

# The Individual's Right of Privacy *in a Marriage*

by

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## I. Introduction

In *Griswold v. State of Connecticut*,<sup>1</sup> the Supreme Court guaranteed the right of privacy “surrounding the marital relationship.” The Court stated:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>2</sup>

The right of privacy is closely connected with the integrity and sanctity of the family. Many of the Supreme Court's early decisions implicating the right of privacy arose in the context of husband-wife and parent-child relationships. The fundamental rights associated with family relationships, first articulated as privacy rights in *Griswold*, had their origins in cases such as *Meyer v. Nebraska*,<sup>3</sup> *Pierce v. Society of Sisters*,<sup>4</sup> and *Skinner v.*

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<sup>1</sup> 381 U.S. 479 (1965).

<sup>2</sup> *Id.* at 484-86.

<sup>3</sup> 262 U.S. 390 (1923).

<sup>4</sup> 268 U.S. 510 (1925).

*Oklahoma ex rel. Williamson*.<sup>5</sup> In *Meyer* and *Pierce*, the Court established the rights of parents to direct the upbringing of their children and to place their children in private schools.<sup>6</sup> In *Skinner*, which invalidated legislation mandating the sterilization of habitual criminals, the Court held that the right to procreate within marriage was one of “the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”<sup>7</sup>

Since *Griswold*, the Court has continued to stress the constitutional protection of marital and family integrity.<sup>8</sup> The Court also migrated toward an individual’s right to be free from government interference. In *Eisenstadt v. Baird*,<sup>9</sup> the Court struck down a statute prohibiting the distribution of contraceptives to single persons. Reasoning that the state had failed to demonstrate a purpose for the dissimilar treatment of married and unmarried persons, the Court held that the statute violated the Equal Protection Clause of the Constitution. In so doing, the Court stated that “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>10</sup>

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<sup>5</sup> 316 U.S. 535 (1942).

<sup>6</sup> See *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-403.

<sup>7</sup> 316 U.S. at 541; see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“if appellee’s right to procreate means anything at all it must imply some right to enter [into marriage,] the only relationship in which the State of Wisconsin allows sexual relations legally to take place”).

<sup>8</sup> See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion) (zoning ordinance intruding on choice of family living arrangements held unconstitutional “because the Constitution protects the sanctity of the family”); *Zablocki*, 434 U.S. at 386 (statute prohibiting marriage of individuals whose support obligations were in arrears, or whose children were likely to become public charges, struck down because “it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society”). See also *State v. Howard*, 580 S.E.2d 725, 730 (N.C. Ct. App. 2003) (“marriage closes the bedroom door”).

<sup>9</sup> 405 U.S. 438 (1972).

<sup>10</sup> 405 U.S. at 453 (emphasis in original).

In *Carey v. Population Services International*,<sup>11</sup> the Court emphasized that the privacy right “protects *individual* decisions in matters of childbearing,” and that this “constitutional protection of *individual* autonomy in matters of childbearing is not dependent” on marital status and family ties.<sup>12</sup> And the Court in *Lawrence v. Texas*<sup>13</sup> held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in consensual act of sodomy in the privacy of their home.

While there is no doubt a constitutional right of privacy, a right of both the family and the individual to be free from state interference in matters of family and individual autonomy, a right of privacy *surrounding* the family, is there a right of privacy *in* the family? In other words, is there a common law right of privacy of husbands and wives to be free from the interference of *each other*?

## II. The Common Law Right of Privacy

The common law right of privacy originated in a law review article entitled *The Right to Privacy* by Samuel D. Warren and future Supreme Court Justice Louis Brandeis.<sup>14</sup> The authors were troubled by a new invention, the Kodak camera. This new-fangled camera “rendered it possible to take photographs surreptitiously,” greatly weakening the right of people to live private lives.<sup>15</sup>

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<sup>11</sup> 431 U.S. 678, 684 (1977).

<sup>12</sup> 431 U.S. at 687 (emphasis added); *see also* *Planned Parenthood v. Danforth*, 428 U.S. 52, 69, 74 (1976) (state cannot condition right to abortion in first twelve weeks of pregnancy upon consent of spouse, nor, in the case of unmarried minors, upon parental consent).

<sup>13</sup> 539 U.S. 558 (2003).

<sup>14</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009); Matthew R. Porio, *Off-Guard and Online: The Unwitting Video Stars of the Web and the Public Disclosure Tort*, 18 SETON HALL J. SPORTS & ENT. L. 339 (2008).

<sup>15</sup> *Id.* at 211.

To protect the privacy of individuals, specifically the “evil of the invasion of privacy by the newspapers”<sup>16</sup> and the “unauthorized circulations of portraits of private persons,”<sup>17</sup> Warren and Brandeis set out the fundamentals of the now common law “right to privacy,” or the “right to be let alone” that would protect the “privacy of the individual.”<sup>18</sup>

After this seminal article, the first jurisdiction to recognize the common law right to privacy was Georgia. In *Pavesich v. New England Life Insurance Co.*,<sup>19</sup> the Georgia Supreme Court determined that the “right of privacy has its foundation in the instincts of nature,” and is therefore an “immutable” and “absolute” right “derived from natural law.”<sup>20</sup> The court emphasized that the right of privacy was not new to Georgia law, since it was encompassed by the well-established right to personal liberty.<sup>21</sup> As of today, all jurisdictions recognize some variations of the tort of invasion of privacy.<sup>22</sup>

The *Restatement (Second) of Torts* outlines the four causes of action that comprise the tort generally referred to as invasion of privacy. Intrusion upon seclusion occurs when one “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person.”<sup>23</sup> Appropriation protects an individual’s identity and is committed

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<sup>16</sup> *Id.* at 195.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 193.

<sup>19</sup> 50 S.E. 68 (Ga. 1905).

<sup>20</sup> *Id.* at 69-70.

<sup>21</sup> *Id.* at 70.

<sup>22</sup> The vast majority of jurisdictions recognize the right to privacy in some form, either in common law or by statute, as “an integral part of our humanity.” *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998); *see also Doe v. High-Tech Inst., Inc.*, 972 P.2d 1060, 1067 (Colo. Ct. App. 1998) (observing that the “vast majority of courts in other jurisdictions which have recognized other types of common law privacy claims, without significant debate, also have recognized the existence of a discrete claim for invasion of privacy based on intrusion upon seclusion”). In recognizing the tort of intrusion upon seclusion, the Minnesota Supreme Court noted that “the heart of our liberty is in choosing which parts of our lives shall become public and which parts we shall hold close.” *Lake*, 582 N.W.2d at 235. *See also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>23</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

when one “appropriates to his own use or benefit the name or likeness of another.”<sup>24</sup> Publication of private facts is an invasion of privacy when one “gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>25</sup> False light publicity occurs when one “gives publicity to a matter concerning another that places the other before the public in a false light . . . if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.”<sup>26</sup>

As noted by one commentator,<sup>27</sup> of these four privacy torts, “intrusion” best captures the essence of invasion of privacy as Warren and Brandeis first set forth the tort:

Of the four privacy torts, intrusion best captures invasion of privacy. The tort protects one’s mental interests, and focuses on the manner in which private information has been obtained. The intrusion tort was intended 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.” Moreover, the other three privacy torts deal with the use of information once it has been acquired. Only intrusion redresses invasions of privacy where the acquired information is not used. The Restatement provides liability for intrusion upon seclusion if “[o]ne . . . intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [and] the intrusion would be highly offensive to a reasonable person.”<sup>28</sup>

The commentator continues:

Alone, an intentional intrusion is not enough to sustain an intrusion upon seclusion claim. The plaintiff must also show that the intrusion is highly offensive to a reasonable person. Additionally, the plaintiff must also prove that the matter intruded upon is private—meaning that there is a reasonable expectation of privacy in the matter. Both of these requirements are objective elements, meant to strike a balance

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<sup>24</sup> *Id.* at § 652C.

<sup>25</sup> *Id.* at § 652D.

<sup>26</sup> *Id.* at § 652E.

<sup>27</sup> Tigran Palyan, *Common Law Privacy in a Not So Common World: Prospects for the Tort of Intrusion upon Seclusion in Virtual Worlds*, 38 Sw. L. Rev. 167 (2008).

<sup>28</sup> *Id.* at 171.

between the individual privacy interests and societal interests; these elements render the tort to protect only one's "reasonable expectation" of privacy, and only against "highly offensive" intrusions. The reasonable person standard, as manifested in both of these elements, gives courts leeway in striking this balance.<sup>29</sup>

Stated more simply, to prove invasion of privacy based on intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwarranted access to data about, the plaintiff.<sup>30</sup> The nature of the intrusion may include "unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying."<sup>31</sup> But a claim for invasion of privacy can survive only if the plaintiff had an "objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source."<sup>32</sup>

In the realm of husband and wife relations, discerning what can be an "objectively reasonable" expectation of seclusion or solitude in the place, conversation, or data source must be fact specific, because the spouses *share* privacy in the bedroom and in their most intimate functions. For example, it would not be an invasion of privacy for a spouse to open the door to the couple's bedroom and view the other spouse in bed.<sup>33</sup> But whether it would be an invasion of privacy for one spouse to videotape the other in a state of dishabille will depend on the facts of the case: did they have a practice of doing so in the past? And how does that past history impact on the current factual situation?<sup>34</sup> The

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<sup>29</sup> *Id.* at 182-83.

<sup>30</sup> *See* *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 490 (Cal. 1998).

<sup>31</sup> *Id.* at 489. The types of invasion intrinsic in the tort of intrusion upon seclusion are those such as harassment; peeping through windows or into some other locations in which a plaintiff has chosen to seclude himself; opening personal mail; eavesdropping on private conversations; entering a plaintiff's home without permission or searching his or her belongings; examining a plaintiff's private bank account; or other invasions of that nature. *Danai v. Canal Square Assoc.*, 862 A.2d 395, 400 (D.C. 2004). Other examples are set forth in the Comments & Illustrations to § 652B of the RESTATEMENT (SECOND) OF TORTS.

<sup>32</sup> *Id.*

<sup>33</sup> *Clayton v. Richards*, 47 S.W.3d 149 (Tex. Ct. App. 2001), *rev. denied* (Jan. 10, 2002).

<sup>34</sup> *See, e.g., Pohle v. Cheatham*, 724 N.E.2d 655 (Ind. Ct. App. 2000), *aff'd in part, vacated in part on other grounds*, 789 N.E.2d 467 (Ind. 2003) (former wife's actions in voluntarily posing for sexually explicit photographs taken by

problem was noted in *State v. Perez*,<sup>35</sup> where the husband was prosecuted criminally for surreptitiously videotaping his wife while she undressed alone in a shared bathroom:

We recognize that in the context of a marriage relationship, the reasonable expectation of privacy a spouse has turns on the facts of each case. There is nothing in the record before us to indicate that appellant and K.P. had a practice of surreptitious installation of videotape devices, undisclosed or non-consensual videotaping in an area where reasonable expectation of privacy was apparent, and subsequent acceptance of and agreement with such practice. We decline to engage in conjecture here concerning the effect evidence of such practice would have on subsequent cases.<sup>36</sup>

This article will consider the “intrusion” tort of invasion of privacy, and what constitutes a sufficient manifestation of an expectation of privacy sufficient for a court to conclude that the defendant intruded upon the plaintiff’s seclusion.

This article will not consider the other types of invasion of privacy contained in the *Restatement*. For example, if a husband videotapes the wife without her knowledge and then posts it on the internet, this article will consider only the fact that he videotaped his spouse as an intrusion, not the fact that he posted it on the internet as publication of private facts.

### III. Husband/Wife Eavesdropping

#### A. *Eavesdropping as a Violation of Federal Wiretap Law*

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Wiretap Act) prohibits the interception of “wire or oral” communications unless one party to the communication consented to the interception.<sup>37</sup> The original 1968 Wiretap Act restricted “wire communications” to those transmitted by tele-

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former husband, prior to dissolution of parties’ marriage and at time when former wife entertained hope of reconciliation, even when taken together with former wife’s failure to take action to obtain photographs during dissolution or following former husband’s apparent threat to make them public, did not, as matter of law, amount to implied waiver of her right to complain about former husband’s later publication and distribution of such photographs).

<sup>35</sup> 779 N.W.2d 105 (Minn. Ct. App. 2010).

<sup>36</sup> *Id.* at 110 n.2.

<sup>37</sup> 18 U.S.C. § 2511(2)(c)-(d) (2000).

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phone companies licensed by the FCC,<sup>38</sup> while “oral communications” were those that took place face-to-face.

Congress amended the Wiretap Act with the Electronic Communications and Privacy Act of 1986 (ECPA) to also prohibit the intentional interception of electronic communications.<sup>39</sup> Congress also addressed other privacy concerns in new technologies.

Briefly, the ECPA is divided into three titles.<sup>40</sup> Title I is the former Wiretap Act. The ECPA amended the Wiretap Act by, inter alia, adding the word “electronic” to the types of communications protected from interception,<sup>41</sup> as well as by amending the definition of interception to include more than just aural forms of interception.<sup>42</sup> Title II of the ECPA, generally referred to as the Stored Communications Act,<sup>43</sup> is an entirely new title that prohibits anyone but an authorized user from accessing stored electronic communications, including e-mail and voice mail.<sup>44</sup>

Thus, the ECPA Amendments now divide the former Wiretap Act into Title I, II, and III. The former Title III of the Omnibus Crime Control and Safe Streets Act is now Title I of the ECPA. Title I of the ECPA now regulates the interception of any conversation, including electronic conversations. Title II of the ECPA regulates access to stored e-mail, fax communications, and voicemail.

What is essential to remember for this discussion is that there is no “interspousal immunity” for wiretapping under the statute.<sup>45</sup> Rather, individuals, though in a marital relationship,

<sup>38</sup> Wiretap Act, tit. III, § 2510, 82 Stat. 197 (1968).

<sup>39</sup> 100 Stat. 1848 (1986).

<sup>40</sup> Title III of the ECPA regulates call-tracing devices such as caller ID and pen registers. This title is not relevant to the present discussion and will not be examined.

<sup>41</sup> 18 U.S.C. § 2511(1) (2000). *See* Committee on the Judiciary, The Electronic Communications Privacy Act of 1986, H.R. Rep. No. 99-647, at 2 (1986).

<sup>42</sup> 18 U.S.C. § 2510(4) (2000).

<sup>43</sup> 18 U.S.C. § 2701-2711 (2000).

<sup>44</sup> The Stored Communications Act was amended by the USA PATRIOT Act, but the amendments concern government monitoring of e-mail.

<sup>45</sup> *Glazner v. Glazner*, 347 F.3d 1212 (11th Cir. 2003); *Heggy v. Heggy*, 944 F.2d 1537, 1539 (10th Cir.1991) (concluding that Title III applies to interspousal wiretapping); *Kempf v. Kempf*, 868 F.2d 970, 972-73 (8th Cir.1989) (same); *Pritchard v. Pritchard*, 732 F.2d 372, 374 (4th Cir.1984) (same); *United States v. Jones*, 542 F.2d 661, 667 (6th Cir.1976) (same); *Gill v. Willer*, 482 F. Supp. 776,



have an individual expectation of privacy in communications covered by eavesdropping and wiretapping laws that the marital relationship does not obviate.

### B. *Eavesdropping as the Tort of Invasion of Privacy*

The largest areas of non-governmental spying are commercial espionage and spying between husbands and wives.<sup>46</sup> In the quaint world before e-mail, in *Hamberger v. Eastman*,<sup>47</sup> a typical case concerning tape recording, the court held that a landlord had committed the tort of invasion of privacy by implanting a

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778 (W.D.N.Y.1980) (finding the reasoning in *Simpson*, which was overruled by *Glazner*, to be unpersuasive); *Kratz v. Kratz*, 477 F. Supp. 463, 473-75 (E.D. Pa.1979) (rejecting *Simpson* as contradictory to the explicit language of the statute and clear intent of Congress); *Remington v. Remington*, 393 F. Supp. 898, 901 (E.D. Pa.1975) (finding that a husband had asserted a valid civil cause of action against his wife for the installation of a wiretapping device); *Ex parte O'Daniel*, 515 So.2d 1250, 1253 (Ala.1987) (same); *People v. Otto*, 831 P.2d 1178, 1185 (Cal. 1992) (same); *Rickenbaker v. Rickenbaker*, 226 S.E.2d 347, 352 (N.C. 1976) (same); *Pulawski v. Blais*, 506 A.2d 76, 77 n.2 (R.I.1986) (same); *W. Va. Dep't of Health & Human Res. ex rel. Wright v. David L.*, 453 S.E.2d 646, 652 (W. Va. 1994) (same). *But see Anonymous v. Anonymous*, 558 F.2d 677, 679 (2d Cir.1977) (holding that the facts of that case involving interspousal wiretapping did not constitute a violation of Title III, but noting that the court did not suggest "that a plaintiff could never recover damages from his or her spouse under the Federal wiretap statute"); *Stewart v. Stewart*, 645 So.2d 1319, 1321 (Miss. 1994) (concluding that Title III does not apply to domestic relations cases); *Baumrind v. Ewing*, 279 S.E.2d 359, 360 (S.C. 1981) (same).

<sup>46</sup> See Remarks of Sen. Long, Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 89th Cong. 1st Sess., part 5 at 2261 (1965-66) ("The three large areas of snooping in this [non-governmental] field are (1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these areas.").

Professor Robert Blakey, generally credited as the architect of Title III, testified that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., part 2 at 413 (1967). Senator Hruska, a co-sponsor of the bill, commenting on the scope of the statute, noted that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2110, 2112, 2274.

<sup>47</sup> 206 A.2d 239, 241-42 (N.H. 1964).

listening device in the wall of the marital bedroom of his tenants, the plaintiffs who were husband and wife.<sup>48</sup>

More recently, husbands and wives have taken to cyber-snooping, i.e., looking into each other's computers and e-mails.<sup>49</sup> In *White v. White*,<sup>50</sup> the court had the opportunity to discuss whether the wife's actions in accessing the husband's e-mail on his computer constituted intrusion upon seclusion under the *Restatement's* section 652B. The court first noted that an intrusion may be:

by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or by compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication.<sup>51</sup>

Thus, peering into one's e-mails may, under certain circumstances, constitute an invasion of privacy.

To constitute a tort, however, the intrusion must be highly offensive to the reasonable person, and a "reasonable person" cannot conclude that an intrusion is "highly offensive" when the actor intrudes into an area in which the victim has either a lim-

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<sup>48</sup> See also *Britton v. Britton*, 223 F. Supp.2d 276 (D. Me. 2002) (husband stated cause of action against wife for invasion of privacy alleging wife had recorded telephone between husband and corporate entity for which he worked); *Fischer v. Hooper*, 732 A.2d 396 (N.H. 1999) (where former wife sued former husband for violation of New Hampshire wiretapping and eavesdropping statute and for common law tort of invasion of privacy, in connection with husband's post-divorce recording of wife's telephone conversations with parties' daughter without wife's knowledge, court held that jury question was presented as to whether husband invaded wife's privacy).

<sup>49</sup> See Camille Calman, *Spy vs. Spouse: Regulating Surveillance Software on Shared Marital Computers*, 105 COLUM. L. REV. 2097, 2126 (2005) (good discussion of expectations of privacy in marriage); Don Corbett, *Virtual Espionage: Spyware and the Common Law Privacy Torts*, 36 U. BALT.L.REV. 1, 19 (2006); Jennifer Mitchell, *Sex, Lies, and Spyware: Balancing the Right to Privacy Against the Right to Know in the Marital Relationship*, 9 J. L. & FAM. STUD. 171 (2007); see also Katherine Fisher Clevenger, *Spousal Abuse Through Spyware: The Inadequacy of Legal Protection in the Modern Age*, 21 J. AM. ACAD. MATRIM. LAW. 653 (2008) (use of spyware between husbands and wives constitutes spousal abuse).

<sup>50</sup> 781 A.2d 85 (N.J. Super Ct. Ch. Div. 2001).

<sup>51</sup> *Id.* at 91, citing RESTATEMENT (SECOND) OF TORTS ' 652B at comment b. 378-79 (1977).

ited or no expectation of privacy. Thus, the crux of the issue is whether the victim of the intrusion has exhibited an expectation of privacy. The *White* court concluded that the husband had not exhibited an expectation of privacy, and thus there could be no invasion of that privacy he was claiming:

Plaintiff lived in the sun room of the marital residence; the children and defendant were in and out of this room on a regular basis. The computer was in this room and the entire family had access to it and used it. Whatever plaintiff's subjective beliefs were as to his privacy, objectively, any expectation of privacy under these conditions is not reasonable. Indeed even subjectively, plaintiff knew his living accommodations were not private; he avers that he did not leave the letter to his girlfriend in plain view.<sup>52</sup>

Thus, a manifestation of an expectation of privacy in the computer area is key.

#### **IV. Husband/Wife Videotaping**

As noted above, intrusion may include eavesdropping, wiretapping, and visual or photographic spying. As between husbands and wives, prior to the advent of e-mail, the preferred method of intrusion was videotaping. The reason may be the desire to obtain evidence of adultery, or the reason may be titillation. The result, however, is an invasion of privacy.

In *Miller v. Brooks*,<sup>53</sup> a wife hired private investigators to install a hidden camera in the bedroom of her estranged husband's separate residence. The husband discovered the hidden equipment and sued both his wife and her agents who assisted her in its installation. The trial court granted summary judgment in favor of the defendants. On appeal from that ruling, the North Carolina Court of Appeals noted the expectation of privacy "might, in some cases, be less for married persons than for single persons," but that "such is not the case . . . where the spouses were estranged and living separately."<sup>54</sup> Finding no "evidence [the husband] authorized his wife or anyone else to install a

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<sup>52</sup> *Id.* at 91. *Cf.* *O'Brien v. O'Brien*, 899 So. 2d 1133 (Fla. Dist. Ct. App. 2005) (husband did not sue under an invasion of privacy theory, but he was able to successfully enjoin his wife from disclosing the intercepted data in their divorce proceeding under the Florida Security of Communications Act).

<sup>53</sup> 472 S.E.2d 350 (N.C. Ct. App. 1996).

<sup>54</sup> 472 S.E.2d at 355.

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video camera in his bedroom,” the appellate court reversed the summary judgment, concluding issues of fact remained for trial in the husband’s claims against his wife and her agents.<sup>55</sup>

The court in *Miller v. Brooks* suggested that there might be a different standard of privacy for persons in a committed relationship and for persons who are estranged and living apart. The court rejected such a distinction in *Lewis v. LeGrow*.<sup>56</sup> In that case, a boyfriend secretly videotaped the consensual sexual activity he engaged in with his girlfriends. The court held that the boyfriend’s bedroom was a “private place” under the invasion of privacy statute, and thus the girlfriend had a reasonable expectation to be free from being secretly spied on and having her privacy invaded when in that bedroom. There is a vast difference, the court concluded, between knowingly exposing oneself to a sexual partner during consensual sex and having that intimate event secretly videotaped.<sup>57</sup>

These plaintiffs had an expectation of privacy because they were in a private place, the bedroom. The court expanded on this principle that the bedroom is a private realm in *In re Marriage of Tigges*,<sup>58</sup> and specifically rejected the notion that whether the parties are living together or estranged is a factor:

As we have already noted, in the case before this court the record is unclear whether Jeffrey installed the equipment and accomplished the

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<sup>55</sup> *Id.* See also *Clayton v. Richards*, 47 S.W.3d 149 (Tex. Ct. App. 2001) (husband, whose wife hired private investigator to install hidden video camera in couple’s bedroom, sued investigator for invasion of privacy; the court held that questions of fact existed as to whether wife tortiously invaded husband’s privacy, and as to whether investigator knowingly aided wife in the commission of tortious acts, precluding summary judgment for investigator).

<sup>56</sup> 670 N.W.2d 675 (Mich. Ct. App. 2003).

<sup>57</sup> See also *H.E.S. v. J.C.S.*, 815 A.2d 405 (N.J. 2003) (holding, as matter of first impression, that husband’s alleged video surveillance of wife’s bedroom could constitute harassment and stalking as predicate offenses of domestic violence; husband’s alleged acts of installing a microphone and camera in his wife’s bedroom and connecting them to a VCR in his bedroom could be harassment and, thus, a predicate offense of domestic violence, even though the husband did not want the wife to know of the surveillance; the husband’s alleged behavior went beyond merely observing his wife in her bedroom, he allegedly listened to her conversations and then followed her after threatening to kill her if she did not drop the divorce action, and he could have acted with the purpose to alarm or seriously annoy his wife).

<sup>58</sup> 758 N.W.2d 824 (Iowa 2008).

recording of Cathy's activities before or after the parties separated. We conclude, however, the question of whether Jeffrey and Cathy were residing in the same dwelling at the time of Jeffrey's actions is not dispositive on this issue. Whether or not Jeffrey and Cathy were residing together in the dwelling at the time, we conclude Cathy had a reasonable expectation that her activities in the bedroom of the home were private when she was alone in that room. Cathy's expectation of privacy at such times is not rendered unreasonable by the fact Jeffrey was her spouse at the time in question, or by the fact that Jeffrey may have been living in the dwelling at that time.<sup>59</sup>

These cases should be contrasted in *Colon v. Colon*,<sup>60</sup> where the court held that the wife's video surveillance of an office in the marital home did not constitute an invasion of husband's privacy.

Implicit in these cases is some suggestion that where a spouse invades the privacy of the other spouse for a "legitimate purpose," such as the protection of another or the prevention of unlawful behavior, an intrusion may not be "offensive." Thus, where a former husband takes pictures of his ex-wife's lesbian lover in the nude to document the risk to his daughter who is living with the couple, there is no invasion of privacy.<sup>61</sup>

## V. Husband/Wife Installation of a GPS

In *Turner v. American Car Rental, Inc.*,<sup>62</sup> the court held that it was for the jury to determine whether a rental car agency's use of a global positioning system (GPS) to track a rental vehicle and fine the driver for violations of speed limit was an invasion of privacy. The court could not conclude that as a matter of law, an operator of a motor vehicle had an expectation of privacy on the

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<sup>59</sup> *Id.* at 827.

<sup>60</sup> 2006 WL 2318250 (N.J. Super. Ct. App. Div. Aug. 11, 2006).

<sup>61</sup> *Todd v. City of Natchitoches, Louisiana*, 238 F. Supp.2d 793 (W.D. La. 2002) (neither wife nor her sister invaded husband's privacy under Louisiana law when they entered into marital home where husband lived in order to retrieve court-sanctioned household items from home, in connection with divorce proceeding, or when wife videotaped the retrieval; at the time of the incident, home and its contents were community property, wife maintained interest in house, her belongings, and the belongings of her children, and wife was justified in videotaping based on tensions between the couple); *Plaxico v. Michael*, 735 So. 2d 1036, 1039-40 (Miss. 1999) (explaining that the ex-husband's invasion surreptitious videotaping of ex-wife was justified because he sought to secure the "welfare of his daughter").

<sup>62</sup> 884 A.2d 7 (Conn. App. Ct. 2005).

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public highways, that equipping a motor vehicle with a GPS violated the driver's privacy, or that surveillance by tracking his travel on the highway and noting his speed in excess of the posted limit interfered with his solitude, seclusion and private affairs.

The *Turner* case suggests that installation of a GPS *could* be an invasion of privacy, but as yet, there are no cases reaching that decision in the civil context.<sup>63</sup> In fact, the law would suggest that if the information gleaned from a GPS could be observed in public, then there is no invasion of privacy.<sup>64</sup>

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<sup>63</sup> As of now, the law on whether a warrant is required for the installation of a GPS device on a person's car is split, the decisions divided on whether a person has an expectation of privacy on the public roads. *Compare* *United States v. Knotts*, 460 U.S. 216 (1983) ("monitoring the signal of a [radio transmitter] beeper placed in a container of chemicals that were being transported to the owner's cabin did not invade any legitimate expectation of privacy on the cabin owner's part and, therefore, there was neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment"); *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (GPS technology is similar to police use of cameras on lampposts, or even simple use of a police car to follow the suspect down the road); *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999) (permitting it); *United States v. Moran*, 349 F. Supp. 2d 425 (N.D.N.Y. 2005), *with* *United States v. Bailey*, 628 F.2d. 938 (6th Cir. 1980); *United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978); *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977) (not permitting it); *People v. Weaver*, 909 N.E.2d 1195 (N.Y. 2009) (installation and surreptitious use of a GPS device to monitor an individual's whereabouts require a warrant supported by probable cause); *State v. Jackson*, 76 P.3d 217 (Wash. 2003) (placing a GPS on defendant's impounded vehicles, whereby these vehicles could be tracked by satellite, involved a search and seizure under Washington's state constitution, and therefore required a warrant). *See generally* Ramya Shah, *From Beepers to GPS: Can the Fourth Amendment Keep up with Electronic Tracking Technology?*, 2009 U. ILL. J.L. TECH. & POL'Y 281 (discussing the Fourth Amendment and GPS tracking technology).

<sup>64</sup> *See* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding thermal scan of home to be a search because it yields "details of the home that would previously have been unknowable without physical intrusion"); *United States v. Karo*, 468 U.S. 705, 715 (1984) (holding beeper monitoring to be a Fourth Amendment search because it revealed "a critical fact about the interior of [a home] that the Government. . . could not have otherwise obtained without a warrant).

## VI. Manifesting an Expectation of Privacy to One's Spouse

As noted above, "intrusion upon seclusion" comes within the greater umbrella of invasion of privacy and specifically seeks to protect a plaintiff's mental interests. While the early cases focused on physical intrusions into a plaintiff's space, the cases began to eventually encompass any type of prying or intrusion into anything the plaintiff would consider private. Prosser was careful to note that intrusion cases, like the other privacy torts, were subject to limitations. For example, Prosser felt plaintiffs could not expect to recover for any perceived slight or interference with their solitude. Plaintiffs also could not state a claim for alleged intrusions that took place in public, where the plaintiff had no right to be left alone, or if there were disclosures that were required to comply with existing law.<sup>65</sup> Today, intrusion is probably the branch that best represents the goal of privacy torts—the protection against "affront[s] to individual dignity."<sup>66</sup>

A claim for that affront to individual dignity will lie, however, only when the plaintiff has exhibited an "objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source."<sup>67</sup> How does a husband or wife (or cohabitant) manifest such an expectation of privacy in shared living quarters? Marriage does not destroy one's constitutional right to personal autonomy but, at the same time, each spouse does relinquish some of his or her rights to seclusion.<sup>68</sup>

The mere act of being on a telephone exhibits an expectation of privacy; telephone conversations are per se private with the other party, and no further expectation of privacy needs to be exhibited. Thus, eavesdropping on a telephone is an invasion of privacy.<sup>69</sup> Courts have routinely found intrusions by means of eavesdropping and recording devices within the purpose of the tort.<sup>70</sup> One court noted that "eavesdropping is the quintessential

<sup>65</sup> Prosser, *supra* note 22, at 391.

<sup>66</sup> *Shulman*, 955 P.2d at 489.

<sup>67</sup> *Id.* at 490, citing RESTATEMENT (SECOND) OF TORTS § 652B, com. c., p. 379.

<sup>68</sup> *In re Matter of Dubreuil*, 629 So. 2d 819 (Fla. 1993).

<sup>69</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>70</sup> *See, e.g., Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1117 (Md. Ct. Spec. App. 1986) (intrusion by a 'detection device' at the plaintiff's

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example of a highly offensive intrusion upon seclusion.”<sup>71</sup> Further, the mere act of being in a bedroom or private area of a home is sufficient to manifest an expectation of privacy.<sup>72</sup>

The inquiry becomes more ambiguous, however, when dealing with areas like a home office, living room, or kitchen. In these instances, the inquiry will have to be fact specific: what is the history of the plaintiff in these areas? Did the defendant have unfettered access to these areas? Was there a history of videotaping or sharing a desk or other electronic equipment in these areas?<sup>73</sup>

These questions come into sharper focus in the area of marital snooping on a computer. Computers are the *most* private repository of information, other than a locked file cabinet:

[F]or most people, their computers are their most private spaces. People commonly talk about the bedroom as a very private space, yet when they have parties, all the guests—including perfect strangers—are invited to toss their coats on the bed. But if one of those guests is caught exploring the host’s computer, that will be his last invitation.<sup>74</sup>

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motel room); *Hamberger v. Eastman*, 206 A.2d 239, 239-40, 242 (N.H. 1964) (intrusion by a listening device installed in the plaintiff couple’s bedroom by their landlord).

<sup>71</sup> *Peavy v. WFAA-TV, Inc.*, 37 F. Supp. 2d 495, 521 (N.D. Tex. 1998). In *Peavy*, the defendants used a police scanner to listen to plaintiff’s telephone conversations over a period of months. *Id.* The court not only found the action intrusive, but held that it constituted intrusion as a matter of law. *Id.*

<sup>72</sup> *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“The Fourth Amendment protects people, not places. But the extent to which the Fourth Amendment protects people may depend upon where those people are.”); *United States v. Burns*, 624 F.2d 95, 100 (10th Cir. 1980) (“Legitimate privacy expectations cannot be separated from a conversation’s context. Bedroom whispers in the middle of a large house on a large, private tract of land carry quite different expectations of privacy, reasonably speaking, than does a boisterous conversation occurring in a crowded supermarket or subway.”); *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999) (“Plaxico was in a state of solitude or seclusion in the privacy of her bedroom where she had an expectation of privacy.”).

<sup>73</sup> See *Bailey v. Bailey*, 2008 WL 324156 (E.D. Mich. Feb. 6, 2008) (plaintiff wife raised an issue of fact regarding whether defendant husband’s use of a key logger to learn her email and messaging passwords so that he could access her private correspondence was objectionable to a reasonable person).

<sup>74</sup> *United States v. Gourde*, 440 F.3d 1065, 1077 (9th Cir.2006) (en banc) (Kleinfeld, J., dissenting). See also *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (“Individuals generally possess a reasonable expectation of privacy in their home computers.”).



The cases discussed herein indicate that the fact that the plaintiff and defendant shared a computer, i.e., both parties had equal access, or both used a computer to which the defendant had the plaintiff's password, will obviate the reasonable expectation of privacy.

A plaintiff will likely have manifested an expectation of privacy by the propitious use of password protection: password to log on to the computer itself (i.e., different user accounts), password to access e-mail (resident e-mail or web-based e-mail), password to access a web browser, password to access text files.<sup>75</sup> That expectation of privacy can be defeated by sharing the password, leaving the account open so that no password is needed to access data, or a password utility that automatically fills in passwords.<sup>76</sup> Also, if each spouse is an administrator on the computer, each can access the other's files. This would defeat an expectation of privacy.

Another significant factor is where the computer is located. There is less of an expectation of privacy when the computer is located in a common area of the home that is accessible to other family members under circumstances indicating the other family members were not excluded from using the computer.<sup>77</sup>

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<sup>75</sup> See *United States v. Andrus*, 483 F.3d 711, 718-19 (10th Cir. 2007) (noting the importance of password protection to the determination of whether a party maintains an expectation of privacy); *Trulock v. Freeh*, 275 F.3d 391 (4th Cir. 2001) (holding that password-protected files are analogous to the locked footlocker inside the bedroom and deciding that by using a password, plaintiff affirmatively intended to exclude others from his personal files); *White v. White*, 781 A.2d 85, 90-91 (N.J. Super. Ct. Ch. Div. 2001) (explaining the importance of password protection in finding expectation of privacy).

<sup>76</sup> *United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006) (wife's statement to police that she and her husband did not have individual user-names or passwords was factor weighing in favor of the wife's apparent authority to consent to a search of the husband's computer); *United States v. Aaron*, 33 Fed. Appx. 180 (6th Cir. 2002) (determining that a live-in girlfriend could give valid consent for search of defendant's computer because defendant had not forbidden her from using computer or "restricted her access with password protections").

<sup>77</sup> See *United States v. Buckner*, 473 F.3d 551, 555-56 (4th Cir. 2007) (determining wife's consent to search was valid where wife leased computer in her name, wife occasionally used computer, computer was found in living room, and fraudulent activity had been conducted from that computer using accounts opened in wife's name); *Morgan*, 435 F.3d at 663-64 (concluding wife had apparent authority because she initiated contact with police, she told police she

## VII. Conclusion

As noted by one commentator. “Privacy is a concept in disarray. Nobody can articulate what it means.”<sup>78</sup> Despite the lack of clearly articulable standards as to what constitutes invasion of privacy,<sup>79</sup> human beings innately crave an inner core of privacy that cannot be breached by society.<sup>80</sup>

At the same time, marriage or marriage-type relationships demand “transparency.”<sup>81</sup> One needn’t be a psychologist to know that a spouse who says “That’s none of your business” to the other spouse is in deep trouble. The law, in fact, recognizes transparency in marriage by granting a privilege to husband-wife communications. “This pairing of trust and transparency within marriage constitutes the moral ground for legal immunity. . . and explains why this immunity is not extended to (mere) friends.”<sup>82</sup>

The law of invasion of privacy within the marriage attempts to straddle these opposing concepts: wanting a core of privacy yet also wanting to share intimacy with another person. As new technologies evolve that enable individuals to invade another’s privacy, the law will have to more clearly address the special case of

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had used the computer, she had installed software on the computer, she and her husband did not have usernames or passwords, and the computer was located in common area of the house); *United States v. Smith*, 27 F. Supp. 2d 1111, 1116 (C.D. Ill.1998) (concluding live-in girlfriend had actual and apparent authority to consent to search of defendant’s computer because girlfriend gave police permission to enter house and search computer and computer and desk were in common area and surrounded by children’s toys).

<sup>78</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 477 (2006).

<sup>79</sup> DECKLE McLEAN, *PRIVACY AND ITS INVASION* 3, 5 (1995) (“[t]he ability of most people to articulate the nature of privacy has not caught up with their intuitive understanding that it is important. In fact, language itself is not yet adequate to the task of communicating clearly about privacy.”).

<sup>80</sup> McLEAN, *supra* note 78, at 3, 9 (“Anthropological and historical evidence . . . is sufficient to indicate that a demand for various kinds of privacy and an intuitive understanding of them are built into human beings.”).

<sup>81</sup> “Transparency,” deemed essential for a successful long-term relationship, is defined as making a conscious decision to share all aspects of one’s life that can easily be kept secret.

<sup>82</sup> Meghan McCalla, *The “Socially Endorsed, Legally Framed, Normative Template”*: *What Has In re Marriage Cases Really Done for Same-Sex Marriage?*, 1 EST. PLAN. & COMMUNITY PROP. L.J. 203, 226 (2008).

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how intrusion into seclusion applies to intimate partners, and not rely on an "I know when I see it" sensibility.

