces in proving that the defendant operated or made use of the surveillance device, or if used, that the defendant viewed the plaintiff. If, however, this concern motivated the court, it would have been better

106. For example, with respect to *De May v. Roberts*, 9 N.W. 146 (Mich. 1881), in which an invasion-of-privacy claim was stated when the defendant was an uninvited spectator to the plaintiff giving birth, there presumably still would have been an intrusion if the defendant had been blind. See, e.g., RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) ("The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home."). When, however, a claim is recognized in such a situation, it is through the use of a weak sense of the word "privacy." See *infra* note 170. In fact, the facts in *Harkey* are strikingly similar to Professor Hyman Gross's "key-to-the-castle" scenario discussed *infra* note 170.

107. *Eastman*, 206 A.2d at 240.

108. *Harkey*, 346 N.W.2d at 75 (emphasis added).

109. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 14-16 (1988) (arguing that courts, when deciding common law cases, rely on the community's moral norms as revealed in official sources).

for the court to have devised a rule that shifts the burden of proof to the defendant to prove that he or she did not operate the device when the plaintiff was present (something similar to *res ipsa loquitur* or the principle that a party should bear the burden of proof when the evidence bearing on the issue is within its control).¹¹⁰ Whether such an approach is suitable is a matter beyond the scope of this Article; I suggest it merely as a possible (and better) alternative to holding that an attempted surveillance is actionable.

Second, and perhaps more importantly, the court seems to have been employing a definition of privacy different from, and more expansive than, the definition employed by the courts that rejected claims based on an attempted surveillance. The court in *Harkey* appears to have been protecting the plaintiff and her daughter against conduct that it deemed contrary to social norms and that was demeaning.¹¹¹ If this is so, *Harkey* represents a significant expansion of the tort of invasion of privacy, and any conduct contrary to social norms and demeaning to a plaintiff could, consistent with *Harkey*, be made tortious.

This, however, is certainly not the intent of invasion of privacy law¹¹² and would turn the tort into a catch-all cause of action making tortious any demeaning conduct. Because the concept of privacy is subject to many different definitions, it is important to have the tort limited by clear boundaries. Prosser's identification of four sub-torts serves this function. By treating an attempted surveillance as an intrusion even when the attempted surveillance was discovered only after the fact stretches the definition of an intrusion beyond its generally accepted meaning and threatens to eradicate the tort's established boundaries. If this happens, employers will be unable to predict where a court will place the boundaries on any given day. Additionally, an attempted surveillance, while perhaps morally wrong, should not give rise to liability because the consequences of an attempted surveillance (the mental distress over thinking about what

110. See John K. Hicks, Note, *What Should We Do With the Fire Defense, Late in the Evening?*, 83 TEX. L. REV. 1225, 1258 (2005) ("One factor for a court to consider in allocating the burden of proof is each party's access to the evidence required to carry the burden.").

111. The court was surely also motivated by the fact that the attempted surveillance caused injury (albeit emotional), a factor usually not present in an attempted tort (and perhaps the strongest reason for holding there is no such thing as liability for an attempted tort, particularly when the primary goal of tort law is compensation). See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984).

112. I realize that exactly whose intent one would look to in a situation like this is not easy to answer.

could have been) are not sufficiently grave to warrant the cost of official intervention.¹¹³

Therefore, because there is more justification for rejecting than accepting an attempted surveillance as an invasion of privacy, I will reject such a notion for purposes of stating a bright-line rule as to when surreptitious surveillance is tortious.

B. Intentional

The tort of invasion of privacy is generally considered an intentional tort.¹¹⁴ The *Restatement* defines "intent" to mean "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."¹¹⁵ "The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids."¹¹⁶ Thus, malice is not a necessary element of intent.¹¹⁷

Rarely is intent (or lack of it) an issue in cases involving an employer's surreptitious physical surveillance of employees. Usually, the

113. See EISENBERG, *supra* note 109, at 29 ("The policy of social gravity is that morally wrongful conduct should not give rise to liability unless its consequences are normally of sufficient importance, in terms of either the societal interests implicated or the injury likely to result, to justify the social cost of official intervention."). This is not to say that official intervention might not be warranted under criminal laws. Official intervention might be warranted in that context to deter future attempts, but tort law, which is primarily concerned with compensation, does not justify intervention when the harm is not sufficiently grave.

114. *Scott v. Estes*, 60 F. Supp. 2d 1260, 1275 (M.D. Ala. 1999). Most courts have refused to recognize a claim for negligent invasion of privacy. See, e.g., *Noonan, Astley & Pearce v. Commercial Union Ins. Co.*, No. 95-55693, 1997 WL 30324, at *1-2 (9th Cir. Jan. 21, 1997) (unpublished table decision) (refusing to recognize claim for negligent invasion of privacy); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380-81 (Md. 1997) (same); *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 7 (S.C. Ct. App. 1989) (same); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 54 (Tex. App. 2001) (same, despite other Texas courts having done so).

115. RESTATEMENT (SECOND) OF TORTS § 8A (1965). See also *Snakenberg*, 383 S.E.2d at 6 ("For purposes of civil liability, an act is intentional if (1) it is done willingly; and either (2) the actor desires the result of his conduct, whatever the likelihood of that result happening; or (3) the actor knows or ought to know the result will follow from his conduct, whatever his desire may be as to that result.").

116. KEETON ET AL., *supra* note 111, § 8, at 36 (footnote omitted). One court has stated that "an actor commits an *intentional* intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989). This is a curious definition because it would protect those ignorant of the law and would have significant (beneficial) consequences for employers conducting surreptitious surveillance. As long as the employer is not substantially certain that its conduct is tortious, its conduct is thereby rendered not tortious.

117. *Snakenberg*, 383 S.E.2d at 6.

employer intends to conduct the surveillance and intends to learn whether the employee is engaging in the very activity that is ultimately viewed during the surveillance. The issue of intent, however, would be relevant when an employer conducts surreptitious surveillance of a particular location without knowing employees use the location to engage in private activities. This was the issue in *Acuff v. IBP, Inc.*¹¹⁸

In *Acuff*, the employer installed a camera in the ceiling tiles of the nurse manager's office because items were disappearing from the office.¹¹⁹ According to the employer, the employees who decided to have the camera installed, and those who actually installed it, did not know the office was used for employee medical examinations.¹²⁰

After the surveillance became common knowledge among employees, employees who had been treated in the office while surveillance occurred sued for invasion of privacy.¹²¹ The employer argued, among other things, that it could not be held liable because it did not intend to invade the employees' privacy.¹²² The court, however, rejected that argument.¹²³ The court held that a nurse manager who was employed by the defendant was aware medical examinations occurred in the office, and her knowledge could be imputed to the defendant.¹²⁴ The court further held that there was sufficient evidence to conclude that an employee who viewed the videotapes thereafter became aware the office was being used for examinations and failed to stop the videotaping.¹²⁵

The first ground for holding the employer liable is specious. There cannot be constructive knowledge and assumed intent for an intentional tort.¹²⁶ Also, the tort concept of transferred intent would not apply because the concept is generally premised on the belief that the defendant's conduct is wrongful, and "the fault is regarded as absolute toward all the world."¹²⁷ In *Acuff*, the defendant's conduct, unlike firing a gun at one person and hitting another, was not wrongful toward the intended subject of the surveillance (the employee who was stealing items from the nurse manager's office). Additionally, an assault is

118. 77 F. Supp. 2d 914 (C.D. Ill. 1999).

119. *Id.* at 918.

120. *Id.*

121. *Id.*

122. *Id.* at 921.

123. *Id.* at 922-23.

124. *Id.* at 923.

125. *Id.*

126. For example, with respect to employment discrimination, it has been stated that "[d]iscrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent." *Silvera v. Orange County Sch. Bd.*, 244 F.3d 1253, 1262 (11th Cir. 2001).

127. KEETON ET AL., *supra* note 111, § 8, at 38.

necessary to transfer intent when the harm caused is a mental disturbance.¹²⁸

The second ground, however, is supportable because intent does not require that a person intend the particular consequence if he or she knows the consequences are "substantially certain to result from the act."¹²⁹ Therefore, if an employee who was aware of the videotaping learned that medical examinations were occurring in the office and failed to stop the taping (and the omissions of that employee could be attributed to the employer), the employer should be held liable for the continued taping (but not the prior taping).¹³⁰

C. Intrusion into Solitude or Seclusion of Another, or His or Her Private Affairs or Concerns

"The intrusion on the plaintiff must concern those aspects of himself, his home, his family, his personal relationships, and his communications which one normally expects will be free from exposure to the defendant."¹³¹ Thus, "[t]he tort of intrusion upon seclusion . . . requires a determination of what is private."¹³²

This factor is composed of two related sub-factors. First, the plaintiff must be engaged in some activity, or be disclosing some matter, that is private.¹³³ Second, the plaintiff must reasonably, and justifiably, expect his or her activity to be free from exposure to the defendant.¹³⁴ Each sub-factor is discussed below.

1. Private Activities

Certain activities are obviously private, such as Jones's act of urinating.¹³⁵ A medical examination¹³⁶ or undressing¹³⁷ are other examples.

128. *Id.* at 39.

129. *Id.* at 34 (citation omitted). Thus, "[t]he actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence." *Id.* at 35.

130. Interestingly, there was no discussion in *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685 (Ala. 2000), regarding whether the defendant's alleged invasion of privacy was unintentional. Perhaps this is because on at least one occasion the investigator suspected Jones was urinating, *see id.* at 687, and thus knew it was substantially certain that videotape of him urinating was being obtained.

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

132. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1090 (2002).

133. *See Acosta v. Scott Labor LLC*, 377 F. Supp. 2d 647, 650 (N.D. Ill. 2005) (holding that plaintiff must allege intrusion with respect to private facts, such as financial, medical, or sexual matters, and that failure to do so defeats claim).

134. One court has stated that the plaintiff must attempt to keep the private facts private. *Id.*

135. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989) ("There are few activities in our society more personal or private than the passing of urine.")

Importantly for our purposes, however, an employee's work-related activities are generally not considered private. For example, in *Smith v. Colorado Interstate Gas Co.*,¹³⁸ the plaintiff sued her former employer for, among other things, invasion of privacy, alleging that the employer had kept her under close observation while she worked.¹³⁹ The court rejected the claim, holding that "[u]nreasonable intrusion of seclusion is not implicated because the allegations do not involve invasions of [the plaintiff's] solitude or personal affairs. Instead, the allegations concern [the defendant's] business affairs."¹⁴⁰ Similarly, in *Acosta v. Scott Labor LLC*,¹⁴¹ the court held that surreptitious videotaping by an employee of other employees (including one of the employer's principals) did not state a claim because the videotaping was not of private facts.¹⁴² The court noted that the fact the plaintiff worked at the company was not highly personal¹⁴³ and held that "employment is not inherently private as a matter of law."¹⁴⁴

The case of *Schibursky v. International Business Machines Corp.*,¹⁴⁵ although involving the tort of intentional infliction of emotional distress, is also instructive. The plaintiff alleged that after she used her employer's open-door policy to appeal a performance appraisal, her employer subjected her to unwarranted and oppressive

(internal quotation marks omitted) (quoting Nat'l Treasury Employees' Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 656 (1989)); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 5.03 cmt. b (Tentative Draft No. 3, 2005) ("Bodily . . . functions have traditionally been regarded as areas in which individuals, including employees and applicants for employment, enjoy substantial protection in their privacy"); *id.* § 5.03(2) (stating that "[m]onitoring an employee or applicant while the employee or applicant performs an excretory function typically performed outside of the presence of others" intrudes on the employee's or applicant's privacy interests); Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. REV. 968, 979 n.73 (1968) ("Sexual and excretory activities . . . are closely guarded in our society."). Whether Jones voluntarily exposed that activity to the defendant's view, or reasonably should have expected surveillance, should not be confused with the separate issue of whether the type of activity engaged in is a private activity.

136. See *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914, 924 (C.D. Ill. 1999) ("There are few things in life that are more private than medical treatments and/or examinations.").

137. See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 5.03(3) (Tentative Draft No. 3, 2005) (stating that "[o]bserving an employee's or applicant's body in a state of undress" intrudes on the employee's or applicant's privacy interests).

138. 777 F. Supp. 854 (D. Colo. 1991).

139. *Id.* at 855-56.

140. *Id.* at 857 (citation omitted).

141. 377 F. Supp. 2d 647 (N.D. Ill. 2005).

142. *Id.* at 650.

143. *Id.*

144. *Id.* at 652.

145. 820 F. Supp. 1169 (D. Minn. 1993).

workplace surveillance.¹⁴⁶ The plaintiff sued for, among other things, intentional infliction of emotional distress,¹⁴⁷ but the court rejected the claim. The court found that the surveillance mainly focused on whether the plaintiff was working unrecorded overtime¹⁴⁸ and noted that the employer did not spy on the plaintiff's private life or any other matter unrelated to her job.¹⁴⁹

Thus, even if an employee has a reasonable expectation of privacy in a particular area, the employee cannot state a claim unless the employee is viewed engaging in some sort of private activity, and activities that are work-related are generally not considered private vis-à-vis one's employer. For this reason, most employer surveillance of activities in the workplace will not be tortious. Of course, there will be some activities that are work-related that will still be considered private. For example, an employee who changes uniforms at work is, when changing clothes, engaged in a work-related activity, yet no one would maintain that undressing is not generally a private activity.

There is, however, support for the argument that any activity that is not exposed to the defendant is automatically considered private. For example, in *Doe v. B.P.S. Guard Services, Inc.*,¹⁵⁰ the court held that fashion models had a cause of action against the employer of security guards when the guards videotaped the models in a dressing area, even though some of the models could not prove they were videotaped in a state of undress.¹⁵¹ Prosser as well suggests that the mere act of conducting surreptitious surveillance of someone in his or her home would be an invasion of privacy.¹⁵²

If an activity that is not exposed to the defendant is automatically considered private for purposes of the tort of intrusion, the requirement that the activity be private merges with the requirement that it not be exposed to the defendant. Unfortunately, the law is not clear on this issue. I propose, however, that like an attempted surveillance, the consequences of a surveillance when the plaintiff is not engaged in a particularly private activity (meaning, at least, an activity a reasonable person would not engage in while in public) are not sufficiently grave to warrant the cost of official intervention.¹⁵³ Therefore, for

146. *Id.* at 1182–83.

147. *Id.* at 1174.

148. *Id.* at 1183.

149. *Id.*

150. 945 F.2d 1422 (8th Cir. 1991) (applying Missouri law).

151. *Id.* at 1427.

152. See Prosser, *supra* note 59, at 392 (stating that when a person “is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain”). What role the taking of a photograph plays in Prosser's opinion is unclear.

153. See EISENBERG, *supra* note 109, at 29 (“The policy of social gravity is that morally wrongful conduct should not give rise to liability unless its consequences are nor-

purposes of stating a bright-line rule, I will reject the notion that an activity is private as long as it is not exposed to the defendant.

2. *Activity Free from Exposure to Defendant*

The plaintiff must normally expect his or her activity to be free from exposure to the defendant.¹⁵⁴ With respect to this factor, the courts are in effect applying the “lawful-vantage-point” concept of Fourth Amendment jurisprudence, which provides that a Fourth Amendment search does not occur if a law enforcement officer “observes individuals, objects, or activities in ‘plain sight’ or ‘open view’ from a lawful vantage point.”¹⁵⁵ Under the lawful-vantage-point concept, surveillance is not tortious if the person conducting the surveillance can see the subject from a location the person has a lawful right to be. As demonstrated below, treating the employment surveillance cases as applying the lawful-vantage-point concept explains the decisions involving employers’ surreptitious physical surveillance of employees irrespective of whether the surveillance occurs when the employee is in public, in the workplace, or in any other location.¹⁵⁶

mally of sufficient importance, in terms of either the social interests implicated or the injury likely to result, to justify the social cost of official intervention.”). Again, this is not to say that official intervention might not be warranted under criminal laws.

154. *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989). Although a plaintiff’s consent to being observed by the defendant ordinarily precludes a claim, some courts have allowed a claim when the defendant gained access to the premises through misrepresentation of the defendant’s motives or by failing to disclose a relevant fact that would have resulted in denial of access. *See, e.g., Sanders v. Am. Broad. Cos.*, 978 P.2d 67 (Cal. 1999) (recognizing claim when undercover news reporter obtained access to workplace by applying for, and receiving, employment); *De May v. Roberts*, 9 N.W. 146 (Mich. 1881) (recognizing claim when friend of physician accompanied physician to birth of plaintiff’s child, and friend should have, but did not, disclose to plaintiff that he was not associated with the medical profession). *But see Turner v. Gen. Adjustment Bureau, Inc.*, 832 P.2d 62, 67 (Utah Ct. App. 1992) (holding that plaintiff failed to state a claim for invasion of privacy when investigators gained access to home through fraud), *overruled on other grounds by Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134 (Utah 2001), *rev’d on other grounds*, 538 U.S. 408 (2003).
155. David S. Rudstein, “*Touchy*” “*Feely*”—*Is There a Constitutional Difference? The Constitutionality of “Prepping” a Passenger’s Luggage for a Human or Canine Sniff After Bond* v. United States, 70 U. CIN. L. REV. 191, 202 (2001).
156. Although the courts have not explained their holdings in terms of the lawful-vantage-point concept, this makes the interpretation no less valid. *See RONALD DWORKIN, LAW’S EMPIRE* 284 (1986) (“[A]n interpretation need not be consistent with past judicial attitudes or opinions, with how past judges saw what they were doing, in order to count as an eligible interpretation of what they in fact did.”). Although one court, in a non-employment case, explicitly rejected the lawful-vantage-point concept, *see West v. Media Gen. Operations, Inc.*, No. 1:00-CV-184, 2001 WL 34079475, at *12 (E.D. Tenn. Nov. 13, 2001) (rejecting defendant’s reliance on lawful-vantage-point concept when defendant, while on public property, videotaped plaintiff on the balcony of a condominium and in the condominium’s

Before analyzing the cases to demonstrate that they are consistent with the lawful-vantage-point concept, I address various issues involving the concept.

a. Lawful-Vantage-Point Concept and Trespass

The test, properly defined, is whether the employer *could* have viewed the employee from a lawful vantage point, not whether the employer was in fact at a lawful vantage point. If an employer conducts surveillance from a location where he or she does not have a legal right to be, but could have viewed the same activities of the employee from a lawful vantage point, no claim should be stated. This is demonstrated by *McLain v. Boise Cascade Corp.*,¹⁵⁷ in which a trespass onto the periphery of the plaintiff's property to conduct surveillance was held not to be an invasion of privacy.¹⁵⁸ Although the court in *McLain*, in holding that a trespass does not automatically make surveillance an invasion of privacy, relied on the factor that requires the invasion of privacy to be highly offensive, the decision is more appropriately viewed as applying the notion that the lawful-vantage-point concept extends to surveillance that could have been conducted from such a vantage point.

In *McLain*, the plaintiff requested a hearing with a workers' compensation board to have his disability payments reinstated.¹⁵⁹ His employer hired a company to conduct surveillance of the plaintiff to determine the validity of the plaintiff's claim of injury,¹⁶⁰ and the investigators filmed the plaintiff engaged in various activities on his property outside his home.¹⁶¹ The plaintiff lived on slightly more than two acres of land, and some of the footage was taken by the investigators while on the periphery of the plaintiff's property.¹⁶² The

private parking lot), the court erroneously interpreted *Evans v. Detlefsen*, 857 F.2d 330 (6th Cir. 1988), as having rejected the concept. In *Evans*, the court held that the plaintiff could establish a claim when the defendant followed the plaintiff to a restaurant and pushed, shoved, and pulled him out of the restaurant. *Id.* at 332, 338. The court rejected the defendant's argument that because the incident occurred in a public restaurant there could be no claim, relying on *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1972). In *Onassis*, a claim for intrusion existed when the conduct, which took place in public, included physical touching, causing fear of physical contact, following the subject too closely in a car, and endangering the safety of the subject's children while they were swimming. *See id.* at 994. Thus, *Evans* stands simply for the proposition that an intrusion claim can exist when the defendant's conduct, far from being surreptitious, is physically harassing.

157. 533 P.2d 343 (Or. 1975).

158. *Id.* at 346.

159. *Id.* at 344.

160. *Id.* at 345.

161. *Id.*

162. *Id.*

court noted that the “plaintiff conceded that his activities which were filmed could have been observed by his neighbors or passersby on the road running in front of his property.”¹⁶³

Although the investigators conducted some of the surveillance on the plaintiff's property, the court stated that “the trespass was on the periphery of plaintiff's property and did not constitute an unreasonable surveillance ‘highly offensive to a reasonable man.’”¹⁶⁴ The court held that “trespass is only one factor to be considered in determining whether the surveillance was unreasonable. Trespass to peer in windows and to annoy or harass the occupant may be unreasonable. Trespass alone cannot automatically change an otherwise reasonable surveillance into an unreasonable one.”¹⁶⁵

Professor Matthew Finkin has stated that “trespassing on home or business property to engage in the surveillance would work an ‘unreasonable’ intrusion” and “[a] trespass . . . would be impermissible.”¹⁶⁶ None of the cases relied on by Professor Finkin, however, held that a trespass to conduct surveillance results in an invasion of privacy even if the surveillance could have been conducted from a lawful vantage point.¹⁶⁷

The holding in *McLain* that a trespass is simply a factor to consider (and not dispositive) is correct because, as recognized by Prosser, the invasion-of-privacy tort based on intrusion “has been useful chiefly to fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights.”¹⁶⁸ The view that a trespass automati-

163. *Id.* at 346.

164. *Id.*

165. *Id.* at 347. This is the position adopted in a California statute, which provides that whether the defendant trespassed is irrelevant if the image could have been achieved with the naked eye without a trespass. CAL. CIV. CODE § 1708.8(b) (West 2006).

166. MATTHEW W. FINKIN, *PRIVACY IN EMPLOYMENT LAW* 225 (2d ed. 2003).

167. *See id.* (citing *McLain*, which rejected such a notion; *Love v. Southern Bell Telephone & Telegraph Co.*, 263 So. 2d 460 (La. Ct. App. 1972), which involved surveillance of the employee inside his home; and *Ford Motor Co. v. Williams*, 134 S.E.2d 32 (Ga. 1963), which involved intrusion inside an employee's home and dealt solely with the issue of *respondeat superior*). Although not relied on by Professor Finkin, the decision in *Association Services, Inc. v. Smith*, 549 S.E.2d 454 (Ga. Ct. App. 2001), comes the closest to supporting his argument. In *Smith*, the court held that it was a question for the jury as to whether an invasion-of-privacy claim existed when the investigator might have trespassed on the plaintiff's private property and at her workplace to conduct the surveillance. *Id.* at 549. There was, however, evidence that the same surveillance (at least with respect to the surveillance from the plaintiff's private property) could not have been obtained from a lawful vantage point. *Id.* at 459, 461. The court did not indicate whether the footage in the workplace could not have been obtained from a lawful vantage point.

168. *See Prosser, supra* note 59, at 392.

cally renders the surveillance an invasion of privacy results in an unnecessary duplicative remedy, which is inconsistent with the use of the invasion-of-privacy tort as a gap filler. If there has been a trespass, then a cause of action for trespass can be asserted and recovery obtained. Trespassing should only be relevant if it allows the person conducting the surveillance to view the employee in a manner that the person would not otherwise be able to view the employee.¹⁶⁹ Thus, a trespass would be irrelevant (at least to an invasion-of-privacy claim) if the employer could have seen the same events from a lawful vantage point.

Also, the view that a trespass automatically makes the surveillance an invasion of privacy is based on the use of a derivative or weak sense of privacy;¹⁷⁰ one is employing the meaning that relates to physical exclusiveness.¹⁷¹ As recognized by Professor Hyman Gross, injury to what is designated by privacy in this weak sense is, however, "met in the law" with the remedies to trespass.¹⁷²

169. Thus, if the employer trespasses on the employee's property to peer through the windows of the employee's home when a view of the inside of the home could not be had from a lawful vantage point, the trespass would be relevant. This follows from the fact that it is reasonable (if one desires to employ such terminology) for a person to not expect the defendant to trespass on his or her property, and thus reasonable for such person to believe he or she was not exposing his or her activities to the defendant. A more difficult issue involves the defendant trespassing onto a third person's property to view the plaintiff. Although it is reasonable to not expect the defendant to trespass on another's property, if your neighbor can view your activities, it would be difficult to argue you have a reasonable expectation of privacy in those activities. However, the concept of "group privacy" or "selective disclosure," which is discussed later, might be applicable, particularly if you knew your neighbors and were friends with them.

170. Hyman Gross, *The Concept of Privacy*, 42 N.Y.U. L. REV. 34, 36-37 (1967). Professor Gross identifies four different sorts of states that are sometimes designated as privacy, which are best viewed as a derivative or weak sense of the word: (1) mental repose; (2) physical solitude; (3) physical exclusiveness; and (4) autonomy. *Id.* at 37-38. Professor Gross explains how persons come to often associate these four weak senses of the word with the strong sense of the word. *Id.* at 39. For example, "privacy, in a given situation, may depend upon physical solitude, or mental repose, or physical exclusiveness, or autonomy." *Id.* Professor Gross provides the following example:

[A] person might secure his privacy by occupying a castle or, in other words, he has secured his privacy through physical solitude and physical exclusiveness. This does not mean, however, that an invasion of such person's physical exclusiveness, say, by obtaining a key to the castle, means that the person's privacy has been invaded, at least not when employing the strong sense of privacy.

Id.

171. *Id.* at 37.

172. *Id.* at 38.

b. *Lawful-Vantage-Point Concept and Selective Disclosure*

A person does not lose his or her right to privacy merely because some persons are able to view him or her from a lawful vantage point. The test is whether the plaintiff's activities are free from exposure to the defendant.

For example, in *Huskey v. National Broadcasting Co.*,¹⁷³ the plaintiff, who was a prisoner, sued NBC for videotaping him while he was in the prison's exercise cage, even though other prisoners and a guard could view him.¹⁷⁴ The court rejected NBC's argument that the plaintiff's visibility to other prisoners and a guard defeated his claim: "[The plaintiff's] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to family members and invited guests in their own homes, but that does not mean they have opened the door to television cameras."¹⁷⁵

Similarly, in another non-employment case, a woman sued the defendant for being an uninvited spectator at the birth of her child,¹⁷⁶ even though other persons were present with her permission. The court held that a claim existed against the uninvited spectator, stating that "[t]o 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."¹⁷⁷

The concept that the subject need not be alone is important because if the presence of any other person (such as a coworker) automatically defeats a claim for invasion of privacy based on surveillance, the subject would have to be alone to state a claim. If this were the law, it would not be an invasion of privacy to conduct surreptitious surveillance of an employee engaged in intimate activities in his or her home as long as the employee was with his or her spouse, and it would also not be an invasion of privacy for a male supervisor to conduct surreptitious surveillance of a female employee in a women's dressing room if other female workers were present in the room. This cannot be the law.

Professor Lyrissa Lidsky has offered a persuasive rationale for the concept that a person who is not alone can still state a claim for invasion of privacy based on surveillance.¹⁷⁸ Although Professor Lidsky's

173. 632 F. Supp. 1282 (N.D. Ill. 1986).

174. *Id.* at 1285.

175. *Id.* at 1288.

176. *De May v. Roberts*, 9 N.W. 146, 146 (Mich. 1881).

177. *Id.* at 149. For an extensive discussion of the group privacy or selective-disclosure doctrine, see *Sanders v. American Broadcasting Cos.*, 978 P.2d 67, 71-77 (Cal. 1999).

178. Professor's Lidsky's rationale appears consistent with the reasoning employed by the court in *Huskey*.

discussion addressed photographs, her rationale is applicable to any surveillance. She asserts that photographing

creates the potential that the subject's actions will be exposed to a completely different audience than the one she intended or expected. Individuals typically tailor their behavior to the expected audience, and by denying individuals this opportunity, the defendant violates both their expectations of anonymity and their autonomy in selecting to whom they will reveal parts of themselves.¹⁷⁹

This concept, known as "group privacy" or "selective disclosure," recognizes "that individuals want to keep things private from some people but not others."¹⁸⁰

When, however, the plaintiff makes the disclosure to a person with whom the plaintiff has no relationship of trust (which is more likely to occur the larger the group to which the disclosure is made), the disclosure cannot be considered "selective." In such a case, a defendant who was not at a lawful vantage point can step into the shoes of a person who was. In other words, the plaintiff can only take advantage of the selective-disclosure concept if the disclosure is truly selective. For example, if the plaintiff is willing to engage in particular activities at a party with many guests, the selective-disclosure concept will not apply unless the plaintiff can demonstrate he or she had some reason to believe none of the guests would disclose what they saw. Presumably, though, the selective-disclosure doctrine will apply to undressing in front of others, irrespective of who the others are, as long as the group is limited to persons of the plaintiff's gender. It is also important to recognize that this Article does not address the dissemination of private facts or pictures, which might be tortious even if the defendant's surveillance was not.

c. *Lawful-Vantage-Point Concept and Activities in Public*

The lawful-vantage-point concept is most commonly employed with respect to surveillance of persons in public. Therefore, "[a]s interpreted by almost all courts, the tort does not protect persons in places accessible to the public," and "tort law currently provides little protection from intrusive videotaping, photography, or surveillance, so long as the activity occurs in a public place."¹⁸¹ The *Restatement* explains as follows:

179. Lyrisa B. Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 237 (1998).

180. Solove, *supra* note 132, at 1108. It has also been argued that "privacy" and "secrecy" are not interchangeable, the former concept being broader than the latter; thus, something can be "private" even if not "secret." See SISSELA BOK, *SECRETS* 10-11 (1982), discussed in John D. Blackburn, Elliot I. Klayman & Richard O. Nathan, *Invasion of Privacy: Refocusing the Tort in Private Sector Employment*, 6 DEPAUL BUS. L.J. 41, 46 n.15 (1993).

181. McClurg, *supra* note 74, at 991-92.

The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability . . . for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.¹⁸²

The *Restatement* provides the following example: "A is drunk on the public street. B takes his photograph in that condition. B has not invaded A's privacy."¹⁸³

As noted by Professor Andrew McClurg, "The steadfastness with which courts have clung to the rule that what occurs in public cannot be private traditionally has meant that most instances of public intrusion do not result in litigation. When they do, the plaintiffs lose early and often."¹⁸⁴ The most likely explanation for the court's steadfast refusal to allow invasion-of-privacy claims involving surveillance of a subject in public is because of the difficulty and uncertainty that would be entailed in determining when a person has a reasonable expectation of privacy in such a situation.¹⁸⁵ The rule regarding public activities has the benefit of being predictable.¹⁸⁶

d. Empirical Versus Normative Concept

Is, however, the lawful-vantage-point concept as broad as it appears? Does conducting surveillance from any lawful vantage point automatically preclude liability? What if it is uncommon for persons to be at that particular vantage point (surely it was unusual for persons to stop on the shoulder of the road near where Jones lived), leading the subject to reasonably believe no one is watching? What if an employee believes he or she is alone in a workplace office?

This issue reveals two different methods of analyzing invasion-of-privacy claims: an empirical approach and a normative approach. Under the empirical approach, an employee must have had a "reasonable" expectation of privacy, with an expectation being reasonable as long as his or "her belief or expectation is one that an ordinary person would possess."¹⁸⁷ As explained by Professor Joshua Dressler with respect to the Fourth Amendment:

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

183. *Id.* illus. 6.

184. McClurg, *supra* note 74, at 992.

185. For example, Professor Lidsky has argued that "many courts have abdicated responsibility for protecting individuals from intrusions in public places," and has suggested that the reason is because such intrusions pose a harder question to resolve. Lidsky, *supra* note 179, at 244.

186. See, e.g., *id.* at 234 (acknowledging that a "rights-based approach to intrusion cases [premised on trespass] would provide needed certainty," but criticizing such an approach for other reasons).

187. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 101 (3d ed. 2002). Under either an empirical approach or a normative approach, the employee must

In the privacy context, [applying this standard] would mean that an expectation of privacy is “reasonable” when a reasonable person would not expect that her privacy is at serious risk. So understood, “reasonableness” contains a significant empirical component, a “matter[] of statistical probability,” e.g., how likely is it that there will be a privacy incursion.¹⁸⁸

Under the normative approach, the employee must have a “legitimate” or “justifiable” expectation of privacy, which involves drawing “a normative conclusion—a value judgment—that she has a right to that expectation.”¹⁸⁹ Under this approach, the privacy protected “is not the privacy that one reasonably *expects* but the privacy to which one has a *right*.”¹⁹⁰

The difference between the two methods is significant. A privacy expectation could be reasonable in the sense that an ordinary person would believe his or her activities were not at serious risk of being viewed by the defendant (perhaps a standard that could have been satisfied by Jones or an employee who believes he or she is alone), yet not be legitimate or justifiable from a normative standpoint.¹⁹¹

To demonstrate the difference between the two methods, Professor Dressler, discussing the Fourth Amendment, provides the following example of when an expectation of privacy might be reasonable, but not legitimate or justifiable:

[S]uppose that [a defendant] commits a crime in a secluded spot in a park during the middle of the night after carefully ascertaining that the area is frequented at that hour only once every 672 days. Based on this information, [the defendant] expects that her actions will not be observed. That expectation might be “reasonable” in the sense that most persons would expect, as a matter of statistical probability, to be free from observation. Nonetheless, if a police officer happened by and observed the criminal conduct, commentators would likely agree . . . that [the defendant’s] subjective privacy expectation should not be protected. This is because [the defendant’s] expectations, although perhaps “reasonable,” were “unjustifiable” or “illegitimate.” That is, as a normative matter, people have no right to expect privacy if they conduct activities in the open, no matter how unlikely it is that they will be discovered on any given occasion.¹⁹²

Conversely, a person might reasonably believe his or her activities are at serious risk of being observed, yet still have a legitimate or justifiable expectation of privacy. For example, a person might have a legitimate or justifiable expectation of privacy in his or her backyard

at least have “an actual, subjective expectation of seclusion or solitude in the place.” *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 812 (9th Cir. 2002).

188. DRESSLER, *supra* note 187, at 101 (quoting Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1081 (1987)).

189. *Id.* at 101–02.

190. *Id.* at 102 (quoting *State v. Campbell*, 759 P.2d 1040, 1044 (Or. 1988)).

191. *Id.*

192. *Id.* (footnote omitted). See also WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 129 (4th ed. 2004) (providing similar example); Note, *supra* note 135, at 983 (same).

even if “police helicopters routinely hover at a very low altitude over the backyards of homes scanning the area.”¹⁹³

In the Fourth Amendment context, the Supreme Court’s approach to the issue of whether the expectation of privacy analysis is empirical or normative has been described as “mixed.”¹⁹⁴ “The Court seems to indiscriminately waffle between phrasing the requirement as a ‘reasonable’ expectation of privacy and a ‘legitimate’ expectation of privacy, leaving uncertain whether the test is meant to be empirical, as suggested by the former term, or normative, as suggested by the latter.”¹⁹⁵ When, however, the Court has relied on an empirical approach, it has done so to conclude that the defendant did not have a reasonable expectation of privacy.¹⁹⁶ In fact, three leading commentators have suggested that the test applied by the Court requires that both the normative approach and the empirical approach be satisfied.¹⁹⁷

Cases involving employers’ surreptitious surveillance of employees and the tort of invasion of privacy also suggest that courts require plaintiffs to satisfy both the normative and empirical approaches. With respect to applying a normative approach, courts have rejected claims when the employee could be viewed by the employer from a lawful vantage point, even if the employee perhaps reasonably believed his or her privacy was not at serious risk. For example, in *I.C.U. Investigations, Inc. v. Jones*,¹⁹⁸ although Jones was aware surveillance might be conducted, he most likely believed his privacy was not at serious risk when he urinated in his front yard. Notwithstanding, the court held there was no cause of action because he engaged in such activities from a location visible to the public.¹⁹⁹ Similarly, in *Salazar v. Golden State Warriors*,²⁰⁰ the court rejected an invasion-of-

193. DRESSLER, *supra* note 187, at 102.

194. *Id.* at 103.

195. Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 517 n.54 (2005).

196. See Barbara J. Flagg, *The Algebra of Pluralism: Subjective Experience as a Constitutional Variable*, 47 VAND. L. REV. 273, 296 (1994) (“[T]he Supreme Court repeatedly has found it appropriate to appeal to a notion of empirical reasonableness to defeat claims to Fourth Amendment protection.”).

197. See LAFAYE ET AL., *supra* note 192, § 3.2, at 129 (“[F]or an expectation to be considered justified it is not sufficient that it be merely reasonable; something in addition is required.”).

198. 780 So. 2d 685 (Ala. 2000).

199. *Id.* at 689–90. Justice Cook, dissenting in *Jones*, essentially employed an empirical analysis to conclude that the jury was entitled to find that Jones retained a right to privacy, even though he was in his front yard and visible to the public. Justice Cook concluded that Jones’s distances from the highway and the layout of his property created a disputed issue as to whether his activities were “public.” *Id.* at 690 (Cook, J., dissenting).

200. No. C-99-4825 CRB, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000).

privacy claim even though the employee was in his vehicle in a dark parking lot.²⁰¹

Courts, however, have also occasionally, when finding surveillance not tortious from a lawful vantage point, pointed out that the employee should have realized his or her privacy was at serious risk because he or she filed a legal claim that might prompt the employer to conduct surveillance.²⁰² This suggests the empirical approach applies in addition to the normative approach. The empirical approach will therefore preclude liability when a reasonable employee would have known his or her activities were at serious risk of exposure, presumably even if the employer's surveillance was not from a lawful vantage point. Although there perhaps should be limits to the application of the empirical approach in non-employment contexts, such as when the government conducts surveillance of citizens (because otherwise the defendant could avoid liability by simply telling the plaintiff the surveillance would be conducted), the use of the empirical approach is suitable in the employment context because the employee can quit in lieu of having his or her privacy put at risk. Also, an employee who continues to work, despite knowing his or her privacy is at serious risk, not only lacks a reasonable expectation of privacy, but as discussed later, has perhaps contractually agreed or given apparent consent to such surveillance.

e. A Limitation on the Lawful-Vantage-Point Concept

There must, however, be a limitation on the lawful-vantage-point concept, and an easy example demonstrates this. Suppose a person drills a hole in the wall of a women's public restroom which enables anyone looking through the hole to view the women inside. A person can look through the hole while standing on public property. If the lawful-vantage-point concept applied, it would not be an invasion of privacy for anyone to look through the hole because such person would be able to see the women from a lawful vantage point. Everyone would agree, however, that the women's expectations of privacy are legitimate and justifiable from a normative standpoint, and reasonable from an empirical standpoint (assuming the subject did not know about the hole), and that there has been an invasion of privacy. What

201. *Id.* at *1-4.

202. *See, e.g., Jones*, 780 So. 2d at 689 (noting that employee who filed workers' compensation claim should have expected "reasonable investigation regarding his physical capacity"); *Johnson v. Corporate Special Servs., Inc.*, 602 So. 2d 385, 388 (Ala. 1992) (noting that employee who filed workers' compensation claim "should have expected a reasonable amount of investigation into his physical incapability"); *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975) ("It is also well established that one who seeks to recover damages for alleged injuries must expect that his claim will be investigated and he waives his right to privacy to the extent of a reasonable investigation.").

then, is the qualification to the lawful-vantage-point concept applied in such a case?

It is this: The defendant loses the right to rely on the lawful-vantage-point concept if he or she engages in conduct to obtain a view of the plaintiff that could not ordinarily be had from a lawful vantage point. An example would be taking an unusual action to circumvent a barrier precluding observation (such as placing a video camera in the ceiling, looking through a hole in a wall the subject reasonably is not aware of, or standing on a ladder). This is a necessary limitation on the lawful-vantage-point concept to ensure it does not defeat claims most everyone would agree should be recognized.

f. Photographs and Vision-Enhancing Equipment

The lawful-vantage-point concept applies even if the defendant takes a photograph or uses a video camera.²⁰³ For example, one court stated that "it is of no moment whether the observation of openly displayed facts is accomplished by a video camera or the naked eye."²⁰⁴ An important issue, however, is whether the lawful-vantage-point concept applies only to what can be seen with the naked eye, or whether it also applies to subjects and activities that can be seen only with image-enhancing equipment.²⁰⁵

To date, courts have been unwilling to limit the lawful-vantage-point concept to that which can be seen with the naked eye. For example, in *Jones*, on only one of the four occasions on which Jones was caught on videotape urinating did the investigator suspect this was what he was doing.²⁰⁶ The specifics of Jones's activities were revealed through the use of a telephoto lens.²⁰⁷ Notwithstanding, the court rejected Jones's invasion-of-privacy claim²⁰⁸ (though one dissenting jus-

203. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (stating it is not an invasion of privacy to take a picture of a person who is in public).

204. *Acosta v. Scott Labor LLC*, 377 F. Supp. 2d 647, 650 (N.D. Ill. 2005). Some commentators, however, have argued that filming, taping, or recording the subject is more intrusive than the mere use of the naked eye. See, e.g., Lidsky, *supra* note 179, at 237 ("[F]ilming, taping, or recording a target is potentially more intrusive than mere observation [P]hotographing someone's activities is more intrusive than simple observation because once a permanent record is created, the subject is at the mercy of the person who holds the photograph."). Professor Lidsky's concern, however, is with respect to dissemination of the recording or photograph.

205. A commentator has argued that the increasing sophistication of technology is particularly threatening to employees' sense of privacy: "As technology grows in sophistication, the danger to employees' privacy interest heightens; such technology's proliferation generates a deep-seated disquietude concerning the privacy rights of employees." Cavico, *supra* note 33, at 1266.

206. *Jones*, 780 So. 2d at 687.

207. *Id.*

208. *Id.* at 689-90.

tice believed the use of the telephoto lens was sufficient to establish a claim).²⁰⁹ Similarly, in *Salazar v. Golden State Warriors*,²¹⁰ the court rejected an invasion-of-privacy claim even though the investigator used a night vision, infrared, high-powered scoping device to take footage of an employee using drugs in his sports utility vehicle in a dark parking lot.²¹¹

At least two courts, however, have stated that there might be a limit to the use of image-enhancing equipment to conduct surveillance of an employee. In *Saldana v. Kelsey-Hayes Co.*,²¹² a case involving surveillance of an employee suspected of malingering, the court stated that “the use of a powerful lens to observe the interior of a home . . . could be found to be objectionable to a reasonable person.”²¹³ Similarly, in *Digirolamo v. D.P. Anderson & Associates, Inc.*,²¹⁴ the court indicated, in dicta, that the lawful-vantage-point concept does not apply to the use of image-enhancing equipment to view an employee who is inside his or her home, relying on Fourth Amendment case law.²¹⁵ Likewise, the *Restatement* indicates that using binoculars or a telescope to see into an upstairs home window would be an invasion of privacy.²¹⁶ Thus, the use of vision-enhancing equipment to see inside one’s home, when the same activities could not have been viewed with the naked eye, might be tortious. If such conduct is tortious, this exception to the general rule that the use of image-enhancing equipment does not affect the lawful-vantage-point concept is best viewed as a limitation based on the increased privacy protection provided to activities in one’s home.

g. The “Public-Place/Private-Matter” Exception

The proper scope of a limitation on the lawful-vantage-point concept that has been suggested by the *Restatement* should be addressed. The exception, known as the “public-place/private-matter” exception, has been explained as follows: “Even in a public place . . . 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.”²¹⁷ The *Restatement* provides the following example of the public-place/private-matter exception:

209. *Id.* at 693 (Johnstone, J., dissenting).

210. No. C-99-4825 CRB, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000).

211. *Id.* at *1-4.

212. 443 N.W.2d 382 (Mich. Ct. App. 1989).

213. *Id.* at 384.

214. No. Civ. A. 97-3623, 1999 WL 345592 (Mass. Super. Ct. May 26, 1999).

215. *Id.* at *3-4.

216. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 2 (1977).

217. *Id.* cmt. c.

A, a young woman, attends a "Fun House," a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy.²¹⁸

This was the exception relied on by one of the dissenting justices in *I.C.U. Investigations, Inc. v. Jones* in concluding that an invasion of privacy occurred because, in his opinion, Jones's act of urinating was "not exhibited to the public gaze."²¹⁹

There are important limits to this exception, however, that are not readily apparent from the *Restatement* and which led the dissenting justice in *Jones* to erroneously rely on the exception. First, a careful reading of the *Restatement* and the case upon which the exception is based shows that the exception does not apply to viewing intentional conduct (such as Jones urinating). As previously discussed, an example provided by the *Restatement* of a situation that would not constitute an invasion of privacy is taking a picture of a drunk person in that condition on a public street.²²⁰ The apparent distinction between taking a picture of the woman with her skirt blown over her head (an invasion of privacy) and taking a picture of a person in a drunken state on a public street (not an invasion of privacy) is that the woman's embarrassing position was unintentional and occurred through no fault of her own (the jet of compressed air was concealed), whereas the drunk person's state was (presumably) the result of his own intent, recklessness, or negligence.

This distinction is confirmed by the case on which the public-place/private-matter exception (and the "fun house" example in the *Restatement*) is based—*Daily Times Democrat v. Graham*.²²¹ A review of *Graham* shows that it was important that the plaintiff's embarrassing position was involuntary. The court stated that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at that moment to be part of a public scene would be illogical, wrong, and unjust."²²² At a later point in its opinion, the court again emphasized the involuntary nature of the plaintiff's position:

One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status. Where the status he expects to occupy is changed *without his volition* to a status embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have

218. *Id.* illus. 7.

219. 780 So. 2d 685, 693 (Ala. 2000) (England, J., dissenting) (internal quotation marks omitted).

220. RESTATEMENT (SECOND) OF TORTS § 652B illus. 6 (1977).

221. 162 So. 2d 474 (Ala. 1964). Interestingly, *Graham*, like *Jones*, was decided by the Alabama Supreme Court. In *Jones*, however, Justice England relied solely on the *Restatement* for a discussion of the exception and did not discuss or even cite to *Graham*. *Jones*, 780 So. 2d at 692-93 (England, J., dissenting).

222. *Graham*, 162 So. 2d at 478.

forfeited his right to be protected from an indecent and vulgar intrusion of his right of privacy merely because *misfortune* overtakes him in a public place.²²³

Thus, as demonstrated by *Graham*, the public-place/private-matter exception applies only when the defendant knows (or perhaps should have known) that the plaintiff's public disclosure of the private matter was involuntary. Hence, the exception had no application to Jones's act of urination.

Second, and more importantly, a review of *Graham* demonstrates that it was not the viewing of the plaintiff in her embarrassing position, or even the taking of her photograph, that was tortious; it was the defendant's publication of the picture on the front page of its newspaper. The court quoted Prosser for the proposition that "there must be yet some undefined limits of common decency as to what can be *published* about anyone; and that a photograph of indecent exposure, for example, can never be legitimate 'news.'"²²⁴ The court also quoted the *Restatement's* assertion that an invasion of privacy occurs "where photographs of a person in an embarrassing pose are surreptitiously taken and *published*."²²⁵

Thus, the public-place/private-matter exception does not apply to viewing, or even taking a picture of, a person in public who is involuntarily put in an embarrassing position. Rather, the exception prohibits publicizing a photograph of the incident. The mere act of taking a picture is properly not considered tortious because taking a picture of an incident for one's own use (without giving it publicity) is not significantly different from maintaining the mental impression of the scene or even sketching the scene afterwards (for one's own use). To hold otherwise would lead to the absurd result that persons must turn away from an embarrassing scene even though the viewer is at a lawful vantage point (though prolonged viewing might be tortious). Therefore, the mere act of viewing Jones urinating could not have fallen within the public-place/private-matter exception; only publicizing the videotape could have been tortious under the exception.

h. Employee Consent

An important issue, though largely unexplored by the courts, involves an employee's purported consent to surreptitious surveillance. For example, does the employee not have a claim if he or she had been told by his or her employer that the company had the right to conduct otherwise tortious surveillance? The issue is difficult because the legal doctrines or concepts involved are unclear. The issue can be seen as one of consent, waiver, agreement, not having a reasonable expect-

223. *Id.* (emphasis added).

224. *Id.* at 477 (emphasis added) (quoting Prosser, *supra* note 59, at 416 & n.270).

225. *Id.* (emphasis added) (quoting RESTATEMENT (FIRST) OF TORTS § 867 cmt. d (1939)).

tation of privacy, or as knowingly exposing one's activities to the defendant's view (which is why I discuss the issue in this section).²²⁶

Under an empirical approach to privacy, which courts in employment surveillance cases seem to apply in addition to a normative approach, the critical issue is whether a reasonable employee would have considered his or her activities at significant risk of exposure. If an employee knows the employer actually engages in surreptitious surveillance, or the employer sufficiently emphasizes its right to conduct such surveillance (by perhaps, disseminating a surveillance pol-

226. For example, under such circumstances, it can be argued that the employee does not have a reasonable expectation of privacy, consents to the surveillance (the strongest case for consent applying to those situations in which the surveillance takes place at work and the employee remains on the job despite being aware of the potential surveillance), or waives any claim. See *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1053 (D. Haw. 2000) ("The right to privacy may be waived or lost through a course of conduct estopping its assertion if the complaining party displays a clear, unequivocal, and decisive act of waiver."); *Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1382 (D. Kan. 1996) (holding that plaintiffs failed to state claim for invasion of privacy when employer advised employees that telephones were for business purposes and would be monitored); *Jackson v. Nationwide Credit, Inc.*, 426 S.E.2d 630, 632 (Ga. Ct. App. 1992) (holding it was not an invasion of privacy for employer to monitor employees' telephones because "[a]ll employees were advised that the telephones were for business only and that the telephones would be monitored"); *Baxi & Nickel*, *supra* note 36, at 143 ("An employer may use the defense[] of consent . . . against an employee's privacy-based tort claim. Consent is a defense if the employee expressly or impliedly consented to the invasion." (footnote omitted)); *Blackburn, Klayman & Nathan*, *supra* note 180, at 55 ("An absolute privilege exists where an employee consents to an invasion of privacy."); *Cavico*, *supra* note 33, at 1287 ("If an employer notifies employees of its surveillance policies, displays copies of the policies and follows them closely, and explicitly informs employees that surveillance may occur without their knowledge, employees' reasonable expectations of privacy are considerably lower."); *Kray & Robertson*, *supra* note 32, at 144 ("[W]here the employer gives notice that monitoring will occur in a reasonably intrusive manner for a business concern, the employee cannot have a reasonable expectation of privacy. Notice defines what the employer expects to be private and allows the employee either to seek alternative employment or implicitly consent to reasonable monitoring by continuing employment, thus negating the employee's expectation of privacy."); *Post*, *supra* note 57, at 974 ("Some norms, like those prohibiting murder, cannot be waived by the consent of individuals. But the norms policed by the intrusion tort are different. They mark the boundaries that distinguish respect from intimacy, and their very ability to serve this function depends upon their capacity for being enforced or waived in appropriate circumstances. In the power to make such personal choices inheres the very essence of the independent self."); Lawrence E. Rothstein, *Privacy or Dignity?: Electronic Monitoring in the Workplace*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 379, 405-06 (2000) ("The employer may unilaterally change the employee's expectation of privacy by instituting a policy of intrusion or by simply intruding on one or more occasions. . . . The employee consents to any intrusions by remaining at work after becoming aware of the intrusion or the possibility of such an intrusion. . . . [A]n at-will employee who objects to the intrusion or the policies allowing them may be immediately dismissed.").

icy), an employee would not have a claim if such actions by the employer would lead a reasonable employee to know his or her otherwise private activities are at significant risk of being exposed to the employer. Though, even with a general surveillance policy that is adequately emphasized, surveillance in a location like a restroom stall would most likely not defeat a claim under an empirical approach because, even with the policy, a reasonable employee might not believe his or her activities in the bathroom stall were at serious risk of being exposed to the employer. A general statement that the employer has the right to conduct surreptitious surveillance of an employee at any location would probably not make unreasonable an employee's expectation to not be viewed in a bathroom stall. An employer could, however, potentially defeat a claim by issuing a policy clearly indicating surveillance will take place within bathroom stalls. Under the empirical approach, the question would be whether the employee reasonably believed his or her activities were therefore at serious risk of exposure.

Under a normative approach, courts will have to decide whether the right to be free from observation is legitimate or justifiable if an employer disseminates a policy indicating it reserves the right to conduct surreptitious surveillance. Under this approach, a court might well hold that from a normative standpoint, a policy reserving the right to conduct surveillance makes an expectation of privacy illegitimate or unjustifiable even though a reasonable employee would not believe his or her activities are at significant risk of exposure. Presuming, however, that an employee has a reasonable expectation of privacy from an empirical standpoint, courts might be reluctant to find that a policy permitting surveillance makes an employee's expectation illegitimate or unjustified in all cases. For example, under a normative approach, an employee would most likely have a legitimate or justifiable expectation of privacy in a restroom stall irrespective of a company policy permitting surveillance, if the policy is not sufficiently specific.²²⁷ A policy that clearly indicates such surveillance will occur, however, might make the employee's expectation of privacy illegitimate or unjustifiable.

This issue is complicated by the nature of an employment relationship, which brings into play notions of contract and consent. If an employer's right to conduct surveillance is considered a term of employment, the employee has agreed to the surveillance in return for

227. Professor Wilborn has argued that conducting surveillance of employees in the restroom is so offensive that even notice to the employees of such surveillance should not defeat a claim. See Wilborn, *supra* note 28, at 853 ("Merely providing notice to employees does not adequately protect their privacy interests. For example, an employer may notify an employee that it will monitor employee restrooms. Knowing that the restrooms are monitored does not decrease the employee's privacy interest when he uses the bathroom.")

being employed, and an expectation of privacy in this situation cannot be considered legitimate or justifiable. This would include a situation in which an employee handbook or a policy manual (which includes a surveillance policy) is considered a binding contract under the law of the applicable state. When the employer and the employee have agreed (as that term is used in contract law) that the employer has the right to conduct surreptitious surveillance, the employer's right to conduct the surveillance is part of the bargain struck between the employer and the employee, and no claim should be stated, unless the contractual provision can be avoided by the employee through potentially applicable contract defenses (such as fraud, mistake, duress, or perhaps even on the grounds such a provision is void as against public policy).

Also, even if an employer is not deemed to have a contractual right to conduct surveillance, the issuance of a surveillance policy, coupled with the employee continuing to work after its issuance, might be considered to be consent to the surveillance, and consent precludes recovery.²²⁸ Importantly, although consent is generally defined as a "willingness in fact for conduct to occur,"²²⁹ "[i]f words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact."²³⁰ Thus, if an employer reasonably understands the employee's decision to work after issuance of a surveillance policy as consent to the surveillance, no claim should be stated.

i. The Lawful-Vantage-Point Concept Stated as a Rule

Based on the above discussion, we can restate the lawful-vantage-point concept as follows (in terms of employers and employees): An employer may conduct physical surveillance of an employee, including surveillance with the use of image-enhancing equipment (except, perhaps, when image-enhancing equipment is used to view activities of the employee in his or her home if such activities could not be viewed with the naked eye), without being liable for an invasion of privacy, as long as (1) the employee's activities could be seen by the employer (with or without the use of image-enhancing equipment) from a place the employer had the right to be, (2) unless the employer engages in conduct to obtain a view of the employee that could not ordinarily be had from a lawful vantage point. I will now turn to cases involving employers' surreptitious physical surveillance of employees to determine whether the discussion above of the lawful-vantage-point concept is consistent with the courts' holdings.

228. RESTATEMENT (SECOND) OF TORTS § 892A(1) (1979).

229. *Id.* § 892(1).

230. *Id.* § 892(2).

j. Application of the Lawful-Vantage-Point Concept to Employers' Surreptitious Physical Surveillance of Employees

An analysis of case law dealing with employers' surreptitious physical surveillance of employees demonstrates that the lawful-vantage-point concept, as described above, is fully applicable to such cases. The easiest cases deal with an employer's surreptitious physical surveillance conducted from public property, or property to which the public is invited. Courts have routinely rejected claims that such surveillance is an invasion of the employee's privacy.²³¹

As previously discussed, because any person has the right to be in public, an employee cannot assert a right-to-privacy claim based on his or her activities that can be viewed from such a location. Accordingly, "employees observed or photographed while on a public street

231. *Runson v. Milwaukee Bd. of Sch. Dirs.*, 969 F.2d 266, 268, 271 (7th Cir. 1992) (applying Wisconsin law and affirming trial court's finding that invasion-of-privacy claim was frivolous when defendant monitored plaintiff's morning and afternoon commuting patterns as well as his residences, stating that the "safety aids who conducted the surveillance never trespassed onto [the principal's] private property and operated only from areas designated as public streets or highways"); *Stonum v. U.S. Airways, Inc.*, 83 F. Supp. 2d 894, 896-97, 906 (S.D. Ohio 1999) (finding no invasion of privacy when defendant photographed plaintiff, who was suspected of abusing family and medical leave, engaging in various activities in "plain view of the public eye"); *Fayard v. Guardsmark, Inc.*, Civ. A. No. 89-0108, 1989 WL 145958, at *1-2 (E.D. La. Nov. 29, 1989) (rejecting invasion-of-privacy claim when employer, who suspected employee of fraternizing with an employee at the refinery where she was assigned, watched her house and ran license checks on cars that came and went from her house because the activities were "entirely open for public viewing"); *Int'l Union v. Garner*, 601 F. Supp. 187, 191-92 (M.D. Tenn. 1985) (holding that no claim was stated when employer recorded license tag numbers of persons attending union meeting held at public place); *Fiorillo v. Berkley Adm'rs*, No. CV010458400S, 2004 WL 1153678, at *1, 4 (Conn. Super. Ct. May 5, 2004) (finding no invasion of privacy when defendant viewed plaintiff, who had filed workers' compensation claim, "driving and walking on public streets, [taking] children to and from school, [traveling] to and from church and shopping at public businesses" because surveillance was limited to acts in public); *Ellenberg v. Pinkerton's, Inc.*, 202 S.E.2d 701 (Ga. Ct. App. 1973) (rejecting invasion-of-privacy claim when employer had investigator drive past employee's residence several times, park his car on a public road near employee's home, and follow employee as he drove); *York v. Gen. Elec. Co.*, 759 N.E.2d 865, 866 (Ohio Ct. App. 2001) (finding no invasion of privacy when defendant viewed plaintiff, who had filed a workers' compensation claim, "arriving at work, going into the chiropractor's office, . . . visiting a lawnmower repair shop, . . . working in his yard, riding a motorcycle, mowing the grass, and performing other activities in his yard" when the defendant never trespassed on the employee's property to conduct the surveillance); *see also Kowalski v. Scott*, 126 F. App'x 558, 559-60 (3d Cir. 2005) (holding that plaintiff failed to state a claim under the Fourth Amendment when his employer hired a private investigator to conduct surveillance of him in public areas at or near a beach while he was on vacation).

[or] outside their homes . . . have no claim for invasion of privacy.”²³² This even applies, for example, to surreptitiously videotaping an employee in his or her church, as long as the church service is open to the public.²³³

The lawful-vantage-point concept also applies to surveillance from a public location when the employee is in his or her home. For example, in *Digirolamo v. D.P. Anderson & Associates, Inc.*,²³⁴ a case involving surveillance of an employee receiving workers' compensation benefits, the court granted the defendant summary judgment when the defendant watched the plaintiff in her condominium, because the surveillance was conducted from a public street.²³⁵

When, however, the surveillance is conducted from a location where the defendant did not have a right to be, courts have found an invasion of privacy. For example, in *Love v. Southern Bell Telephone & Telegraph Co.*,²³⁶ the plaintiff sued for invasion of privacy when his supervisors, after he failed to report to work, entered his home without his permission and viewed him passed out with empty beer cans strewn about.²³⁷ The court affirmed the jury's conclusion that the plaintiff proved an invasion of privacy, stating that the proper standard was whether the supervisors' acts were "reasonable under the circumstances."²³⁸ The court added: "Stated another way, were their reasons for entering plaintiff's trailer motivated by a desire to help . . . or were they in the furtherance of their employer's interest and designed to prove plaintiff's unworthiness as a supervisory employee."²³⁹ Although the court did not characterize the test as one

232. Wilborn, *supra* note 28, at 846 n.80.

233. See *Creel v. I.C.E. & Assocs.*, 771 N.E.2d 1276, 1283 (Ind. Ct. App. 2002) (rejecting claim when employer's investigator videotaped employee playing piano at church service).

234. No. Civ. A. 97-3623, 1999 WL 345592 (Mass. Super. Ct. May 26, 1999).

235. *Id.* at *5. I believe the holding in *Digirolamo* was correct. As Professor Gross has noted, "a great many practices in our society are designed to create or preserve" privacy, including window blinds. Gross, *supra* note 170, at 36. An employee should be expected to take advantage of such practices to the extent reasonably possible. Thus, if a person has window blinds and chooses not to close them, cannot one presume he or she has assumed the risk of being viewed? As Professor Gross notes, "[I]n some instances the law itself is the social practice used to create privacy—for example, restrictions upon further disclosure of personal information obtained by the Government. More often, the law is only a back-up protection for privacy, resorted to when other means to insure privacy have been frustrated." *Id.* If a person does not close his or her blinds, he or she has not used the means available to ensure his or her privacy. Thus, the individual should not be entitled to such back-up protection. The law should only intervene when the employee has taken advantage of such measures. The law should generally not protect the careless; it should be designed to encourage careful conduct.

236. 263 So. 2d 460 (La. Ct. App. 1972).

237. *Id.* at 461-63.

238. *Id.* at 466.

239. *Id.*

based on whether the employer had a lawful right to enter the trailer, that was in fact the test described by the court. If the supervisors had a legitimate concern for the employee's safety, they had a legal right to enter the trailer,²⁴⁰ and there would have been no invasion of privacy. If, however, they did not have a legal right to enter the trailer, there would have been an invasion of privacy.

The lawful-vantage-point concept also explains *Souder v. Pendleton Detectives Inc.*,²⁴¹ a case that was correctly decided, but for the wrong reason. In *Souder*, the plaintiffs, a husband and his wife, sued a detective company that was hired by the insurance company of the husband's employer to conduct surveillance on him after he filed a workers' compensation claim.²⁴² The plaintiffs asserted that two detectives eavesdropped on them, viewed them with binoculars, took pictures of them, and watched them in their home by looking through their windows.²⁴³ The court held that the plaintiffs had sufficiently alleged a claim for invasion of privacy because if the detectives trespassed on the plaintiffs' property and peered through their windows, they would have been guilty of a crime under Louisiana's Peeping Tom statute.²⁴⁴ The court held that "if a possible crime was committed, a suit in civil damages would be present."²⁴⁵ Although it was erroneous for the court to rely simply on whether a criminal law was violated, the court reached the correct result, and a result consistent with the lawful-vantage-point concept, because the defendant conducted the surveillance from a location where it did not have the legal right to be (and presumably it could not have conducted the same surveillance from a lawful vantage point).

A review of the invasion of privacy cases involving the surveillance of employees in the workplace demonstrates that, consistent with the lawful-vantage-point concept, employees generally have no right to be free from surreptitious surveillance by their employer in the workplace.²⁴⁶ Because the employer has a lawful right to be at its own

240. See RESTATEMENT (SECOND) OF TORTS § 197 (1965) ("One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the other or a third person, or the land or chattels of either, unless the actor knows or has reason to know that the one for whose benefit he enters is unwilling that he shall take such action."). The *Restatement* provides the following example: "A, passing B's dwelling, hears issuing from it screams indicating that some person inside is in distress. A is privileged to enter the dwelling for the purpose of rendering assistance." *Id.* illus. 8.

241. 88 So. 2d 716 (La. Ct. App. 1956).

242. *Id.* at 717.

243. *Id.* at 717-18.

244. *Id.* at 718.

245. *Id.*

246. See, e.g., Gruber, *supra* note 80, at 363 ("[T]here is generally no expectation of privacy . . . in the workplace."); Wilborn, *supra* note 28, at 846 n.80 ("The law of privacy does not conceive of an employee's physical workspace as a place of per-

workplace, the employer has the right to view anything that is in plain view from such a vantage point. "Plain view," in the context of employer surveillance of employees, would include anything that is in plain view of an area of the workplace that the employee understands is subject to the employer's right to enter without the employee's permission. For example, it is not an invasion of privacy to conduct surveillance of an employee break room if it is understood that the employer has the right to enter unannounced.²⁴⁷

Consistent with the lawful-vantage-point concept, employees do not have a right of privacy in offices that can be accessed by supervisors. For example, in *Sacramento County Deputy Sheriffs' Ass'n v. County of Sacramento*,²⁴⁸ county jail employees filed a civil action against their employer because of video surveillance of a county jail

sonal seclusion," and "employees observed or photographed while . . . in public areas of their workplaces generally have no claim for invasion of privacy."); Finkin, *Employee Privacy*, *supra* note 61, at 264 ("The law of privacy does not conceive of the physical workspace one enters as a place of personal 'seclusion.'"). The case law is not only consistent with the lawful-vantage-point concept, but with an empirical approach to privacy as well. There is a decreased expectation of privacy in the workplace that arises from the notion that an employer has purchased, to a certain extent, control over an employee through the payment of wages, and that as part of this bargain the employee has waived or consented to surveillance in the workplace. "Privacy is territorial and is seen as a possessive right that may be alienated preemptively and wholesale. . . . When a worker sells her capacity to labor, she alienates certain aspects of the person and puts them under the control of the employer." Rothstein, *supra* note 226, at 382 (footnote omitted). Interestingly, "[t]he general sense of both employees and the public is that employees who enter an employer's premises to do paid work have left 'private' space and entered a 'public' arena." Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values*, 72 CHI-KENT L. REV. 271, 276 (1996). As stated by several commentators:

The demands of employment and the traditional notions of work negate most expectations of being in control of personal space. And while employment may be instrumental in the general pursuit to control the spheres of one's choices in life, an employee's freedom of choice is circumscribed by the employer's control over the details of job performance.

Blackburn, Klayman & Nathan, *supra* note 180, at 48.

247. See, e.g., *Branham v. Celadon Trucking Servs.*, 744 N.E.2d 514, 524 (Ind. Ct. App. 2001) (rejecting invasion-of-privacy claim when supervisor and coworker took plaintiff's picture in break room because other employees used the area to eat lunch); *Brannen v. Kings Local Sch. Dist. Bd. of Educ.*, 761 N.E.2d 84, 91-92 (Ohio Ct. App. 2001) (holding employees did not have reasonable expectation of privacy under Fourth Amendment in break room because other school employees "had unfettered access to the break room, including the principal and most of the teachers," and that even if plaintiffs had reasonable expectation of privacy, surveillance was reasonable, limited in scope, and justified). *But see State v. Bonnell*, 856 P.2d 1265, 1273-77 (Haw. 1993) (holding that employees had reasonable expectation of privacy in break room under Fourth Amendment based in part on fact that employees "could see anyone approaching and could avoid being surprised by an untrusted intruder").

248. 59 Cal. Rptr. 2d 834 (Ct. App. 1996).

office.²⁴⁹ After eleven incidents of inmates' money going missing, the employer installed a concealed video surveillance camera (without audio capabilities) in the jail ceiling overlooking the booking area.²⁵⁰ The court, however, rejected the plaintiffs' invasion-of-privacy claim,²⁵¹ holding that, among other things, "the 'intrusion' took place in a nonprivate office in the booking area of a county jail, wherein plaintiffs had a diminished expectation of privacy."²⁵²

A similar case is *Marrs v. Marriott Corp.*²⁵³ In *Marrs*, a security investigator who discovered that someone had accessed the locked file drawer of his desk requested and received permission from his employer to monitor the desk with a hidden video camera.²⁵⁴ The videotape disclosed the plaintiff employee picking the lock on the desk drawer with a paper clip and looking through files.²⁵⁵ In response, the plaintiff told the employer he was "practicing his lock picking skills," and the employer, not entirely convinced, fired him.²⁵⁶ The plaintiff then brought a civil action alleging, among other things, invasion of privacy.²⁵⁷ The court rejected the claim, holding that the plaintiff did not have "a reasonable expectation of privacy in an open office."²⁵⁸ The court noted that the plaintiff conceded that the area "was a common area that all of [the security guards] had access to."²⁵⁹

Consistent with the lawful-vantage-point concept, there is no right of privacy in dressing and changing rooms if any employee can walk into the room. This is demonstrated by *Thompson v. Johnson County Community College*.²⁶⁰ In *Thompson*, the plaintiffs were security officers employed by the defendant college.²⁶¹ The college provided its security officers with a locker area in which to secure their gear and other personal items, and security personnel would occasionally use this area as a dressing and changing room.²⁶² Other personnel also used the area and did not need permission from the security personnel before entering.²⁶³ The college installed a video surveillance camera in the area to investigate allegations of theft from security personnel

249. *Id.* at 836.

250. *Id.* at 837.

251. *Id.* at 846-47.

252. *Id.* at 847.

253. 830 F. Supp. 274 (D. Md. 1992).

254. *Id.* at 277.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 283.

259. *Id.* (internal quotation marks omitted).

260. 930 F. Supp. 501 (D. Kan. 1996), *aff'd*, No. 96-3223, 1997 WL 139760 (10th Cir. Mar. 25, 1997) (unpublished table decision).

261. *Id.* at 503.

262. *Id.*

263. *Id.* at 503-04.

lockers and allegations that security personnel were bringing weapons to work.²⁶⁴ When the security officers filed suit for invasion of privacy, the court rejected the claim, noting that the "area was not enclosed" and the "[p]laintiffs' activities could be viewed by anyone walking into or through the . . . area."²⁶⁵ On appeal, the Tenth Circuit affirmed.²⁶⁶

The limitation, however, on the lawful-vantage-point concept when the defendant engages in conduct to obtain a view of the plaintiff that could not ordinarily be had from a lawful vantage point, applies to surveillance in the workplace. This is demonstrated by *Speer v. Ohio Department of Rehabilitation & Correction*.²⁶⁷ In *Speer*, a prison's administrative captain, whose duties involved conducting investigations for the prison's chief of security, received information that an employee was becoming too friendly with some of the inmates.²⁶⁸ The captain began an investigation and as part of the investigation, he "positioned himself in the ceiling of a staff restroom for over seven hours" to spy on the employee.²⁶⁹ The court stated that while the "proper and efficient operation of the institution was of top priority and, unquestionably, reasonable surveillance of employees in an institutional setting is an acceptable investigative tool, . . . we have been unable to find any evidence that the [administrative captain's] admitted conduct in the bathroom was defensible as a policy matter."²⁷⁰ This holding is consistent with the exception to the lawful-vantage-point concept because the captain engaged in conduct to obtain a view of the plaintiff he could not have otherwise had.

Employees might also have a claim for employer surveillance of a dressing area. For example, in *Doe v. B.P.S Guard Services, Inc.*,²⁷¹ a case previously discussed with respect to determining which activities are private, the court affirmed a jury verdict for the plaintiffs (who were female fashion models) when security guards surreptitiously videotaped them in their dressing area.²⁷² This holding is not only consistent with the limitation on the lawful-vantage-point concept regarding situations in which the defendant engages in conduct to ob-

264. *Id.* at 504.

265. *Id.* at 507.

266. *Thompson v. Johnson County Cmty. Coll.*, No. 96-3223, 1997 WL 139760 (10th Cir. Mar. 25, 1997) (unpublished table decision).

267. 624 N.E.2d 251 (Ohio Ct. App. 1993).

268. *Id.* at 252.

269. *Id.*

270. *Id.* at 254. *See also Harkey v. Abate*, 346 N.W.2d 74 (Mich. Ct. App. 1983) (holding that installation of hidden viewing device in public restroom for patrons at skating rink constituted invasion of privacy).

271. 945 F.2d 1422 (8th Cir. 1991).

272. *Id.* at 1427; *see also Liberti v. Walt Disney World Co.*, 912 F. Supp. 1494, 1506 (M.D. Fla. 1995) (denying summary judgment for employer on invasion-of-privacy claim when coworker made holes in wall of dressing area to view plaintiffs).

tain a view of the plaintiff that could not ordinarily be had from a lawful vantage point, it is consistent with the group privacy or selective-disclosure concept discussed by Professor Lidsky. That plaintiffs were willing to undress in front of other fashion models did not defeat their invasion-of-privacy claims against other persons.

Also, an office in which employees receive medical treatment is an area that it would be understood an employer does not have the right to enter during the examination, thus precluding surveillance. In *Acuff v. IBP, Inc.*,²⁷³ discussed previously in the section involving "intent," the employer conducted surveillance of the nurse manager's office, where employee medical examinations occurred. Employees who had received medical treatment in the office then filed suit against the company for invasion of privacy, and the court held for the employees.²⁷⁴ The holding in *Acuff*, like the holding in *B.P.S. Guard Services*, is consistent with the exception to the lawful-vantage-point concept when the defendant engages in conduct to obtain a view of the plaintiff that could not ordinarily be had, as well as the group privacy or selective-disclosure concept (because the examiner's presence did not defeat the claim).

What about an office with a closed door? As Professor Hyman Gross has recognized, permissible conduct would vary depending on which sign (literally or figuratively) is on the door. A sign that states "Do Not Enter" has a different effect from a sign that says "Authorized Personnel Only."²⁷⁵ In the employment setting, if it is understood that management can enter an office without knocking, then the lawful-vantage-point concept will entitle management to conduct surreptitious surveillance of the office. But if there is a lock on the door, and management does not have a key, the lawful-vantage-point concept would not permit surveillance. The employee, however, would need to be seen engaging in some sort of private activity in the office for there to be liability, unless merely being alone is considered a private activity.

D. Highly Offensive to a Reasonable Person

Even if an employer intentionally intrudes upon an employee's seclusion or solitude, or into his or her private affairs, "[t]here is . . . no liability unless the interference . . . is a substantial one, of a kind that would be highly offensive to the ordinary reasonable [person], as the result of conduct to which the reasonable [person] would strongly object."²⁷⁶ Thus, a person does not have the right to be free from any

273. 77 F. Supp. 2d 914 (C.D. Ill. 1999).

274. *Id.* at 926-35.

275. Gross, *supra* note 170, at 39.

276. RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977).

intrusion, only a highly offensive intrusion,²⁷⁷ and whether an intrusion is highly offensive is an objective test.²⁷⁸ Whether the intrusion would be highly offensive to a reasonable person is a jury question, but the court must first make a threshold determination of offensiveness.²⁷⁹ In deciding whether an intrusion is highly offensive, each case is decided on its facts.²⁸⁰

The key factor in deciding whether an employer's surveillance is highly offensive is the employer's motive.²⁸¹ Thus, "the penetration of private space is often not 'highly offensive' unless perpetrated with improper intent."²⁸²

A legitimate motive defeating an otherwise valid claim is best demonstrated by a non-employment case, *Plaxico v. Michael*.²⁸³ In *Plaxico*, the Mississippi Supreme Court upheld the dismissal of a plaintiff's invasion-of-privacy claim even though the defendant peered through a window and took photographs of the plaintiff while she was in bed nude. The defendant was seeking to obtain custody of his child, and suspected that his ex-wife was having a homosexual relationship with the plaintiff, who was living with his ex-wife.²⁸⁴ With respect to the taking of the photographs, the court held that "this conduct is not highly offensive to the ordinary person which would cause the reasonable person to object," and "[i]n fact, most reasonable people would feel [the defendant's] actions were justified in order to protect the welfare of his minor child."²⁸⁵ Two justices dissented, one stating that "peeping into the bedroom window of another is a gross violation of privacy which may subject one to liability for intentional intrusion upon the solitude or seclusion of that other,"²⁸⁶ the other justice believing that only pictures of the defendant's ex-wife could "possibly be characterized as helpful to [the defendant's custody] case."²⁸⁷

In employment cases, most courts determine whether the intrusion would be highly offensive to a reasonable person by balancing "the employer's interest in intruding and the employee's privacy interest."²⁸⁸

277. Finkin, *Employee Privacy*, *supra* note 61, at 227.

278. *Black v. City & County of Honolulu*, 112 F. Supp. 2d 1041, 1053 (D. Haw. 2000).

279. *Stein v. Marriot Ownership Resorts, Inc.*, 944 P.2d 374, 379 (Utah Ct. App. 1997).

280. *Black*, 112 F. Supp. 2d at 1053.

281. Friedman, *supra* note 31, at 25-26 (footnote omitted); *see also* Cavico, *supra* note 33, at 1285 (noting that courts must consider "the employer's interest in obtaining the information" to determine whether employer's surveillance violates employee's right of privacy).

282. Post, *supra* note 57, at 971.

283. 735 So. 2d 1036 (Miss. 1999).

284. *Id.* at 1038.

285. *Id.* at 1040.

286. *Id.* (Banks, J., dissenting).

287. *Id.* at 1041 (McRae, J., dissenting).

288. Gruber, *supra* note 80, at 367. *See also* Borse v. Piece Goods Shop, Inc., 963 F.2d 611, 625 (3d Cir. 1992) (stating that balancing test is to be applied under Penn-

Thus, "courts will measure expectations of privacy against employers' business-related needs to intrude."²⁸⁹ It has therefore been noted that

[t]he employee's right to privacy . . . is a relative right. It requires a balance between the contending interests of the employee's personal privacy expectations and the employer's traditional interests in quality, performance, and productivity. Courts customarily balance the conflicting interests of employers and employees through the common law of torts.²⁹⁰

As stated by two commentators:

[T]he courts specifically have recognized that an employee's common law right of privacy is limited by an employer's countervailing rights arising out of the employment relationship. Included among these is the right to engage in investigation of employees suspected of illegality, fraud, or other misconduct committed in the course of employment. In exercising this right, employers even have been allowed to conduct reasonable surveillance of employees outside the workplace.²⁹¹

In fact, "[c]ases involving the surveillance type of invasion of privacy tort give primacy to an employer's [sic] protecting its business interests."²⁹² As stated by Professor S. Elizabeth Wilborn:

Because routine monitoring can appear harmless from some perspective (especially that of a third party), and because the negative effects of such monitoring are often gradual and incremental, this standard frequently forecloses an employee claim based on typical workplace monitoring and surveillance. In particular, to the extent that the monitoring complained of can be arguably linked to work-related activities, those challenges have been unsuccessful.²⁹³

Accordingly, a legitimate purpose can be "dispositive in eliminating liability."²⁹⁴ In fact, "a strong, countervailing employer business need

sylvania law); Decker, *supra* note 27, at 561 ("While employers may have legitimate business interests that sometimes require infringing on employee privacy, there are compelling reasons to limit this intrusion where no legitimate interest exists."); Baxi & Nickel, *supra* note 36, at 143 ("Courts must balance the private employer's interests against the employees' reasonable expectation of privacy."); Conlon, *supra* note 30, at 290 ("In practice, courts will [therefore] first define the scope of an employee's reasonable expectation of privacy and then balance the employer's business interest against the employee's individual rights."); Kray & Robertson, *supra* note 32, at 144 ("In determining whether enhanced monitoring violates an employee's right to privacy, three factors are considered: the means used in obtaining the information, the employer's purpose in obtaining the information, and the nature of the information sought."). One commentator argues that the concept of "reasonable expectation of privacy" has merged, in the employment law context, with the analysis of the employer's motive for conducting the surveillance. King, *supra* note 29, at 461.

289. King, *supra* note 29, at 464.

290. Cavico, *supra* note 33, at 1345.

291. Jenero & Mapes-Riordan, *supra* note 65, at 83 (footnote omitted).

292. Cavico, *supra* note 33, at 1286.

293. Wilborn, *supra* note 28, at 845.

294. Friedman, *supra* note 31, at 26. See also Finkin, *Employee Privacy*, *supra* note 61, at 239-40 ("[T]he presence of a business purpose is often dispositive of the legitimacy (technically the 'inoffensiveness') of the intrusion as a matter of law. . . ."); Baxi & Nickel, *supra* note 36, at 143 ("An employer who monitors

may legitimize even an intrusion into an employee's home."²⁹⁵ Therefore, "[i]ntrusion by surveillance is nontortious if the employer can point to a pertinent, legitimate, and significant business reason for the surveillance. Although, if the means of intrusion are extremely offensive courts may still impose liability."²⁹⁶

This factor helps insulate most employers from liability for surreptitious physical surveillance of employees because it is unusual for an employer to conduct such surveillance for an illegitimate reason, and the motive will usually be considered legitimate as long as it is work related. For example, in *Salazar v. Golden State Warriors*,²⁹⁷ the court stated that a "pertinent factor for a court to consider is whether the intrusion is justified by a legitimate motive,"²⁹⁸ and then held that the employer had a legitimate motive because it was "work-related."²⁹⁹

There are numerous legitimate reasons why an employer would conduct surveillance. Monitoring employees' work performance is legitimate, and it has been recognized that "[m]ost workplace surveillance techniques are permissible if the information sought pertains to employee job functions."³⁰⁰ As two commentators have noted, "An employee would be hard-pressed to assert . . . that the employer's conduct in monitoring the performance of [work] tasks, for legitimate business purposes, through relatively unintrusive forms of electronic surveillance, is 'highly offensive.'"³⁰¹ "Supervisors have monitored workers ever since the industrial revolution"³⁰²

employees in an effort to maintain a business interest would probably prevail over such a claim [to privacy]."); Conlon, *supra* note 30, at 286 ("[T]he common law legitimizes otherwise intrusive behavior if an employer can demonstrate a business purpose.").

295. Cavico, *supra* note 33, at 1308–09.

296. *Id.* at 1286 (footnote omitted). Professor Wilborn's proposed federal legislation would require an employer "to have a legitimate business reason for any surveillance it chose to conduct." Wilborn, *supra* note 28, at 880. Professor Cavico has argued that

artificially enhanced electronic surveillance techniques targeting an individual employee or small group of employees are warranted only when the employer has a serious problem, such as a crime, that cannot be solved by traditional surveillance, or disclosed electronic surveillance, and the employer has well-established, specific reasons for believing that secret artificial surveillance means will detect the malefactor(s).

Cavico, *supra* note 33, at 1292.

297. No. C-99-4825 CRB, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000).

298. *Id.* at *3.

299. *Id.*

300. Cavico, *supra* note 33, at 1286.

301. Jenero & Mapes-Riordan, *supra* note 65, at 82.

302. Note, *Addressing the New Hazards of the High Technology Workplace*, 104 HARV. L. REV. 1898, 1903 (1991) [hereinafter *Hazards*].

It is legitimate for an employer to conduct surveillance of employees to help increase efficiency. In *Thomas v. General Electric Co.*,³⁰³ the plaintiff sued his employer after his employer took his picture without his permission.³⁰⁴ The employer "engaged in the practice of taking and using motion pictures for the purpose of documenting the layout of equipment and machinery, and the movements of employees while engaged in the performance of their respective jobs."³⁰⁵ The court found that "[s]uch pictures are efficient, effective, and economical means of studying methods of production and the individual operations involved therein. They are used as aids in studying and establishing time standards and safe, efficient manufacturing methods and procedures."³⁰⁶

The plaintiff had requested that his employer not take pictures of him because he felt it invaded his privacy, but the employer took his picture anyway.³⁰⁷ The motion pictures of the plaintiff were to be used by the employer only in the study of its operations.³⁰⁸ The court held that the employer had not violated the plaintiff's right to privacy.³⁰⁹ The court relied on the lack of any evidence that the photographs were taken for "any purpose other than to be studies in order to increase the efficiency of defendant's operations and to promote the safety of its employees in the discharge of the duties they were employed to perform."³¹⁰ The court stated that "[n]o case has been referred to the Court and the Court has found none forbidding an employer to use such means to improve the efficiency of its workers and promote their safety."³¹¹

It is also legitimate for an employer to conduct surveillance as part of a workplace investigation. For example, in *DeLury v. Kretchmer*,³¹² the court noted that the employer had shown ample reason for taking pictures of employees when the pictures were being taken as part of an investigation into employee wrongdoing and were going to be shown to the complainants.³¹³

Although physical surveillance away from the workplace is perhaps less common than surveillance at the workplace,³¹⁴ employers sometimes have a legitimate interest in employees' off-duty con-

303. 207 F. Supp. 792 (W.D. Ky. 1962).

304. *Id.* at 792.

305. *Id.* at 793.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.* at 799.

310. *Id.*

311. *Id.*

312. 322 N.Y.S.2d 517 (Sup. Ct. 1971).

313. *Id.* at 518-19.

314. Boehmer, *supra* note 27, at 757 n.84.

duct,³¹⁵ and “[n]o bright lines can be drawn between personal and business activities.”³¹⁶ An employer might have a legitimate interest in knowing whether an employee is engaged in off-duty illegal acts, or whether the employee is engaged in off-duty violations of the employee’s duty of loyalty.³¹⁷ As one commentator has noted, “Employers possess permissible concerns regarding their employee’s off-the-job behavior, actions, or personality characteristics that adversely affect work performance, productivity, the employer’s standing, or other employees. Certain off-the-job conduct can be treated as work related and, therefore, properly subject to scrutiny and restraint.”³¹⁸

It is a legitimate motive for an employer to conduct surveillance of an off-duty employee to defend a legal claim asserted by the employee. The court in *Ellenberg v. Pinkerton’s, Inc.*,³¹⁹ stated that

[r]easonable surveillance is recognized as a common method to obtain evidence to defend a lawsuit. It is only when such is conducted in a vicious or malicious manner not reasonably limited and designated to obtain information needed for the defense of a lawsuit or deliberately calculated to frighten or torment the plaintiff, that the courts will not countenance it.³²⁰

For example, in *Johnson v. Corporate Special Services, Inc.*,³²¹ the plaintiff alleged that the defendant invaded his privacy by conducting surveillance on him while investigating his workers’ compensation claim,³²² but the court found that the purpose of the investigation was legitimate because “the predominant issue in the workman’s compensation case was the extent of [the plaintiff’s] injury.”³²³

One court has even upheld viewing an off-duty employee through a window in his house with the use of a high-powered camera lens when the motive was legitimate. In *Saldana v. Kelsey-Hayes Co.*,³²⁴ the court held that although “the use of a powerful lens to observe the interior of a home . . . could be found objectionable to a reasonable

315. Some states, however, have statutes restricting an employer’s ability to discipline employees for engaging in certain off-duty activities. See, e.g., COLO. REV. STAT. § 24-34-402.5(1) (2005) (“any lawful activity”); N.Y. LAB. LAW § 201-d(2)(c) (McKinney 2000) (“legal recreational activities”).

316. Kray & Robertson, *supra* note 32, at 144.

317. Richard M. Howe, *Minding Your Business: Employer Liability for Invasion of Privacy*, 7 LAB. L.J. 315, 345, 382–83 (1991).

318. Cavico, *supra* note 33, at 1309 (footnote omitted). It has been suggested, however, that some employers “assert that everything about an employee is relevant and necessary in determining suitability for employment. Thus, the employer feels it is important to know if the employee smokes marijuana at home, is a homosexual, or socializes with the ‘wrong’ kind of people.” Decker, *supra* note 27, at 561.

319. 202 S.E.2d 701 (Ga. Ct. App. 1973).

320. *Id.* at 704.

321. 602 So. 2d 385 (Ala. 1992).

322. *Id.* at 386.

323. *Id.* at 388.

324. 443 N.W.2d 382 (Mich. Ct. App. 1989).

person,”³²⁵ the intrusion at issue was into matters that the plaintiff had no right to keep private.³²⁶ In *Saldana*, the plaintiff had suffered a work-related injury, and the defendant suspected the plaintiff was malingering.³²⁷ The court stated that “[t]he defendants’ duty to refrain from intrusion into another’s private affairs is not absolute in nature, but rather is limited by those rights which arise from social conditions, including the business relationship of the parties.”³²⁸ The court noted that the “[d]efendants’ surveillance of plaintiff at his home involved matters which defendants had a legitimate right to investigate Plaintiff’s privacy was subject to the legitimate interest of his employer in investigating suspicions that plaintiff’s work-related disability was a pretext.”³²⁹ One judge dissented, believing that “an allegation of pervasive surveillance of the investigatory target through the windows of his own home, particularly when accomplished by means of a camera lens, at a minimum creates a genuine issue of material fact as to whether the intrusion was unwarranted.”³³⁰

Of course, there are also illegitimate motives for surveillance, “such as frustration of union organizing efforts, circumvention of employment discrimination laws via intensified scrutiny of protected employees, and identification of whistleblowers.”³³¹ Sometimes, therefore, the employer’s motive will be at issue. For example, recall that in *Love v. Southern Bell Telephone & Telegraph Co.*³³² whether an invasion of privacy was committed by supervisors entering an employee’s home hinged on whether the supervisors’ “reasons for entering plaintiff’s trailer [were] motivated by a desire to help, . . . or [whether they were] in the furtherance of their employer’s interest and designed to prove plaintiff’s unworthiness as a supervisory employee”³³³ (which apparently was not a sufficient business reason to overcome the severity of the intrusion).

325. *Id.* at 384.

326. *Id.*

327. *Id.* at 383.

328. *Id.* at 384.

329. *Id.*

330. *Id.* at 385 (Holbrook, J., concurring in part and dissenting in part).

331. Wilborn, *supra* note 28, at 827 n.8 (citing OFFICE OF TECH. ASSESSMENT, THE ELECTRONIC SUPERVISOR: NEW TECHNOLOGY, NEW TENSIONS 102–04 (1987)). See also Westin, *supra* note 246, at 276–77 (“[I]f employees can show that the real purpose of employer surveillance is not to assure proper work performance or prevent crime at work sites, but to identify whistle blowers, or find out what employees think of management policies, or spy on union organizing campaigns, or satisfy voyeuristic impulses, then American law provides employees with remedies against such improperly-motivated employer behavior.”).

332. 263 So. 2d 460 (La. Ct. App. 1972).

333. *Id.* at 466.

Also, if the employer intentionally seeks and obtains information that is not relevant to the employer's interest that initially motivated the surveillance, an employer will likely not be able to rely on the legitimate motive to defeat an otherwise valid claim. For example, in *I.C.U. Investigations, Inc. v. Jones*,³³⁴ the justices disagreed as to whether the video of the plaintiff urinating was in furtherance of the employer's investigation of the plaintiff's alleged injury.³³⁵

An illegitimate purpose, however, will not render unlawful the surveillance of an employee from a lawful vantage point. For example, in *Pemberton v. Bethlehem Steel Corp.*³³⁶ there was evidence that the defendants conducted surveillance of a (married) union business agent to determine "whether [he] had girlfriends and where he got his money."³³⁷ The court noted that such a purpose could "have only the most tangential relevance to any legitimate concern of [the defendants]."³³⁸ Notwithstanding, the court stated that the defendants would have been entitled to summary judgment if the surveillance had been limited to observing him outside his residence, outside what appeared to be his girlfriend's home, outside a shopping center and convenience store, and along public roads.³³⁹ What kept the defendants from obtaining summary judgment was evidence that they had used a listening device as part of the surveillance.³⁴⁰

The conclusion that an improper motive by itself is not sufficient to establish a claim is consistent with the requirement that the plaintiff show an intrusion into his or her seclusion or solitude, or private affairs or concerns, in addition to showing that the intrusion was offensive. Motive is thus used to make non-tortious a surveillance that would otherwise be actionable. For example, as previously discussed, an employer's motive in determining whether an allegedly injured employee is malingering justifies viewing the plaintiff in his home

334. 780 So. 2d 685 (Ala. 2000).

335. *See id.* at 690 (Cook, J., dissenting) ("Clearly, a videotape of Jones urinating in his yard served no legitimate purpose in Jones's workers' compensation case."). *Jones* demonstrates the difficult position employers and their investigators would be put in if liability could attach for surveillance that furthers a legitimate interest but that happens to capture an employee unexpectedly engaging in a private act (such as urinating in the front yard). If Justice Cook's dissent were the law, it would put the employer or its investigator in the position of deciding, at the time the footage is being taken, whether any activities are not relevant to the investigation. If the investigator made a mistake in *Jones*, I do not believe it was taking the footage of the plaintiff urinating, but was perhaps disclosing the tape to the employer's attorney without inquiring as to whether such footage would be relevant to the workers' compensation case (presuming such an inquiry was not made).

336. 502 A.2d 1101 (Md. Ct. Spec. App. 1986).

337. *Id.* at 1116.

338. *Id.*

339. *Id.* at 1117.

340. *Id.*

through a window with open curtains, even when image-enhancing equipment is used.³⁴¹

Because, however, it is a balancing test, courts are empowered to assess the strength of an employer's motive (as in *Love*) and balance it against an employee's privacy interest. Thus, if an employer trespasses onto an employee's land, peers through a window of the employee's house, and views the employee engaged in an intimate activity, a weak employer motive (such as a concern that an employee's homosexual relationship will impact its business) would most likely be insufficient to defeat the privacy claim. But consistent with employment law generally, courts will most likely not second-guess whether an employer's asserted business motive is legitimate.³⁴²

E. The Rule Governing Employers' Surreptitious Physical Surveillance of Employees

Based on the foregoing, the rule regarding when an employer's surreptitious physical surveillance violates an employee's common law right to privacy can be stated as follows: An employee has a claim if (1) the employer actually conducts surveillance of the employee; (2) the employer intends to conduct surveillance of the employee engaged in private activities or should know the surveillance will capture the employee engaged in private activities; (3) the surveillance is of the employee engaged in private activities; (4) the employer, when conducting the surveillance, could not have had that view from a lawful vantage point, or is engaged in conduct to obtain a view of the employee that could not ordinarily be had from a lawful vantage point; and (5) the employer's motive in conducting the surveillance does not outweigh the employee's privacy interest.

V. SHOULD COURTS EXPAND AN EMPLOYEE'S RIGHT TO BE FREE FROM SURREPTITIOUS PHYSICAL SURVEILLANCE BY HIS OR HER EMPLOYER?

The above analysis of the case law demonstrates that an invasion-of-privacy claim will only be stated with respect to an employer's surreptitious physical surveillance of employees in limited circumstances. This state of the law, and the state of privacy law generally, has led some commentators to argue for an expansion of employee privacy rights. Proponents of an expanded right of employee privacy argue that a lawsuit under the current state of the law is usually futile³⁴³

341. *Saldana v. Kelsey-Hayes Co.*, 443 N.W.2d 382, 384 (Mich. Ct. App. 1989).

342. *See, e.g., Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991) ("Courts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions.")

343. *See King, supra* note 29, at 449.

and that the “[t]he tort of intrusion has never lived up to its potential.”³⁴⁴ The failure to succeed in obtaining legislation expanding employee privacy rights³⁴⁵ presents the question of whether state courts should step in and expand such rights under the common law, and in particular, under the tort of intrusion.

As discussed below, there are insufficient reasons for courts to modify the existing law regarding employers’ surreptitious physical surveillance of employees. In analyzing whether a change in the law via the court’s common law powers is warranted, I rely on Professor Melvin Eisenberg’s descriptive account in *The Nature of the Common Law* of how courts decide common law cases,³⁴⁶ including when courts generally overturn precedent.³⁴⁷

Professor Eisenberg asserts that the real-world model of the common law incorporates three standards: (1) social congruence; (2) systemic consistency; and (3) doctrinal stability.³⁴⁸ By “social congruence” Eisenberg is referring to the common law ideal that “the body of rules that make up the law should correspond to the body of legal rules that one would arrive at by giving appropriate weight to all applicable social propositions and making the best choices where such propositions collide.”³⁴⁹ By “systemic consistency” Eisenberg is referring to the common law ideal that “all the rules that make up the body of the law should be consistent with one another.”³⁵⁰ By “doctrinal stability” Eisenberg is principally referring to *stare decisis*.³⁵¹

Because the real-world model of the common law incorporates the standard of doctrinal stability in addition to the standards of social congruence and systemic consistency, criticism of a legal rule based on the rule’s failure to satisfy the latter standards still might not warrant a change. According to Eisenberg, a legal rule should only be over-

344. Lidsky, *supra* note 179, at 203.

345. Such efforts have even included proposed federal legislation. *See supra* note 29. It has also been noted that “[a]ttempted legislative action on the state level [with respect to employee privacy] has been repeatedly blocked by company threats to move their business to a state without the proposed restrictions.” Wilborn, *supra* note 28, at 862. *See also* Finkin, *Employee Privacy*, *supra* note 61, at 224 (“In terms of positive law, the legislative response has varied from the occasional and piecemeal . . . to the non-existent. The latter may be explained for the most part by the politics of privacy, which pits organized business interests against a largely unorganized mass of individual workers.”).

346. *See* Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 456–57 (1989) (reviewing EISENBERG, *supra* note 109, and concluding that “Eisenberg’s objective is more to explain than to defend the method of the common law”).

347. EISENBERG, *supra* note 109.

348. *Id.* at 49.

349. *Id.* at 44.

350. *Id.* Professor Eisenberg states that the “[a]ttainment of this ideal promotes predictability and evenhandedness and furthers the legitimacy of the law by demonstrating its formal rationality.” *Id.*

351. *Id.* at 47.

ruled if “(i) it substantially fails to satisfy the standards of social congruence and systematic consistency, and (ii) the values that underlie the standard of doctrinal stability and the principle of stare decisis . . . would be no better served by the preservation of a doctrine than by its overruling.”³⁵² For reasons of stability, as long as an announced rule is substantially congruent with applicable social propositions, the rule should not be abandoned or altered simply because a competing rule is marginally more congruent with such propositions.³⁵³

Employing Eisenberg’s real-world model of the common law to determine whether the law regarding employers conducting surreptitious surveillance of employees should be altered demonstrates that it should not.

A. Social Congruence

There is little support for a conclusion that the current rules regarding employer surveillance are substantially incongruent with applicable social propositions. Of the three types of social propositions identified by Eisenberg—(1) moral norms; (2) policies; and (3) experiential propositions³⁵⁴—the first two are relevant to whether the law involving surreptitious surveillance is substantially incongruent with applicable social propositions.³⁵⁵

1. Moral Norms

Eisenberg describes moral norms as “moral standards that claim to be rooted in aspirations for the community as a whole, and that, on the basis of an appropriate methodology, can fairly be said to have substantial support in the community, can be derived from norms that have such support, or appear as if they would have such support.”³⁵⁶ Many commentators argue that existing privacy law is in need of change because it does not implement the correct definition of privacy, thus suggesting the law does not correctly reflect a moral norm. Such an argument, however, is unavailing, at least with respect to employer physical surveillance, because there does not appear to be any empirical support for an assertion that the employer physical surveillance considered non-tortious by the courts is viewed as morally wrong by a substantial portion of the community.

Constructing a criticism of existing privacy law on the basis that courts are employing an incorrect (and allegedly narrow) definition of

352. *Id.* at 104–05.

353. *Id.* at 3.

354. *Id.* at 14.

355. *See id.* at 37 (“Experiential propositions are propositions about the way the world works.”).

356. *Id.* at 15.

privacy is easy, but not necessarily because courts are out of touch with applicable moral norms. Rather, constructing such a criticism is easy because the concept of privacy lends itself to so many different definitions.³⁵⁷ As one commentator has stated, "In a philosophical sense, 'privacy' proves nearly impossible to define because of its inherent subjectivity."³⁵⁸ While "the concept of privacy has become pervasive in modern legal thought[,] . . . a clear definition of this right . . . has eluded both courts and legal scholars. It is the fundamental nature of the concept that leads to such great difficulty in application."³⁵⁹ Some commentators, notably Hyman Gross, have argued for a more narrow definition of privacy.³⁶⁰ Other "[l]egal scholars . . . speak in broad terms when referring to privacy," and "[p]rivacy [then] envelops a wide range of topics relating to integrity, personal property, movement, sensibilities, and information."³⁶¹

Some commentators who define privacy broadly, define it based on the interest it is designed to protect. For example, Professor Edward Bloustein argued that Prosser was wrong in asserting that the interest to be protected is an emotional one, and that the right to privacy protects the principle of "human personality," and that the "gist of the wrong" is a "blow to human integrity."³⁶² "To Bloustein, privacy is a matter of respect for persons."³⁶³ Similarly, Professor Robert Post ar-

357. It is debatable whether privacy can even be defined as a single concept; some commentators question whether there is a separate "right to privacy." See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422 (1980) ("Commentators have argued that privacy rhetoric is misleading: when we study the cases in which the law (or our moral intuitions) suggest that a 'right to privacy' has been violated, we always find that some other interest has been involved."). Professor Gavison refers to such commentators as "reductionists" because "they are united in denying the utility of thinking and talking about privacy as a legal right, and suggest some form of reductionism." *Id.* Professor Solove notes that "some theorists, referred to as 'reductionists,' claim that the impoverishment of the discourse is symptomatic of the fact that privacy should not be understood as a distinct conception. They argue that privacy is reducible to other conceptions and rights." Solove, *supra* note 132, at 1124.

358. King, *supra* note 29, at 444.

359. *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1128 (Alaska 1989). An array of legal theorists have attempted to define "privacy" in either a descriptive sense in order to explain the common theme in the case law protecting privacy, or in a normative sense to show what the law should protect. In either event, these theorists have sought to isolate privacy's core characteristics, referred to by one scholar as "the quest for a common denominator or essence" of privacy. Solove, *supra* note 132, at 1099.

360. Gross, *supra* note 170.

361. Shawn C. Helms, *Translating Privacy Values with Technology*, 7 B.U. J. SCI. & TECH. L. 288, 300 (2001). Perhaps the most notable example of a court applying an expansive definition of privacy with respect to the tort of intrusion is *Harkey v. Abate*, 346 N.W.2d 74 (Mich. Ct. App. 1983), discussed previously.

362. Bloustein, *supra* note 73, at 974.

363. Blackburn, Klayman & Nathan, *supra* note 180, at 46 n.15.

gues that one kind of interest involved in privacy cases is an interest that "arises from the dignitary harm which plaintiffs suffer as a result of having been treated disrespectfully."³⁶⁴ Post argues that the victim's "status as a person to whom respect is due has been called into question" by the defendant.³⁶⁵ One commentator has argued that "[i]f privacy actions were understood to encompass human dignity concerns, as Bloustein persuasively advocates, privacy doctrine would certainly provide modern workers with some protection from the current abusive practices."³⁶⁶

Thus, by simply defining privacy broadly, commentators can easily argue that the current state of the law does not fully protect employee privacy. For example, if privacy rights extend to any employer conduct deemed disrespectful, an argument can be made that any surreptitious physical surveillance is an invasion of privacy.

Fortunately, I need not join the debate over the proper definition of privacy.³⁶⁷ As previously discussed, to be overturned, a legal rule must be substantially incongruent with applicable social propositions (including moral norms). The above difference of opinion about the definition of privacy demonstrates that advocates of an expansive view of privacy cannot yet claim that the definition employed by the courts is substantially incongruent with current moral norms. For example, one commentator argued that a survey in the 1990s involving monitoring business telephone calls showed that "majorities of the public and of working people are unconvinced that employee privacy is threatened by legitimate employer monitoring of work."³⁶⁸

Additionally, courts should be wary to conclude that a common law rule is substantially incongruent with moral norms when efforts at changing the rule (or similar rules) through legislative action have

364. Post, *supra* note 57, at 967.

365. *Id.* at 968.

366. *Hazards, supra* note 302, at 1914.

367. I will, however, state that I do not believe that the objections to physical surveillance, at least as they relate to monitoring employees in the workplace for performance issues, in fact relate to privacy. As Professor Boehmer has recognized, "It may . . . be argued that artificial monitoring and surveillance in the workplace is not really an issue of privacy because employees expect to be observed as part of the normal supervision process; employees do not have a reasonable expectation of privacy in the employment relationship." Boehmer, *supra* note 27, at 770. As noted by Professor Westin, "[W]hen advocates claim that performance monitoring is a privacy issue . . . the concept of privacy is stretched beyond its rational limits." Westin, *supra* note 246, at 282. Rather, if there is any legal concept under which such surveillance should be analyzed, it is intentional infliction of emotional distress. Courts, however, have correctly been hesitant to apply this tort to the workplace. *See Decker, supra* note 27, at 572 ("Intentional infliction of emotional distress may arise in the employment context if there is an intrusion into an employee's privacy that is extremely outrageous. Hence, this tort is only useful for redressing the most extreme employment privacy invasions.").

368. Westin, *supra* note 246, at 282.

failed. Although some commentators argue that big business has thwarted efforts to increase employee privacy rights, it is doubtful that courts should increase privacy rights based on a perception that the democratic system is not operating fairly. If that is the case, the root of any such problem should be addressed, instead of courts adopting rules that they believe would be enacted if the legislative process operated fairly.

Importantly, this is not a situation in which the persons adversely affected are in a minority group and cannot adequately protect their interests through the legislative process or through unionization. Every person who is employed is subject to surreptitious employer surveillance.³⁶⁹ The issue of surreptitious surveillance is thus not analogous to issues facing minority groups, such as employment discrimination.³⁷⁰

Also, the lawful-vantage-point concept in fact promotes a moral norm, the moral norm that a person has the freedom to be present at lawful vantage points, and the corresponding freedom to observe his or her surroundings. Eliminating the lawful-vantage-point concept would thus be inconsistent with a moral norm.

2. Policies

By "policies" Eisenberg is referring to "states of affairs [that are] conducive or adverse to the general welfare."³⁷¹ Whereas "moral norms . . . characterize conduct as right or wrong, policies characterize states of affairs as good or bad."³⁷² Various policy factors support the existing rule regarding employer physical surveillance.

For example, the policies that employers should generally be entitled to operate their businesses as they deem fit and that rules that promote efficiency are generally preferable to rules that do not, support maintenance of the existing rule. Courts should be wary to sec-

369. One could argue that surveillance does not occur enough for a majority of employees to be concerned, and thus it is difficult to obtain support for an expansion of rights that would protect all employees. Although virtually every employee is aware that his or her employer *could* be watching, they usually do not believe that it is happening to them. Such an argument, however, is insufficient to warrant court intervention in this matter. While there is merit to the argument that employees often do not appreciate potential threats to their interests because offensive conduct is not widespread, the fact that the offensive conduct is not widespread suggests that a court-imposed remedy is not necessary, particularly when one considers the other reasons discussed herein for not changing the existing rule.

370. I thus disagree with Professor Wilborn drawing an analogy to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17 (2000), in support of her argument that Congress should enact legislation protecting employees' privacy. See Wilborn, *supra* note 28, at 884.

371. EISENBERG, *supra* note 109, at 26.

372. *Id.*

ond-guess whether employer practices, particularly those designed to promote efficiency, are legitimate. As courts have consistently stated, courts do not act as a super personnel department.³⁷³

Additionally, the current rule regarding surveillance provides for symmetry of information between employers and employees, which increases efficient transactions.³⁷⁴ The employee knows whether he or she is malingering, stealing office products, or violating company policies, but without the use of surreptitious physical surveillance the employer might lack this same information. Surreptitious surveillance enables an employer to assess the working relationship accurately and make efficient decisions, such as terminating an employee who is discovered to be inefficient or who is stealing (or not terminating an employee because the surveillance proves the employee innocent). An employer might be able to obtain information that prevents frivolous litigation, or that results in a just result in litigation, both efficient outcomes.

In response to this position, critics of employer surveillance (not necessarily just physical surveillance) often argue that surveillance does not, in fact, benefit employers. For example, Professor Frank Cavico argues:

A surveillance system can distort reporting of an individual employee's work effort by overly emphasizing the quantity of work performed at the expense of overlooking the quality of the employee's job. Further, there is a risk that the system will not review employee performance fairly and will not accurately assess the employee's worth to the employer.³⁷⁵

Professor Wilborn similarly states that “[a]ny productivity monitoring should be developed with employee input if the employer wishes the monitoring to work well.”³⁷⁶

If, however, these commentators are correct, employers will not engage in excessive surreptitious workplace surveillance, and the market will self-regulate. Ultimately, in deciding whether to engage in a particular course of lawful activity, employers generally act as rational profit-maximizers.³⁷⁷ Accordingly, an employment practice should not be declared inefficient based on speculation; the mere fact that the practice is engaged in creates a presumption of efficiency.

Furthermore, a policy (as that term is used in Eisenberg's discussion of social propositions)³⁷⁸ should only be relied on if “it can fairly be

373. See *supra* note 342.

374. Friedman, *supra* note 31, at 14 n.30 (“[E]conomists warn that information flows should be open evenly lest one side or another gain an unfair advantage during the transition” (quoting DAVID BRIN, *THE TRANSPARENT SOCIETY* 24 (1998))).

375. Cavico, *supra* note 33, at 1289–90.

376. Wilborn, *supra* note 28, at 881 n.208.

377. See Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 *TEMP. L. REV.* 451, 453 (2003) (discussing the view that the corporation is a rational profit-maximizer).

implemented by remedies within the power of courts," and are appropriately rejected if implementation of the policy results in frustrating other policies.³⁷⁸ Even if one accepted the argument that some monitoring is ineffective or inefficient, a rule prohibiting any surveillance would be over-inclusive and thus still frustrate the policy that efficient actions should be encouraged. To apply a rule prohibiting only inefficient or ineffective surveillance, courts and juries would be put in the difficult position of deciding whether the surveillance was in fact inefficient or ineffective. More importantly, employers would be punished for surveillance that did not produce the anticipated results.

The policy of "social gravity" also supports the existing rule. "The policy of social gravity is that morally wrongful conduct should not give rise to liability unless its consequences are normally of sufficient importance, in terms of either the societal interests implicated or the injury likely to result, to justify the social cost of official intervention."³⁷⁹ Courts should be wary to provide legal remedies for violations of moral norms that only cause harm to one's dignity and emotions; the interests implicated or the injury likely to result do not usually justify the cost of intervention.

Also, "[a] special group of policies state desirable characteristics of legal rules,"³⁸⁰ and one of the foundational principles on which a legal rule should be based is that of "replicability," by which Eisenberg means the ability of lawyers and parties to predict how the law applies to a particular factual situation.³⁸¹ The use of a clear rule, like the lawful-vantage-point concept, promotes replicability because it enables lawyers and parties to more easily predict how the law applies to their situation.

Additionally, the use of a clear rule promotes the goal of objectivity (another foundational principle upon which a rule should be based), pursuant to which "a court should reason by articulating and applying rules that it is ready to apply in the future to all persons who are situated like the disputants."³⁸² The vaguer a rule, the less likely it is that a court will be viewed as objective when applying the rule. Whether the existing rule regarding employer surveillance should be replaced with a standard that, while not as clear, is more consistent with (alleged) prevailing notions of privacy, can be viewed in terms of a typical rules-versus-standards debate.³⁸³ For any rules-versus-standards debate, the proponent of either a rule or a standard can

378. EISENBERG, *supra* note 109, at 31.

379. *Id.* at 29.

380. *Id.* at 27.

381. *Id.* at 10-12.

382. *Id.* at 9.

383. I recognize that the standard could be phrased so favorably for the employee that the result is a rule that might look as follows: "An employer can never conduct surreptitious physical surveillance of its employees."

easily marshal the traditional pros and cons involved in such a debate.³⁸⁴ Whether a rule or a standard is preferable will depend on a balancing of the pros and cons with respect to the particular issue involved.

With respect to the issue of employers conducting physical surveillance, a clear rule is preferable to a vaguer standard. The inability of commentators to agree on a definition of privacy demonstrates that an effort to adopt a standard is virtually hopeless. Even if a standard could be adopted, it would be so vague as to be incapable of consistent application by courts, and would not provide any guidance to employers seeking to conduct surreptitious physical surveillance.

I recognize that this is the type of argument a proponent of a particular rule always makes against the adoption of a vaguer standard, but if one analyzes the present issue in terms of a rules-versus-standards debate, the particular issue involved—invasion of privacy—is not particularly suited to the use of a standard. This is demonstrated by the commentators who premise an invasion of privacy on conduct that is disrespectful or that harms a person's dignity. Such a standard is an invitation to inconsistency, and would enable a judge to declare any conduct that he or she deems disrespectful to be tortious. Such a standard would be inconsistent with the goals of replicability and objectivity.

A final policy merits consideration—the ability of market forces to regulate abusive employment practices without court intervention. The at-will nature of most employment relationships, pursuant to which an employee is free to end the relationship at any time for any reason,³⁸⁵ will help ensure that employers will not engage in particularly abusive practices. If employers engage in objectionable surveillance, the free market might often remedy this by employees demanding better treatment. Such demands will carry weight because employees can threaten to end the employment relationship without fear of liability, and employees can also threaten to unionize.³⁸⁶ Public knowledge of such abusive practices might also damage an employer's recruiting efforts.

384. See generally Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

385. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 739 (2000) ("American common law generally construes employment for an indefinite or unstated term as a relationship which may be terminated 'at will' by either party for any reason or no reason at all.")

386. For example, even Professor Wilborn believes that "[e]mployee awareness and fear of employer monitoring and surveillance will grow as the impact of such monitoring is increasingly felt by the American worker." Wilborn, *supra* note 28, at 874 n.186. See also Jenero & Mapes-Riordan, *supra* note 65, at 97 ("There is yet another reason for employers to proceed cautiously in the area of electronic

An employer's concerns about such possibilities will arguably prevent most employers from engaging in abusive practices.³⁸⁷ Thus, as stated by two commentators, "[I]f for no other reason than their economic self-interest, employers would be well-advised to consider the 'fairness' issues when developing and implementing electronic monitoring programs."³⁸⁸ Professor Robert Boehmer has acknowledged that "these market forces, and corresponding moves toward self-regulation, may well serve as a significant limiting factor."³⁸⁹ Employers will also be wary to tempt courts to alter the existing law.

Critics argue that "the market is not truly 'free,' but instead merely reflects the inherent bargaining advantage employers maintain over prospective employees."³⁹⁰ In making my argument about self-regulation, I do not intend to suggest that most employees have the power to negotiate an employment provision with their employer that prohibits surreptitious physical surveillance.³⁹¹ But the employment at-will relationship, the potential for employees to unionize, and a good reputa-

monitoring of employees. . . . [T]he question of 'fairness' should not be overlooked. It is the perception of unfairness that often motivates employees to seek union representation and compels courts to create new law."). As recognized by Professor Wilborn, "The perception of mistrust and unfairness resulting from employer monitoring practices may motivate employees to seek union representation." Wilborn, *supra* note 28, at 885. In fact, "[s]ome union contracts regulating the use of electronic monitoring have been negotiated." *Hazards*, *supra* note 302, at 1908.

387. Although this Article addresses surreptitious surveillance, no employer engages in surreptitious surveillance without the understanding that if it hopes to rely on such surveillance for taking adverse employment action against the employee who was the subject of the surveillance, the fact that surveillance was conducted will most likely have to be disclosed.

388. Jenero & Mapes-Riordan, *supra* note 65, at 97.

389. Boehmer, *supra* note 27, at 806.

390. King, *supra* note 29, at 448.

391. For example, Professor Wilborn argues that "current labor conditions do not permit employees to bargain effectively over the protection of important rights such as privacy. The global mobility of labor and capital have decreased employees' ability to bargain." Wilborn, *supra* note 28, at 886. See also Boehmer, *supra* note 27, at 763 n.119, 765 ("Due to the significant decrease in the unionized segment of the United States workforce in recent years, this type of protection is not available to a large percentage of the workforce," and "the role of organized labor as a limiting factor [in the use of artificial surveillance devices] will decrease as labor unionization rates continue to drop."). Professor Finkin is also critical of the argument that the market will curb abuses of employer power, and the argument that "if the employee does not like the employer's intrusion . . . she is free to quit and find one whose workplace is less intrusive or less constrained." Finkin, *Employee Privacy*, *supra* note 61, at 255. He argues that such employees "may be relegated to a secondary labor market." *Id.* at 256. Professor Boehmer has argued that "[t]he nature of the employer-employee bargaining relationship is such that many, if not most, United States employees do not possess the luxury of simply refusing to enter into the employment relationship when they learn that intrusive monitoring and surveillance will be one of its key elements." Boehmer, *supra* note 27, at 771.

tion's positive effect on recruiting quality employees will most likely reduce (if not eliminate) many employer abuses.³⁹² These self-regulating factors are probably already reducing abusive practices, and there is no evidence that the use of physical surveillance is currently widespread (even if employer surveillance in general is perhaps increasing).³⁹³ As Professor Boehmer has recognized with respect to artificial monitoring of employees in general, "[D]espite this trend toward [its use], there are signs that some employers are concluding that the negative effects of artificial monitoring outweigh its benefits and are consequently reducing its use."³⁹⁴

Professor Finkin questions whether the lack of a widespread problem means that the law should not be changed.³⁹⁵ Finkin notes "that the law does concern itself with wrongful, but rare, aberrational manager actions,"³⁹⁶ and points to the "restroom voyeur" as an example.³⁹⁷ He is correct, but the most extreme employer abuses (such as conducting surreptitious surveillance of employees in the restroom) are already tortious.

B. Systemic Consistency

Considerations of systemic consistency support the existing rule. In this respect, Fourth Amendment law, as a body of law that addresses when the government can lawfully conduct physical surveillance of its citizens, must be considered.³⁹⁸ Any body of tort law involving physical surveillance by employers of its employees that does not take cognizance of Fourth Amendment law is ignoring the goal of systemic consistency.

392. Critics of the free-market argument assert that "fundamental rights of privacy, involving human dignity and personal integrity, should not be traded and bargained for like chattel." King, *supra* note 29, at 448.

393. See Boehmer *supra* note 27, at 743-44 ("It is, of course, inevitable that some illegitimate use will occur. However, that abuse does not now appear to be occurring on a large scale. . . . To the contrary, the most commonly cited employer reasons for implementing artificial monitoring and surveillance systems appear to be legitimate and are well within the acceptable scope of an ordinary employer-employee relationship.")

394. *Id.* at 763.

395. Finkin, *Employee Privacy*, *supra* note 61, at 243-44.

396. *Id.* at 244.

397. *Id.*

398. Professor Eisenberg's discussion of systemic consistency involves common law rules being consistent with one another. It seems appropriate, however, when addressing whether a common law rule is systemically consistent, to consider statutes and constitutional provisions as well. As stated by Professor Dworkin, "[T]he adjudicative principle of integrity [Dworkin's theory of adjudication] asks judges to make law coherent as a whole, so far as they can, and this might be better done by ignoring academic boundaries . . ." DWORKIN, *supra* note 156, at 251.

Systemic consistency does not mean that the tort law rule should be identical to the Fourth Amendment rule. Because the Fourth Amendment does not apply to private actors, the Fourth Amendment should arguably restrict surveillance more than tort law. Although some critics of existing privacy law might argue that tort privacy rights regarding employer physical surveillance should exceed those provided by the Fourth Amendment, such an argument cannot be sustained unless such critics can identify a legitimate reason why the government should be held to less of a standard than private actors. This will likely prove difficult, particularly because the government has traditionally been viewed as the primary threat to individual liberty. For purposes of systemic consistency, the tort-law rule should thus not restrict surveillance more than the Fourth Amendment. If, therefore, it turns out the rules under tort law and the Fourth Amendment are essentially the same, altering the tort rules to increase employee privacy rights would be inconsistent with considerations of systemic consistency because they would exceed Fourth Amendment rights.

Although public-sector employees presumably have greater privacy rights under the Fourth Amendment than employees have under tort law,³⁹⁹ the treatment of physical surveillance under those two sources of law is, in fact, essentially the same. For example, whereas an attempted intrusion is generally not considered tortious, an attempted search does not violate the Fourth Amendment.⁴⁰⁰

Tort law and Fourth Amendment law are also essentially the same with respect to whether a private matter or activity has been observed through physical surveillance. As I previously discussed, courts applying the tort of intrusion to employment settings are applying the lawful-vantage-point concept, which allows an employer to view anything that would be in plain view from a lawful vantage point. This is consistent with Fourth Amendment law. Although the Supreme Court in *Katz v. United States*⁴⁰¹ might have intended to end the notion that a person's constitutionally protected zone of privacy is tied to places and not persons, even in *Katz* the court stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."⁴⁰² As stated by one court, "Generally, the police are free to observe whatever may be seen from a place where they are entitled to be."⁴⁰³ This is consistent with tort law involving physical surveillance.

399. See generally Wilborn, *supra* note 28, at 866-67.

400. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998).

401. 389 U.S. 347 (1967).

402. *Id.* at 351.

403. *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997).

Under the Fourth Amendment, like tort law, the use of image-enhancing equipment does not generally render an otherwise lawful search unlawful. For example, in *On Lee v. United States*,⁴⁰⁴ the Supreme Court stated in dicta that “[t]he use of bifocals, field glasses or the telescope to magnify the object of a witness’ vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions.”⁴⁰⁵ Professor Dressler states that “[*On Lee*] teaches that the sighting of an object in plain view from a lawful vantage point—even if this sighting occurs through the use of binoculars or other magnifying devices—does not constitute a search.”⁴⁰⁶

The Supreme Court has not receded from this position. For example, in *Dow Chemical Co. v. United States*,⁴⁰⁷ the Court held that there was no Fourth Amendment violation when the Environmental Protection Agency used an image-enhancing camera to take pictures from a plane.⁴⁰⁸ (The Court did, however, state that “surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public . . . might be constitutionally proscribed absent a [search] warrant.”⁴⁰⁹) The one exception to *On Lee*’s statement that has been recognized by lower courts is when image-enhancing equipment is used to view activities inside a person’s home.⁴¹⁰ Thus, Fourth Amendment case law involving the use of image-enhancing equipment is the same as case law involving the tort of invasion of privacy.

Also, like tort law, a trespass does not automatically make police surveillance a violation of the Fourth Amendment.⁴¹¹ As stated by one court: “Although police observations made when trespassing are usually improper, it is not the trespass itself which renders them unlawful. Instead, such observations generally violate Fourth Amendment rights simply because those observed cannot reasonably anticipate observation from vantage points obtained by trespassing.”⁴¹²

The motive needed to render an otherwise unlawful surveillance lawful is also essentially the same under the Fourth Amendment and

404. 343 U.S. 747 (1952).

405. *Id.* at 754.

406. DRESSLER, *supra* note 187, at 115.

407. 476 U.S. 227 (1986).

408. *Id.* at 239.

409. *Id.* at 238.

410. *See* *United States v. Taborda*, 635 F.2d 131, 139 (2d Cir. 1980) (holding that use of enhanced viewing equipment to view inside of suspect’s home without warrant violates Fourth Amendment); *United States v. Kim*, 415 F. Supp. 1252, 1256 (D. Haw. 1976) (same).

411. *United States v. Fields*, 113 F.3d 313, 322 (2d Cir. 1997).

412. *Id.*

tort law. Under the Supreme Court's decision in *O'Connor v. Ortega*,⁴¹³ a public employer need not have probable cause under the Fourth Amendment to conduct a work-related search.⁴¹⁴ Rather, the search is "judged by the standard of reasonableness under all the circumstances."⁴¹⁵ A search is reasonable if there are "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose."⁴¹⁶ Although the Court declined to address whether individualized suspicion is an essential element of the standard of reasonableness it adopted,⁴¹⁷ the Court described the holdings of the lower courts (which it did not overrule) as generally providing that "any 'work-related' search by an employer satisfies the Fourth Amendment reasonableness requirement."⁴¹⁸ Similarly, under tort law, a private employer's surveillance of an employee has been held legitimate as long as it is "work related."⁴¹⁹

Also, for purposes of systemic consistency, tort remedies, as opposed to contract remedies, should be employed cautiously with respect to employment relationships. The employment relationship is a voluntary undertaking between two parties, and each party has the opportunity to negotiate the relationship's terms. Thus, contract law already provides a mechanism for addressing these issues. If a party to a contractual relationship has failed to contract for protection from a particular practice by the other party, it is questionable whether court-created tort law should be used to remedy the employee's failure to obtain such protection.

VI. CONCLUSION

The tort of invasion of privacy will usually not provide a remedy to an employee who is subjected to surreptitious physical surveillance by his or her employer. The lack of such a remedy stems from the rule that an employer is generally entitled to conduct surreptitious physical surveillance of its employees from any lawful vantage point. On

413. 480 U.S. 709 (1987).

414. *Id.* at 724.

415. *Id.* at 725-26.

416. *Id.* at 726.

417. *Id.*

418. *Id.* at 720-21 (citing *United States v. Nasser*, 476 F.2d 1111, 1123 (7th Cir. 1973); *United States v. Collins*, 349 F.2d 863, 868 (2d Cir. 1965)). See also R. Scott McClain, Comment, *The Expanding Spectrum of Permissible Public Employee Drug Testing*, 1990 DETROIT C. L. REV. 727, 740 ("Generally, the lower courts have held that any 'work-related' search by an employer satisfies the fourth amendment reasonableness requirement.").

419. *Salazar v. Golden State Warriors*, No. 99-4825, CRB, 2000 WL 246586, at *3 (N.D. Cal. Feb. 29, 2000).

balance, this rule is preferable to a vague standard based on a broader definition of privacy than is currently employed by the courts. The inability to show that the law is contrary to existing social norms, the difficulty involved in scrutinizing the benefits of employer practices, and the fact that the employment at-will doctrine and the ability of employees to unionize will likely minimize (and perhaps has minimized) abusive practices, all demonstrate that a change in existing law by the courts is not warranted.