Cambridge Law Journal, **78(2)**, July 2019, pp. 409–437
doi:10.1017/S0008197319000400

RECOGNISING A PRIVACY-INVASION TORT: THE CONCEPTUAL UNITY OF INFORMATIONAL AND INTRUSION CLAIMS

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ABSTRACT. *This article presents the novel view that "inclusion into seclusion" and "public disclosure of embarrassing facts" ("misuse of private information" ("MOPI") in the UK), which both the academic commentary and US case law treat as two separate legal actions, occupy the same conceptual space. This claim has important practical ramifications. No further development of the law is required to realise an actionable intrusion tort as part of the UK's MOPI tort. The argument is defended in doctrinal and theoretical terms and by reference to both UK and US law. It is presented in three forms: first, in negative terms, that the orthodox distinction between the two claims (informational privacy and intrusion) is unsustainable; second, in positive terms, that both guard against the same wrong (unwarranted privacy invasion) and the same harm (mental distress), in a way that is distinctive from other privacy actions and legal claims based upon the autonomy value; finally, in pragmatic terms, that MOPI's mature jurisprudence is sufficiently flexible and dynamic to recognise intrusion-only claims using its existing legal framework.*

KEYWORDS: *privacy, intrusion, informational privacy, autonomy, jurisprudence.*

I. INTRODUCTION

In its litany of privacy laws, the US recognises something called an intrusion into seclusion tort. Canadian and New Zealand law has been extended, recently, to recognise the same[1] and the Australian Law Reform

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[1] See T.D.C. Bennett, "Emerging Privacy Torts in Canada and New Zealand: An English Perspective" (2014) E.I.P.R. 298.

Commission has recommended that Australian law do likewise.[2] Ostensibly, English and Welsh law lacks this tort and commentators, led by Dr. Nicole Moreham,[3] have argued that the gap should be filled. In both the commentary and, especially, US law, intrusion into seclusion and disclosure of embarrassing private facts are treated as two separate torts. The latter *is* recognised in English and Welsh law and known as misuse of private information ("MOPI"), having emerged from a common law development of breach of confidence, post-Human Rights Act 1998, in the seminal case of *Campbell v MGN Ltd*.[4] Moreham argues that the common law should create a new physical privacy tort. It would protect against unauthorised surveillance of a person in a private place (and, potentially, in a public place if the harm was sufficiently serious).[5] This action, she says, could "coexist happily" with MOPI; in suitable cases, a claimant might "succeed in both actions".[6] Her views have attracted judicial attention. The Supreme Court, in *PJS v News Group Newspapers Ltd.*,[7] agreed that the right to privacy under Article 8 of the European Convention on Human Rights "embraces more than one concept"[8] and protects against "unwanted access to [or intrusion into] one's… personal space".[9] Consequently, it continued an injunction against publication of the claimants' identities despite them being widely known to the public. It did so to protect them from intrusive newsgathering activities. This decision has had a paradigm-shifting effect. It is now recognised that MOPI also covers intrusion. The question remains how far this coverage extends.

This article is about realising greater protection against intrusion. It differs from pre-existing commentary in two important respects. First, it argues that the orthodox conception of the intrusion tort is sub-optimal because the *location* of the act dominates legal reasoning. Second, that the popular treatment of privacy law as a binary, involving physical privacy and informational privacy, misrepresents its nature: that the two are not merely linked but inseparable. Consequently, it argues that the strategy for realising intrusion is misconceived. MOPI does not need extension to recognise a meaningful intrusion claim; it is already capable of doing so. The argument's originality, then, lies in its novel conception of intrusion

[2] *Serious Invasions of Privacy in the Digital Era*, ALRC Final Report 123, 2014.
[3] This is set out primarily in N. Moreham, "Beyond Information: Physical Privacy in English Law" [2014] C.L.J. 350 and developed in "Liability for Listening: Why Phone Hacking Is an Actionable Breach of Privacy" (2015) 7 J.M.L. 155 and N.A. Moreham and Sir Mark Warby (eds.), *Tugendhat and Christie: The Law of Privacy and the Media*, 3rd edn. (Oxford 2016) 10.82–10.92. See also N. Moreham, "A Conceptual Framework for the New Zealand Tort of Intrusion" (2016) 47 V.U.W. L.R. 283.
[4] *Campbell v MGN Ltd.* [2004] UKHL 22.
[5] Moreham, "Beyond Information", p. 376.
[6] Ibid., at p. 377.
[7] *PJS v News Group Newspapers Ltd.* [2016] UKSC 26.
[8] Ibid., at para. [58]. This is Mr. Justice Tugendhat's finding in *Goodwin v News Group Newspapers Ltd.* [2011] EMLR 502, at [85].
[9] Ibid.

and the interrelationship between physical and informational privacy. Its significance relates to the impact that this conception has upon the law: it provides both normative and doctrinal reasons why no new legal action is required. This alternative analysis allows us to see why MOPI should not be confined to informational privacy alone.

The argument has three parts. The first dismantles the conceptual barrier between physical and informational privacy. The next section demonstrates that the treatment of intrusion as an exclusively spatial construct is the product of arbitrary design by the grand architect of US privacy law, William Prosser. This interpretation persists in the US law, and in Moreham's design, as a pragmatic, "floodgates" measure. Problematically, though, it reduces intrusion to a sort of property right, in which the notion of privacy is inferior. Reading the intrusion tort through the lens of "seclusion" limits its proper reach by excluding states of "seclusion" that are psychological or technological in nature. For example, it prohibits claims based upon intrusion into grief and suffering,[10] employers vetting employees' social media activities[11] or camera-equipped drones flying over private land.[12] This article, therefore, argues for a richer notion of intrusion that restores the centrality of privacy concerns.

Section III uses this enlarged notion of intrusion to argue that physical and informational privacy are not merely related but inseparable. It is only the focus that changes. Sometimes informational privacy looms largest, sometimes physical privacy, but both are always present. This observation is vital to the strategy of realising greater intrusion protection. In Moreham's binary view of privacy law, the solution is for MOPI to beget a new physical privacy action as breach of confidence beget MOPI. Although she, like other commentators, recognises that informational privacy and physical privacy share many common features, including the same values of autonomy and human dignity, these are said to be only family resemblances. This misconceives the relationship. Although Moreham is right to say information is not primarily at stake in the cases she discusses, she is wrong to suggest it disappears altogether. It persists in the medium in which the intrusion is stored (if it is stored) or in the sensory data that the observer gains about the individual.

The final section argues that MOPI has evolved substantially from its original state so that it stands ready to encapsulate this alternative conception of intrusion. Indeed, it will be argued that the name MOPI no longer reflects the actuality of the mature jurisprudence that has developed over the past 15 years. It has outgrown the limiting label that Lord Nicholls gave it in

[10] See examples discussed in P. Wragg, "Leveson and Disproportionate Public Interest Reporting" (2013) 5 J.M.L. 241, at 247–52.

[11] J. Titcomb, "Bosses Told to Stop Snooping on Employees' Facebook Profiles", *The Telegraph*, 13 July 2017.

[12] H. Mance, "Privacy and Safety Curbs on Drones Proposed", *Financial Times*, 26 November 2017.

Campbell v MGN and is now better described as protecting against unwarranted privacy invasion. It follows that no new cause of action is required to realise an intrusion tort, but rather an application of the pre-existing MOPI principles to a fact-pattern where the intrusion element dominates. Indeed, this fact-pattern is given to us in the recent case of *Fearn v Tate*,[13] in which residents of high-rise flats complained the Tate Modern's new viewing gallery overlooking their homes was intrusive.

II. Informational Privacy and Intrusion as Discrete Claims

Although Warren and Brandeis's seminal article "The Right to Privacy"[14] is the spiritual touchstone of US privacy law,[15] its influence has been eclipsed by William Prosser's 1960 article, "Privacy". Here, Prosser claimed that his meticulous examination of the case law revealed "not one tort, but a complex of four"[16]: "public disclosure of embarrassing private facts about the plaintiff"; "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs"; appropriation of another's name or likeness; and publicity that shines a false light on the victim. We shall examine only the first two. The orthodox view claims that "intrusion concerns the physical actions of a defendant, whereas public disclosure involves the dissemination of information".[17] It will be argued that this distinction is formal rather than substantive: that is, it speaks to the positive law's treatment of the two torts and, as a result, is descriptive not analytical. As will be seen, a legal culture has developed of focusing on the *form* of intrusion to determine liability, rather than the *substance* of it. There are two strands to this negative case for conceptual unification, and both attack the doctrinal interpretation of "seclusion" as an exclusively spatial construct for being a synthetic rather than organic prerequisite (being Prosser's pragmatic device for limiting claims): first, that intrusion into seclusion is contextual (which includes the spatial); second, that this spatial-only construct is outmoded: new privacy-invading technologies do not fit within it and challenge our understanding of what both "intrusion" and "seclusion" mean. The discussion focuses mainly on this first point.

It is important to clarify the grounds of this argument. As with other debates about rights, there are (at least) three levels of abstraction in the privacy literature. At the highest level are the philosophical claims (moral and legal) about the value(s) that state recognition of privacy serves.

[13] *Fearn v Tate* [2019] EWHC 246.
[14] S. Warren and L. Brandeis, "The Right to Privacy" (1890) 4 Harv.L.Rev. 193.
[15] Melville Nimmer called it "the most influential law review article every written", N.B. Nimmer, "The Right of Publicity" (1954) 19 L.C.P. 203.
[16] W.L. Prosser, "Privacy" (1960) 48 C.L.R. 383.
[17] R. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 C.L.R. 957, at 978. See also D.J. Solove, *Understanding Privacy* (Cambridge, MA 2008), 163; and R. Gavison, "Privacy and the Limits of the Law" (1980) 89 Yale L.J. 421, at 433.

Here we see familiar arguments that privacy serves autonomy,[18] individuality,[19] personality,[20] human dignity,[21] social interaction,[22] etc. At the lowest level are rules or principles that animate specific privacy rights, such as MOPI, GDPR, breach of confidence, etc. Sat in-between is the more specific but (normally) theoretical discussion about the scope and nature of that right (or rights), etc. It is at this level where mid-level principles emerge that bridge the gap between theory and practice, norm and fact, and conceptualisation and realisation.[23]

Our focus will be on these mid-level principles. We are not concerned wholly with a theory of privacy (as such) nor the myriad claims that privacy conceivably extends to. We can, therefore, accept that privacy is a "good thing" and that humans are entitled to it as autonomous beings, pursuing their own conception of the good life, etc. Prosser's 1960 article is at the lowest level of abstraction; it contains no real conceptualisation of privacy. Indeed, although judges consistently cite it when deciding privacy cases, it was never Prosser's aim to provide any grand theory: as Richards and Solove note: "he was not interested in helping to structure the law" and seemed to view the privacy torts as a "rather thoughtless and incoherent set of [doctrines]".[24] Prosser's systemisation, though, became important when, as lead reporter for the *Restatement (Second) of Torts*, he became "chief architect"[25] of their eventual form in law. Consequently, it was he that crystallised the legal tests for determining liability. The result, therefore, is synthetic rather than organic. This is important to emphasise, since the very name "intrusion into seclusion" is of his design and the legal tests reflect his interpretation of the law: an interpretation that has been challenged in the literature,[26] but not in practice.[27]

[18] See e.g. C. Fried, "Privacy" (1968) 77 Yale L.J. 475.
[19] See e.g. A.F. Westin, *Privacy and Freedom* (New York 1967).
[20] R.B. Parker, "A Definition of Privacy" (1974) 27 Rutgers L.Rev. 275.
[21] See e.g. E.J. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 N.Y.U.L.Rev. 962.
[22] See e.g. Fried, "Privacy", who argues that privacy is necessary for relations of love, trust and friendship to form; Post, "The Social Foundations of Privacy", who argues that privacy safeguards "rules of civility"; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012) 75 MLR 806, who argues privacy rights acknowledge the "barriers" that citizens erect to prevent others "accessing" them.
[23] See e.g. R. Dworkin, *Law's Empire* (Cambridge, MA 1986); M.D. Bayles, "Moral Theory and Application" (1984) 10 Soc.Theory & Prac. 110; "Mid-level Principles and Justification" in J. Ronald Pennock and John W. Chapman (eds.), *Justification: NOMOS XXVIII* (New York 1986), 49; K. Henley, "Abstract Principles, Mid-level Principles, and the Rule of Law" (1993) 12 Law & Phil. 121.
[24] N.M. Richards and D.J. Solove, "Prosser's Privacy Law: A Mixed Legacy" (2010) 98 C.L.R. 1887, at 1912.
[25] Ibid., at p. 1888.
[26] See e.g. Bloustein, "Privacy as an Aspect of Human Dignity"; J.J. Thomson, "The Right to Privacy" (1975) 4 Phil.& Pub.Aff. 295; H. Kalven Jr., "Privacy in Tort Law – Were Warren and Brandeis Wrong?" (1966) 31 L.C.P. 326; and Richards and Solove, "Prosser's Privacy Law".
[27] See e.g. Richards and Solove, "Prosser's Privacy Law".

Thus, section 652 B of the *Restatement (Second) of Torts* (1977) defines intrusion in physical terms: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."

Meanwhile, section 652D, which relates to informational privacy, makes no reference to the physical: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, 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."

Both operate according to the "highly offensive" test which the House of Lords, in *Campbell v MGN Ltd.*, found to be incompatible with English and Welsh law (and, consequently, no more will be said about it here).[28]

Prosser's treatment of intrusion is brief.[29] The first case he identifies, *De May v Roberts*, is of a woman who allowed her doctor's assistant (Scattergood) to assist in childbirth on the mistaken grounds he was medically-qualified.[30] (This was an impression the defendant doctor had neither expressed nor anticipated.) The court found this omission to be deceitful and awarded damages. Prosser does not say anything about the court's reasoning; the case report, though, states:

> The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants.[31]

Prosser references other cases involving intrusion into a person's home, hotel room, state-room (on a boat), as well as another involving the illegal search of a person's shopping bag.[32]

In this way, we see the formation of Prosser's view that intrusion relates to "physical" privacy; that it is about the intrusion upon a "zone" that the victim has designated as "private".[33] This informed his formulation of the test for the *Restatement* and, consequently, has informed judicial reasoning. When the US courts hear an intrusion claim, under section

[28] *Campbell* [2004] UKHL 22, at [96], [135]–[136]. Moreham calls it "a capricious concept which cannot be readily understood in advance", "Beyond Information", p. 293.
[29] Prosser, "Privacy", pp. 389–92.
[30] *De May v Roberts*, 46 Mich. 160, 9 N.W. 146 (1881).
[31] Ibid., at p. 166.
[32] Prosser, "Privacy", p. 389.
[33] See commentary to W.L. Prosser and J.W. Wade, *Restatement of the Law, Torts*, 2nd ed. (American Law Institute, 1977), s652B.

652B, the phrase "intrusion" is judged not on its own terms, as a state of mind, but almost entirely through the lens of its correlative "seclusion". As a result, claims stand or fall on whether the court is satisfied that the alleged wrong happened in a place that qualifies as sufficiently "secluded". Only then is the variable nature of intrusion judged (through a second lens: "highly offensive to a reasonable person"). Yet this is not the only interpretation of the legal wrong at stake. If we consider *De May v Roberts*, the wrong can be described as the change in psychological state that the victim experiences: it is only *afterwards* that the claimant suffers distress when she realises Scattergood is an imposter. The court's reasoning emphasises this point: it was the fact of (supposed) deceit that established liability. The level of mental distress – the shame she suffered – informed the size of the award. This should be emphasised: it was not the physical actions of Scattergood that triggered the claim but the claimant's understanding of his presence. Thus, the claim turned not on physical proximity but her psychological state.

The point can be further explored by examining the facts of *Miller v NBC*.[34] The defendant broadcaster was making a documentary about paramedics. The film crew, trailing the paramedics, recorded the unsuccessful attempt to resuscitate Mr. Miller, who had suffered a massive heart attack and had collapsed in his bedroom. The claimants (Miller's wife and daughter) did not know of the film crew's presence, nor that they had entered the family home. They only discovered this subsequently when the event was broadcast on TV. This upset Miller's wife, prompting her to make an angry phone-call to the producers; it provoked a more severe reaction in Miller's daughter: she suffered an anxiety attack. Neither claimant appeared in the broadcast, nor witnessed the filming, but Miller's wife's claim succeeded where his daughter's failed. The reason deserves attention: the court found the fact of unauthorised filming in the wife's home was determinative: "the NBC camera crew, the uninvited media guests, not only invaded the Millers' bedroom without [the deceased's] consent, they also invaded the home and privacy of his … wife … a place where NBC had no right to be without her consent."[35] The daughter's claim failed because "she was not present when the invasion of her parents' household occurred nor did those premises belong to her". This is strikingly formal. Even if the daughter had been present, the harm was caused not by witnessing the intrusion, but seeing it broadcast. When two people suffer the same harm from an event, why should the property owner have a better right to privacy?

Understandably, restricting liability to physical manifestations of intrusion has pragmatic value as a means of legal certainty. It avoids opening

[34] *Miller v NBC* 187 Cal. App. 3d 1470 (1986).
[35] Ibid., at p. 1486.

the floodgates. Yet, surely, in *Miller v NBC* the legal wrong is not trespass (as such) but intrusion into grief and suffering. Would it undermine legal certainty to say that the broadcasters ought to have considered the relatives of the deceased before broadcasting? Is it not in keeping with the tort to find that the crass insensitivity of broadcast would cause foreseeable distress, anxiety and anger in his immediate family, to see his death portrayed as entertainment? Indeed, since the court acknowledges that the "elements of emotional distress" that actionable intrusion remedies are "anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, anguish, etc", the finding that the daughter could not obtain redress is deeply problematic. Of course, this is not to say that the fact of emotional distress always warrants a legal remedy. The point is that the restriction of intrusion to an exclusively spatial construct ignores the more important, and more relevant, fact that intrusion is *contextual*.

This sort of taxonomical inflexibility is apparent in other US decisions. For example, it was held in *Remsburg v Docusearch Inc.* that since a person's work address is "readily observable by members of the public, the address cannot be private and no intrusion upon seclusion action can be maintained".[36] The defendants had sold personal details about an individual that led the purchaser to discover her whereabouts, which he then visited to murder her – a plot he had previously announced on his personal website and which would have been known to the defendant had they conducted even the most basic due diligence.[37] Similarly, in *Swerdlick v Koch*,[38] the court dismissed an intrusion action about private surveillance of the home since the activity recorded was observable by the public.[39] Expecting privacy in a public place, on this analysis, is "unreasonable". Indeed, the harshness of this rule is brought home by the facts of *Allstate Insurance Co. v Ginsburg*[40] in which the court ruled that workplace sexual assault and sexual harassment, committed by the victim's supervisor, did not constitute actionable intrusion because "seclusion" refers to "a 'place' in which there is a reasonable expectation of privacy and [not] a body part … the tort of invasion of privacy was not intended to be duplicative of some other tort. Rather, this is a tort in which the focus is the right of a private person to be free from public gaze".

It is entirely understandable, and right, that the courts would want to avoid double recovery. But that objective does not require the conclusion that actionable intrusion exists only in the shadows. Prosser himself is

[36] *Remsburg v Docusearch Inc*. 816 A. 2d 1001 (N.H., 2003).
[37] The facts of this case are discussed in R. Cohen-Almagor, *Confronting the Internet's Dark Side* (Cambridge 2015), 141–45.
[38] *Swerdlick v Koch*, 721 A. 2d 849 (R.I., 1998).
[39] This surveillance formed part of a complaint that business use of the property violated planning regulations.
[40] *Allstate Insurance Co. v Ginsburg* 863 So. 2d 156 (Fla. 2003).

guilty of this formalism: "On 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."[41]

This is not to say that the fact of being secluded is sufficient to succeed in the claim. There are several "restroom" cases that establish there may be a legitimate reason for spying on people using the toilet or changing room, including, for example, to detect and deter crime.[42] The most egregious example of this is surely *Hougum v Valley Memorial Homes*,[43] in which the claimant, a chaplain at the defendant's Lutheran-orientated care homes, was caught masturbating in a locked toilet cubicle at a Sears (retail store), by a security guard (Moran), who happened to be using the next cubicle. There was a hole drilled into the adjoining wall. According to Moran, whilst reaching for the toilet paper, "he noticed movement through the hole" and, on closer inspection, realised what Hougum was doing. But, he said, it took him "ten seconds, possibly more or less" to do so. After which, he alerted the police and Hougum was arrested for "disorderly conduct". He was subsequently dismissed from his position as Chaplain. Hougum had no cause of action in intrusion because Moran was entitled to observe Hougum's behaviour: using an unhelpful double-negative, the court concluded that "he was not required to ignore the possibility of shoplifting or vandalism in his employer's public restroom". Yet other cases give the lie to this bald finding: if a security guard is always entitled to check on a cubicle's occupant to ensure crime is not in progress, then there can never be freedom from intrusion in these circumstances. But other cases show the claim will be successful where the spying is done for lurid reasons.[44]

In this way, it seems intrusion into seclusion claims are determinable by not only formalism but also the stark application of moralism: Hougum was not a sympathetic character (so far as the court was concerned). This sort of result-pulled ad hoc decision-making is apparent in stalking cases. In *Summers v Bailey*,[45] the defendant harassed the claimant by loitering at her store (which he had sold to her) and prominently displaying his firearm, watching her for long periods from an adjacent parked car, near both the store and her home, following her home from work and by hectoring her (to give up the store). This behaviour compromised the potential sale to another person. Despite recognising that "watching or observing a person in a public place is not an [actionable] intrusion", the court made

[41] Prosser, "Privacy", p. 391.
[42] E.g. *Lewis v Dayton Hudson Corp*, 128 Mich. App. 165 (1983); *Elmore v Atlantic Zayre Inc.*, 178 Ga. App. 25 (1986).
[43] *Hougum v Valley Memorial Homes* 574 N W 2d 812 (1998).
[44] E.g. *Harkey v Abate* 346 N.W. 2d 74 (Mich Ct App, 1984); *Kjerstad v Ravellette Publications, Inc.*, 517 N.W. 2d 419 (S.D. 1994).
[45] *Summers v Bailey* 55 F.3d 1564, (1995).

an exception since "surveillance [which] aims to frighten or torment a person" is actionable.[46] Clearly, these were facts demanding a remedy, but this reasoning is only defensible if intrusion into seclusion is understood as contextual, not only spatial. Otherwise, it is unintelligible how the narrowly defined threshold requirement of "seclusion" is overlooked in favour of the second step concerning offensiveness.

Let us consider this point in the context of workplace privacy. Intrusion claims have enjoyed little success[47] in preventing employers from monitoring their employees' private e-mails[48] or from accessing confidential medical records.[49] In the court's view, this sort of activity is qualitatively different, say, from coerced urinalysis or a personal property search because disclosures about medical history or those made through email are "voluntary".[50] Of course, in a way the distinction is unrealistic: as one commentator notes, since the employer *defines* the scope of privacy in the workplace, through company policies and procedures, it is hard to establish a *reasonable expectation* of privacy contrary to its conception.[51] But, in a more important sense, it is entirely artificial. For example, imagine that employer A must choose between X (a woman) or Y (a man) for a lucrative promotion. A discovers that X is pregnant and uses this information against X to promote Y. Why should it matter whether A finds out through discovery of the pregnancy test kit following a forced personal property search or by reading the email from her doctor confirming her results? There ought to be an actionable claim for intrusion in both.

For these reasons, the confinement of the intrusion tort to a narrow sense of "solitude" is unsustainable. As *Hougum* shows and *Summers* confirms, it is the larger question of morality contained in the "highly offensive to a reasonable person" test that is determinative. Where the facts call for a remedy, the courts seem quite prepared to loosen or otherwise circumvent the "solitude" question to impose liability. But, moreover, as the hypothetical workplace scenario shows, the application of solitude as an exclusively spatial construct can be an entirely artificial distinction to draw. These criticisms are important for the second part of the argument: that, ultimately, this notion of solitude is both outmoded and too restrictive: new privacy-invading technologies mean that serious intrusions can happen ethereally, without any physical violation of private space. This, of itself, calls for re-examination of the issue.

[46] It cited *Pinkerton v Stevens*, 132 S.E.2d at 120 (1963) in support.
[47] See criticism in e.g. J.A. Flanagan, "Restricting Electronic Monitoring in the Private Workplace" (1994) 43 Duke L.J. 1256; "Addressing the New Hazards of the High Technology Workplace" (1991) 104 Harv.L.Rev. 1898.
[48] *Smyth v Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).
[49] See e.g. *Valencia v Duval Corporation*, 132 Ariz. 348, 645 P. 2d 1262 (Ariz. 1982); *Johnson v Corporate Special Services Inc.*, 602 So.2d 385 (Ala. 1992).
[50] *Smyth*, 914 F. Supp. 97 (E.D. Pa. 1996), 101.
[51] K.J. Conlon, "Privacy in the Workplace" (1996) 72 Chi-Kent L.Rev. 285, at 290.

Of course, this is not a new problem. In 1975, Thomson wrote: imagine, a man has a pornographic picture, kept inside a wall-safe and we use our X-ray specs to see it.[52] Her ultimate point is not important for our purposes,[53] but it is understandable that Fried, in 1978, should dismiss her example as "wildly far-fetched".[54] In 2014, though, this event happened: Apple's "cloud" service (the locked wall-safe) was hacked and the private, nude self-portraits of various celebrities became publicly available (the X-ray specs). The phenomenon of hacking is but one source of modern intrusion. It can also be achieved through "trolling" (in which cyber-bullies pursue their victims across social media platforms to belittle, harass, vilify and torment),[55] camera-equipped drones flying over private land and, through advertisers, the Government and employers monitoring "cookies" (data evidencing which websites a user has visited). These modern intrusions not only challenge our understanding of "seclusion" but also significantly blur the boundaries between informational privacy and intrusion into seclusion. As Solove notes, "intrusion need not involve spatial incursions: spam, junk mail … and telemarketing are disruptive in a similar way because they sap people's time and attention and interrupt their activities".[56] Here we see the neat distinction between informational and physical privacy collapse. Moreover, according to Edward Snowden, this sort of privacy invasion is happening on an industrial scale: GCHQ routinely captures information indiscriminately transmitted through transatlantic fibre-optic cables.[57] Consequently, although much of it may be anodyne it captures the sense of both intrusion and informational privacy. The wrong is done by *accessing* e-mails.

The law's capacity to capture this wrongdoing is jeopardised by limiting actionable intrusion through the blunt instrument of property rights. Such treatment is both limited and limiting for its failure to recognise that the essence of privacy invasion is objectification and its impact. By objectification, I mean to treat a person as something less than human, something less than autonomous – an object to be used by the tortfeasor – and to act in circumstances where those actions are unwanted (i.e. where the intruder knows or ought to have known that the actions were against the person's wishes). The orthodox view of intrusion – and Moreham gravitates towards this herself – is to treat it as tantamount to unauthorised surveillance (that is unauthorised by the object of surveillance and/or the state). Clearly, surveillance is an important part of intrusion, but it is not the totality. The term

[52] Thomson, "The Right to Privacy", p. 298.
[53] She argued that the "wrong" would be a violation of property rights (the right to control one's property); that privacy invasion is subsidiary.
[54] C. Fried, "Privacy: Economy and Ethics – a Comment on Posner" (1978) 12 Ga.L.Rev. 423, at 424.
[55] See e.g. A. Gaus, "Trolling Attacks and the Need for New Approaches to Privacy Torts" (2012) 47 U.S. F.L.Rev. 353.
[56] Solove, *Understanding Privacy*, p. 163.
[57] See G. Greenwald, *No Place to Hide* (Harmondsworth 2015).

surveillance presupposes a sort of detached, non-confrontational intrusion, in which the victim may not discover until much later the fact of intrusion. But, of course, it must also include confrontational intrusion, as when the suspicious husband bursts into the hotel room thinking he will discover infidelity or into the obstetrician-gynaecologist consultation and demands to know the identity of the unborn child's father. It may be more psychological in nature, as when the journalist pesters the widow in mourning or the employer harangues the grieving employee. Or, the intrusion might be internet-based, as when the Brexiteer employer insists the interviewee will not be offered a job unless her social media activity proves she has never disseminated anti-Brexit material.

This wider sense of "seclusion" has gone unrecognised, though. As Richards and Solove have lamented, development of the torts "ossified" after Prosser's death in 1972; consequently: "the privacy torts struggle to remain vital and relevant to the privacy problems of the Information Age".[58] Or, as Kalven Jr. put it: "the deadening common sense of the Prosser approach cuts the tort loose from the philosophic moorings Warren and Brandeis gave it from, that is, the excitement of association with the grand norm of privacy".[59] Specifically, in its fixation with form over substance, the US jurisprudence does not consistently (and only rarely) embody the insight that privacy invasion can also relate to a psychological and/or technological state. If it did, it would realise that privacy actions should be determined by the impact of privacy invasion upon the victim not by the concessions to collective living that the victim is expected to make.

III. Unification

Although commentators generally agree that informational and physical privacy protect the same values (autonomy and human dignity),[60] no one has argued that they are conceptually inseparable. The closest the commentary has come was when Edward Bloustein[61] claimed Prosser was mistaken when he said they had "almost nothing in common".[62] He argued that intrusion and informational privacy claims belonged to "the same framework of theory".[63] But all that Bloustein proved was a commonality of goals. Since Bloustein, the commentary has moved only marginally to say, as Solove

[58] Richards and Solove, "Prosser's Privacy Law", p. 1890.
[59] Kalven Jr., "Privacy in Tort Law", p. 333.
[60] See e.g. Bloustein, "Privacy as an Aspect of Human Dignity"; Fried, "Privacy"; Parker, "A Definition of Privacy"; W.A. Parent, "Privacy, Morality, and the Law" (1983) 12 Philosophy & Public Affairs 269; and, more recently, L.J. Strahilevitz, "Reunifying Privacy Law" (2010) 98 C.L.R. 2007; P.M. Schwartz and K.-N. Peifer, "Prosser's Privacy and the German Right of Personality" (2010) 98 C.L.R. 1925.
[61] Bloustein, "Privacy as an Aspect of Human Dignity".
[62] Prosser, "Privacy", p. 389.
[63] Bloustein, "Privacy as an Aspect of Human Dignity", p. 982.

does, that since privacy is a pluralistic concept, informational privacy and intrusion bear familial resemblances.[64] This section adopts a position that goes far beyond the existing literature. It argues that physical and informational privacy are always present in unwarranted privacy-invasion claims, all that changes is the degree to which one is involved. In this way, privacy invasion is an elastic concept: sometimes the physical dimension is greater and sometimes the informational.

According to the orthodox view, in physical privacy claims informational privacy is not at stake. So, for example, Post argues that although both types preserve "rules of civility", intrusion "mark[s] the boundaries that distinguish respect from intimacy",[65] whilst informational privacy "regulates forms of communication rather than behavior".[66] Similarly, Gavison argues that privacy has three dimensions: secrecy, anonymity and solitude.[67] In this way intrusion is separate to informational privacy because "[t]he essence of the complaint is not that more information about us has been acquired, nor that more attention has been drawn to us, but that our spatial aloneness has been diminished".[68] The extreme version of this is Thomson's view that the reason these privacy torts are unrelated is because they are manifestations of other rights: "The question arises … whether or not there are *any* rights in the right to privacy cluster which aren't also in some other rights cluster. I suspect that there aren't any, and that the right to privacy is everywhere overlapped by other rights."[69]

Moreham develops this theme. She argues that in the paradigm case of intrusion into seclusion – say, the landlord who watches his tenants shower through a concealed camera – the tortfeasor gains no real information in a meaningful sense about the claimant and neither is it the gathering of "information" that the claimant complains about.[70] Moreham, then, agrees with Gavison, that although some information has been acquired, the essence of the complaint has nothing much to do with informational privacy. But, although she sees the residual informational privacy claim, arguably, her conclusions lead her down the wrong path: she takes this as proof that physical privacy is something different to informational privacy. Re-examining the concealed shower camera example, we see that informational privacy is at stake in the literal sense that the recorded images are information and in the broader sense that the observer acquires

[64] E.g. Solove, *Understanding Privacy*, p. 162.
[65] Post, "The Social Foundations of Privacy", p. 974.
[66] Ibid., at p. 979.
[67] E.g. Gavison, "Privacy and the Limits of the Law", pp. 429–40. See also E. Van Den Haag, "On Privacy" in J.R. Pennock and J.W. Chapman (eds.), *NOMOS XIII: Privacy* (New York 1971), 149, 151: that privacy, as a moral claim, is about unauthorised watching, publications and invasion of the senses.
[68] Ibid., at p. 433.
[69] Thomson, "The Right to Privacy", p. 310.
[70] Moreham, "Beyond Information", pp. 354–55.

sensory data about the individual which extends to at least her physical dimensions and her behaviours, but may also include her quirks, her preferences, her goals and her longings. Although it is the act of intrusion that might spur her to action, the attack on her informational privacy looms large in the background. Indeed, it is this additional information that distinguishes this sort of intrusion claim from something more innocuous, such as the security camera installed in the common parts of the block of flats. Not only are the images less intrusive, they are less revealing of private information.

When we analyse the MOPI case law we see other instances of this duality. For example, if we consider *Campbell* itself, the complaint related to both physical and informational privacy: the surreptitious use of photography capturing Naomi Campbell with her fellow members of Narcotics Anonymous as they exited onto a public street allowed the public to identify where these meetings were taking place and so jeopardised her recovery.[71] In *Green Corns Ltd. v Claverley Group Ltd.*, a newspaper campaign against the installation, in the local area, of care homes for troubled teens, in which addresses were published, gave rise to violent demonstrations.[72] Although ostensibly concerning informational privacy, the injunction prohibiting further publication of addresses sought to prevent more violations of physical privacy. We see the presence of intrusion-based claims in other claims concerning the publication of diary entries[73]; the dissemination of a sex tape[74]; the image of an infant being pushed in its pushchair on a busy high street[75]; naked images of a person engaged in a sex act[76]; the threat to inform a man's adult offspring of his lovechild with his mistress[77]; divulgence of a junior rugby star's playing ban for using prohibited substances[78]; the revelation of a person's infidelity with a random passenger on an airplane whilst his partner slept[79]; the sale by an internet provider of embarrassing "cookie" data to internet advertisers[80]; the harassment of minors by a photographer[81]; mobile phone hacking[82]; publication of the claimant's name in a court report of a paedophilia case[83]; the threatened newspaper report of a police investigation into the claimant.[84] All these cases involved different forms of intrusive disclosure, conducted by different sorts of

[71] *Campbell* [2004] UKHL 22, at [5], [144]–[147].
[72] *Green Corns Ltd. v Claverley Group Ltd.* [2011] EWHC 3269.
[73] *H.R.H. Prince of Wales v Associated Newspapers Ltd.* [2006] EWCA Civ 1776.
[74] *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB).
[75] *Murray v Express Newspapers plc.* [2009] Ch. 481.
[76] *Contostavlos v Mendahun* [2012] EWHC 850.
[77] *SKA v CRH* [2012] EWHC 766.
[78] *Spelman v Express Newspapers* [2012] EWHC 355.
[79] *Hannon v News Group Newspapers Ltd.* [2014] EWHC 1580.
[80] *Vidal-Hall v Google Inc.* [2014] EWHC 13.
[81] *Weller v Associated Newspapers Ltd.* [2015] EWCA Civ 1176.
[82] *Gulati v MGN Ltd.* [2015] EWCA Civ 1291, [45].
[83] *Khuja v Times Newspapers Ltd.* [2017] UKSC 49.
[84] *ERY v Associated Newspapers Ltd.* [2016] EWHC 2760.

defendants, from newspapers to courts to citizen photographers to blackmailers, as well as different sorts of private information. In each, physical privacy arises, either in the means used by the defendant to obtain the information or in what the information reveals.

These claims are further united by the impact they have upon the individual. As Gross puts it: "unwilling loss of privacy always results in the victims being shamed, not because of what others learn, but because they and not he may then determine who shall know it and what use shall be made of it."[85] It is more accurate to say, not only shame, but self-conscious emotions are roused (that is, shame, embarrassment, guilt and/or injury to pride) since privacy invasion is usually geared towards social harmony (and sometimes homogeneity). Privacy invasion causes the victim to feel exposed and vulnerable through the unwanted scrutiny that it generates. It may trigger conditions like anxiety and/or depression, as well as a sense of powerlessness. This can be seen in a case like *Mosley v News Group Newspapers Ltd.* where *The News of the World* published stills in its newspapers from a video (available online) of the claimant engaged in an orgy, on the thin pretence it was "Nazi-themed".[86] The award of damages reflected the fact that the claimant's life had been "ruined"[87] by the distress caused by this privacy invasion. Likewise, the threat to inform an adulterer's children that he had fathered a lovechild may be said to invoke guilt, as well as shame and embarrassment. Similarly, disclosure that a person is the subject of a police investigation may also injure pride.

In this way, unwarranted privacy invasion undermines the discovery of, experiments with and demonstrations of personality. As Westin observes, "there is a close connection between the availability of privacy from hostile surveillance and the achievement of creativity, mental health, and ethical self-development".[88] Surveillance, in this sense, includes both informational privacy and freedom from intrusion. Or, as Bloustein says, "this measure of personal isolation and personal control . . . is of the very essence of personal freedom and dignity".[89] This includes the capacity to make mistakes; to formulate traits, values and attitudes; to test ideas, amplify them or discard them; to exhibit one's personality to friends, in the knowledge that these exhibitions are not (necessarily) for public consumption. It is a right of self-direction: to develop one's cognitive and physical powers; to form friendships; to associate; to feel; to choose; to be. Similarly, as a precursor to freedom of speech, privacy provides the intellectual space to identify, rehearse and develop ideas and allows for the expression of emotions or

[85] H. Gross, "Privacy and Autonomy" in Pennock and Chapman, *NOMOS XIII: Privacy*, p. 177.
[86] *Mosley* [2008] EWHC 1777 (QB).
[87] Ibid., at para. [236].
[88] Westin, *Privacy and Freedom*, p. 412.
[89] Bloustein, "Privacy as an Aspect of Human Dignity", p. 973.

actions rather than words. Most crucially, no one should have their personality scrutinised microscopically without good reason.

The ends that privacy law serve, then, are the liberal goals of equality and freedom from paternalistic intervention.[90] Of course, they are not unique in doing so, since so do laws relating to freedom from discrimination, freedom of speech and other political rights. As Gross says, "while an offense to privacy is an offense to autonomy, not every curtailment of autonomy is a compromise of privacy".[91] But, their uniqueness is in how they interrelate in the service of these ends. For example, consider Mill's defence, in *Principles of Political Economy*, of tolerance: individuals must have the opportunity to develop their "active energies" of "labour, contrivance, judgment, self-control": "to be prevented from doing what one is inclined to, or from acting according to one's own judgment of what is desirable, is not only always irksome, but always tends … to starve the development of some portion of the bodily or mental faculties."[92] Privacy, then, is the foundational component to developing personality, for it is only through privacy that all the mental faculties can develop. Privacy, in this sense, does not mean solitude; it means freedom from the pressures of society to conform; to have, as Ten puts it, the opportunity to criticise "the existing desires of men".[93]

In this way, privacy serves liberalism in two vital ways: first, that there must be physical and psychological space in which to encounter, devise, experience, foment, test, rebuke, express, understand, interrogate, disown, rehabilitate, challenge, decry, reject, praise, pontificate, revile new and different ways of life, away from public gaze; second, that the search for the good life must entail moments of rationality and irrationality, reason and unreason, logic and illogic. Importantly, the former is different to freedom of expression: this is a pre-expression state of being, before the individual is ready to share, argue and fight for a position. The latter, meanwhile, recognises that autonomy is not a synonym for rationality; that searching for the good life may be idiosyncratic, foolhardy, emotional, etc.[94] In other words, the liberty principle does not allow for interference with actions simply because society at large dislikes the conduct or thinks it irrational or pointless.[95] This last point deserves emphasis: informational privacy and freedom from intrusion provide a secure environment to learn from our mistakes.

[90] J.S. Mill, "On Liberty" in J.M. Robson (ed.), *Collected Works of John Stuart Mill*, vol. XVIII (Toronto 1977), 226.
[91] Gross, "Privacy and Autonomy", p. 181.
[92] J.S. Mill, "Principles of Political Economy, Book V" in J.M. Robson (ed.), *Collected Works of John Stuart Mill*, vol. III (Toronto 1965), 938, 944.
[93] C.L. Ten, *Mill On Liberty* (Oxford 1980), 72.
[94] See J. Gray, *Mill On Liberty: A Defence*, 2nd ed. (London 1996), 81–84.
[95] R. Young, "John Stuart Mill, Ronald Dworkin, and Paternalism" in C.L. Ten (ed.), *Mill's On Liberty: A Critical Guide* (Cambridge 2008), 211–12.

Thus, informational and physical privacy are inseparable in the way they enable this form of autonomy to emerge. In the privacy literature, commentators describe this, in different ways, as an aspect of control. For example, Gross emphasises "the deep motive… to influence the reactions of others".[96] Van Den Haag expresses it as the capacity "to withhold the contribution of my private realm to the contents of someone else's mind".[97] And, as he also puts it, privacy invasion "may also lead to interpretation of my public acts which may restrict my freedom or force me to respond".[98] Similarly, Fried argues that this control provides "a secure sense of self, a sense that morally at least one is one's own man, and not the property of others, or even of the community as a whole".[99] As Bloustein says, "he who may intrude upon another at will is the master of the other and, in fact, intrusion is the primary weapon of the tyrant".[100] Thus, it is the individual who determines, ultimately, what is known and knowable about their personality and physical appearance, especially as it relates to elements that are hidden from general view.[101] Autonomy is threatened, as both Ten and Gray note, not only by overt threats of imprison or punishment but also by covert methods of ostracisation, enmity and vilification: "autonomy is abridged … more fundamentally, when the pressure of public opinion is such that certain options are not even viable forms of life"[102]:

> In a closed society, where the sources of information are very limited, and only prevailing views are easily accessible, men tend to come under the unquestioning sway of these views. They do not hold views different from the prevailing ones or seek to conduct themselves differently from customary practices. There is, therefore, no need for them to be restrained by threats of punishment and by prison bars.[103]

Self-direction is imperilled, therefore, not only by overt acts of retribution for non-conformity, but also by the monitoring of individuality. Keeping records of what individuals do, who they speak to, how they interact, how they spend their leisure, etc, may be as significant a threat to self-direction as incarceration. It chills individuality by making non-conformity noteworthy and, therefore, suspicious. Mill's conception of liberty, therefore, is not only about autonomy; it is about the culture of autonomy: it is about the creation of a society that values autonomy, is populated by autonomous beings and cherishes autonomy instrumentally *and intrinsically*. "Genius can only breathe freely in an *atmosphere* of freedom."[104]

[96] Gross, "Privacy and Autonomy", p. 173.
[97] Van Den Haag, "On Privacy", p. 151.
[98] Ibid, at p. 152.
[99] Fried, "Privacy: Economy and Ethics", p. 427.
[100] Bloustein, "Privacy as an Aspect of Human Dignity", p. 974.
[101] See e.g. Parker, "A Definition of Privacy", p. 280.
[102] Gray, *Mill On Liberty*, p. 77.
[103] Ten, *Mill On Liberty*, p. 72.
[104] Mill, "On Liberty", p. 267, emphasis in original.

Consequently, the liberty principle is not about the homogenous whole tolerating individual eccentricity; it is about the benefits of a system in which autonomy is king: "only the cultivation of individuality … produces, or can produce, well-developed human beings."[105]

It is this interconnected sense of protection for both informational and physical privacy as two sides of the same coin that explains, for example, Thomas Cooley's remark:

> It is better often times that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunk broken open, his private books, papers, and letters exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons.[106]

It is also apparent in Kant's view that the vitality, equality and humanity of an individual is undermined when they become means to an end. Consequently, unwarranted privacy-invasions are "demeaning of individuality"[107]; they jeopardise the formation and continuation of personal relationships; they injure the individual's sense of self "that one is one's own man and not the property of others, or even of the community as a whole".[108]

In making this claim, it can be freely admitted that other forms of action also secure physical privacy and serve the autonomy value. The Protection from Harassment Act 1997, the "revenge porn" laws, the protection from the intentional infliction of emotional distress under *Wilkinson v Downton*,[109] and the rule in *Entick v Carrington*[110] are all important examples. But nothing turns on this admission, for the article is not saying that the law offers no protection against intrusion. Instead, it is arguing that since informational and physical privacy are inseparable at the conceptual level, then the law can replicate this quality at a practical level. Indeed, in the section, it will be argued that the green shoots of this development are apparent in the common law's present thinking about MOPI.

IV. Realisation

A. The Interlacing of Intrusion and Informational Privacy Claims

The previous two sections have sought to persuade the reader that the reasons for treating intrusion into seclusion as something separate and distinctive from MOPI are illusory: specifically, that the distinction is arbitrary; that it excludes important sorts of intrusion that ought to be protected;

[105] Ibid.
[106] T.M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union* (1863), discussed in Solove, *Understanding Privacy*, p. 162.
[107] Bloustein, "Privacy as an Aspect of Human Dignity", p. 974.
[108] Fried, "Privacy: Economy and Ethics", p. 427.
[109] *Wilkinson v Downton* [1897] 2 Q.B. 57.
[110] *Entick v Carrington* (1765) 95 E.R. 807.

and that intrusion from seclusion belongs to a larger notion of unwarranted privacy invasion which includes informational privacy. This final section aims to show how this larger notion of privacy wrong is apparent in the common law treatment of MOPI claims. That is, that the mature MOPI jurisprudence has outgrown its limited and limiting label and, instead, reflects this larger notion of privacy identified in the earlier sections. Ultimately, this section aims to show that the law requires no new cause of action to realise greater protection of intrusion.

In *Campbell v MGN Ltd.*, it was Lord Nicholls who gave MOPI its name, in a passage in which he describes how the action had "shaken off" the shackles imposed by its predecessor "breach of confidence" and so "changed its nature" by dispensing with the requirement of a "pre-existing relationship" on matters concerning "confidential information".[111] But, Lord Nicholls description is misleading to the extent it suggests MOPI replaces breach of confidence, as if that action no longer exists. Clearly, that is not true. The *Campbell* action is not limited by the qualities of breach of confidence; it is *sui generis*. Thus, not only is MOPI not limited to "confidential information", nor constrained by the necessity of "pre-existing relationships", it is also not an equitable action (as breach of confidence is) but a tort.[112] Given its radical departure from other aspects of the breach of confidence claim it is but a short step for it to dispense with the final limiting factor of being only information-based. Put differently, why, when it has been able to assume its own identity in these other ways, could it not do so in respect of this quality? To argue that it could not because breach of confidence concerns only informational claims is to ignore all the other profound differences between breach of confidence and MOPI.

Moreover, when we examine the mature MOPI jurisprudence, we see the increasing role that intrusion plays in the determination of claims. Thus, for example, we see, in the Supreme Court decision in *PJS*,[113] the court quote with approval Mr. Justice Eady's observation that "the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion".[114] This dimension has become increasingly important and has forced itself to the forefront of judicial thinking. In several cases, the wrong at stake in the action is the intrusive way that the information was obtained, rather than the qualities of the information itself or the intrusive effect that dissemination of the information would have upon the claimant and their family life.[115] The two exemplars

[111] *Campbell* [2004] UKHL 22, at [14].
[112] *Vidal-Hall* [2015] EWCA Civ 311.
[113] *PJS* [2016] UKSC 26.
[114] Ibid., at para. [29], per Eady J. in *CTB v News Group Newspapers Ltd.* [2011] EWHC 1326, at [23].
[115] See e.g. *Re JR38's Judicial Review* [2015] UKSC 42; *Weller* [2015] EWCA Civ 1176; *Axon v Ministry of Defence* [2016] EWHC 787; *DMK v News Group Newspapers Ltd.* [2016] 1646 EWHC; *ERY* [2016] EWHC 2760; *Jackson v BBC* [2017] NIQB 51.

of this are *PJS* itself and *Richard v BBC*.[116] *PJS* concerned a kiss-and-tell story. Despite the claimants obtaining an interim injunction to restrain publication (on the grounds the story disclosed no public interest sufficient to outweigh the privacy claim), the story was published, several months later, in the US, Canada and Scotland. The court heard evidence that the names of those involved were readily discoverable through rudimentary internet searches. The defendant argued that since the identity of the parties was now either known or knowable by the public, there was nothing left for the injunction to protect. The Supreme Court disagreed. Even if the information were widely known, the injunction prevented a "media storm" descending upon the claimants and their young family.[117] The injunction, therefore, was not about informational privacy but the consequences of disclosure, which would visit upon the family intense scrutiny through unwanted media attention (that is, both press and broadcast journalism).[118] To say that this protected informational privacy, though, misses the point – for it is not a concern about the qualities in the information revealed (that PJS had had an extra-marital liaison) but having to face questions and endure speculation about that information. In this sense, the disclosure of information is but a precursor to the real problem of intrusion into seclusion.

Richard v BBC further illustrates the point. Here, the claimant, Sir Cliff Richard, objected to extended broadcast coverage of a police raid of his home. The footage showed his belongings being confiscated, police officers entering and leaving his residence, amid speculation that he had committed non-recent sexual abuse. In finding for the claimant, the court criticised the "breathless sensationalism" of the coverage that "made for more entertaining and attention-grabbing journalism".[119] There were two aspects to the privacy claim: the fact of being investigated by the police and the "magnification" which the intrusive coverage provided. This led to three sorts of intrusion occurring (beyond the damage to reputation that the information caused): the intrusive coverage of his home, including its interior (albeit the High Court was fairly dismissive of this),[120] the "unwelcome public attention" that it generated, which included abusive "trolling",[121] and having to respond to "persistent media speculation".[122] Thus, the substantial award in damages reflected not only the invasion of privacy arising from the information itself (ie, that he was the subject of a police investigation) but the highly intrusive manner of obtaining that

[116] *Richard v BBC* [2018] EWHC 1837.
[117] *PJS* [2016] UKSC 26, at [35], [45], [64].
[118] Ibid., at paras. [44], [65], [68], [74].
[119] *Richard* [2018] EWHC 1837, at [300].
[120] Ibid., at para. [265].
[121] Ibid., at para. [329].
[122] Ibid., at paras. [371], [375].

information (through constant television coverage) and the intrusive consequences of that reporting (the unwanted public and media attention).

In this way, cases like *PJS* and *Richard* demonstrate the fluidity and dynamism of MOPI. Judicial reasoning in these cases does not rigidly reject or else separate intrusion claims from informational privacy claims. Even in *Campbell* the House of Lords recognised Campbell's concern that although the "article did not name the venue of the meeting, but anyone who knew the district well would be able to identify the place shown in the photograph"[123] and this, they concluded, would impact severely on her ability to continue her treatment.[124] This demonstrates the blended nature that the privacy claim may (and does) take. Thus, the case law contains instances of disclosures of information leading to intrusion (e.g. *PJS*); intrusive means of acquiring information (e.g. *Campbell* and *Murray*); and intrusion leading to misuse of private information (e.g. *Richard*). The mature jurisprudence, therefore, represents a distinct interlacing of intrusion and informational privacy into a global unwarranted privacy-invasion claim.[125]

B. The Suitability of the MOPI Framework

It is unsurprising that MOPI has developed, piecemeal, in this expansive way, given the flexibility of its framework. To succeed, the claimant must demonstrate that what is at stake generates a reasonable expectation of privacy (the threshold test) and that the interest in protecting privacy is not outweighed by the interest in interfering with it (the balancing test). Whilst the threshold test is ostensibly confined to information, the analytical toolkit used to determine the test is much greater and more encompassing than information alone. The Court of Appeal, in *Murray*,[126] articulated the test in these terms: the judge must take "account of all the circumstances of the case", including the claimant's "attributes", "the nature [including location] of the activity" involved, as well as "*the nature and purpose of the intrusion*" (emphasis added), the "absence of consent" and "the effect on the claimant". In *Jackson v BBC*, the Northern Ireland High Court construed the test in such a way as to find the claimants had a reasonable expectation of privacy in continuing media reports about a police investigation against them for alleged sexual offences because of the intrusive nature of those reports.[127]

For the judge, the term intrusion should assume its common sense, practical and sympathetic usage. For example, it applies, clearly, to

[123] *PJS* [2016] UKSC 26, at [5].
[124] Ibid., at paras. [144]–[147].
[125] In *Richard* [2018] EWHC 1837, the court uses the term "privacy invasion" or "invasion" 16 times: at [264], [285], [287], [301], [316], [317], [318], [320], [345], [350a], [350d], [350e], [363], [365], [369], [417].
[126] *Murray* [2009] Ch. 481, at [36].
[127] *Jackson* [2017] NIQB 51, at [67].

unauthorised acquisition or disposal of naked images of a person[128]; it could apply to cyberstalking, online bullying and online harassment (which fits within what the court has called elsewhere "gratuitous personal attacks")[129]; and it could extend to wider dissemination of embarrassing images of the claimant (where harm is caused, not just offence).[130] By insisting on the subjective and objective, the term would also apply to, for example, the facts of *Peck v UK*.[131] There, the applicant had been recorded, by CCTV, wandering down an empty high street, late at night, brandishing a knife. He was severely clinically depressed, having earlier attempted suicide (which was not recorded). The CCTV operator notified the police, who gave the applicant assistance and removed him from the scene. He posed no danger to the public and was not arrested. The CCTV images, though, were obtained by a newspaper, a local TV station and, eventually, the BBC, all of which published the images to an ever-greater audience, with varying degrees of success in disguising the applicant's identity. The European Court of Human Rights ("ECtHR") agreed that the applicant's Article 8 rights had been seriously interfered with. It was not the photography itself which generated the complaint but that "the disclosure of that record of his movements to the public in a manner … he could never have foreseen which gave rise to such an interference".[132] Formalistic diagnosis of the event, though, is ill-equipped to realise this end: the fact of being in a public place, observable to others and engaging in no behaviour that was particularly private of itself, all point away from this being actionable. But, the claimant's diminished emotional state combined with the actualities of his publicness (it was late; there was no one around; he could not have foreseen the moment would be broadcast later to a national audience) all speak to an intuitive sense of unwarranted intrusion.

This more probing analysis is apparent in other intrusion cases. For example, in *Green Corns Ltd. v Claverley Group Ltd.*,[133] mentioned above (newspaper coverage about care homes for troubled children). The logic of *Remsburg v Docusearch Inc.*[134] (that work addresses are "readily observable" and so not a matter of actionable privacy) suggests intrusion is not at stake. But the context demonstrates otherwise. The defendant newspaper's hostile campaign against the care homes generated angry scenes outside the care homes, in which inhabitants and staff feared for their safety. The court found no difficulty in awarding an injunction to prevent further

[128] E.g. *AMP v Persons Unknown* [2011] EWHC 3454.
[129] E.g. *R. v Debnath* [2005] EWCA Crim 3472, at [17].
[130] E.g. *RocknRoll v News Group Newspapers Ltd.* [2013] EWHC 24.
[131] *Peck v UK* [2003] EMLR 15.
[132] Ibid., at para. [60].
[133] *Green Corns Ltd.* [2011] EWHC 3269.
[134] *Remsburg*, 816 A. 2d 1001 (N.H., 2003).

publication given the seriousness of the intrusion that had arisen. Likewise, in *Othman v English Defence League*,[135] the court prohibited further dissemination of the claimants' home address and of images of the claimant children, because the court recognised the claimants' fear that they would suffer reprisals for being the wife and children of Abu Qatada. In this way, we see that the common law is equipped to protection intrusion into seclusion where the facts demand it, namely when the harm principle is sufficiently engaged.

This general outline of the reasons for protecting unwarranted privacy invasion provides an important means of determining the zone of protection afforded by the tort. The interference with autonomy and dignity in privacy-invasion cases may resemble a sort of objectification: that is, rendering the tort-victim something less than fully human; an object to be used by the tortfeasor for their ends. The notion of intrusion serves an important function in delimiting the scope of privacy-invasion claims in intrusion-dominated claims, but it cannot do all the heavy lifting. For example, we might use the concept of objectification to say that the wife in *Miller* ought to have succeeded where the daughter did not because the camera crew had treated her as less than human by filming the unsuccessful resuscitation without acknowledging her existence or asking her permission. It did not mistreat the daughter, though, because she was not there. Whilst this provides some distinction, it still clings to the contours of the spatial-only construct: the daughter's absence – her lack of physical presence – is determinative. For it could be argued that the broadcast was as insensitive to her feelings as much as her mother's. To broadcast distressing scenes without regard to their predictable effect upon immediate family is to treat them as something less than human. Yet, why only immediate family? What about Mr. Miller's parents, or siblings, or extended family, or close friends, neighbours, colleagues, acquaintances, etc? If their feelings are equivalent to Mrs. Miller's and ought to have been considered prior to broadcast, does that make this notion of actionable intrusion too unwieldy? And, on that point, is objectification itself too amorphous to be useful? What about leering looks? Or contemptuous behaviour? Or superciliousness? Or snobbishness?

To be actionable, then, privacy invasion must not only relate to the values of privacy, but also be sufficiently serious to warrant legal intervention. Consequently, we must triangulate – through value analysis, fact-sensitivity and a scale of harm – to distinguish actionable from non-actionable privacy invasion. In other words, actionable privacy invasion must be a compound term, which involves not only determining that the facts demonstrate that something has occurred which counts as privacy

[135] *Othman v English Defence League* [2013] EWHC 1421.

invasion but that the thing was sufficiently serious to be actionable. We see this combination – of requisite action and significance – in other contexts, such as defamation. Even before section 1, Defamation Act 2013 confirmed it to be so, the common law had concluded that the definition of actionable defamation was a combination of both degree and effect: the impact of the statement on the claimant's reputation must be sufficiently serious to count.[136]

These factors (value, facts, harm) already exist in the MOPI legal framework. So, for example, Eady J. was clearly not persuaded that there was any real harm caused to Sir Elton John by photographs of him for a story about his receding hairline,[137] albeit the judge recognised those images were "likely to cause offence and embarrassment to Sir Elton".[138] That said, the fact of obvious harm is not always sufficient to establish the cause of action. In *Author of a Blog v Times Newspapers Ltd.*, Eady J. again found there was insufficient merit to warrant a claim against publication of an anonymous blogger's real identity. To his mind, names are not of "a strictly personal nature"[139] and, anyway, "blogging is essentially a public rather than a private activity".[140] This was so despite the claimant being a serving police officer, who had written frankly about the force and so feared dismissal and reduced prospects of future employment.[141] Similarly, in *Axon v Ministry of Defence*[142] publication detailing the specifics of a Royal Navy commander's dismissal for bullying did not pass the threshold test despite the claimant's fear that public knowledge jeopardised his prospects of rehabilitation.[143]

Moreover, it is apparent that the courts will not assume that the threshold is passed even where the facts demonstrate obvious privacy invasion. The most egregious example is *YXB v TNO*,[144] which concerned a "kiss-and-tell" story of entirely trivial interest. Despite that, the High Court dismissed the injunctive relief claim because, amongst other things, the claimant had not evidenced the impact that disclosure would have on his family life. This was unacceptable, the court said, because "the court can hardly be expected to attach great weight to the privacy rights asserted on the claimant's behalf if he fails, without justification, to give any evidence himself".[145] This was so, it seems, despite the court revealing, in

[136] *Thornton v Telegraph Media Group Ltd.* [2010] EWHC 1414, at [90].
[137] These facts do not appear in the case report, but are noted in A. McLean and C. Mackey, "Is There a Law of Privacy in the UK? A Consideration of Recent Legal Developments" (2007) 29 E.I.P.R. 389, at 390–91.
[138] *Pinkerton*, 132 S.E.2d at 120 (1963), at [20].
[139] *Author of a Blog v Times Newspapers Ltd.* [2009] EWHC 1358 (QB), at [9]–[10].
[140] Ibid., at para. [11].
[141] Ibid., at para. [27].
[142] *Axon* [2016] EWHC 787 (QB).
[143] Ibid., at para. [57].
[144] *YXB v TNO* [2015] EWHC 826.
[145] Ibid., at para. [61 iii) c)].

the first paragraph of the judgment, that the defendant had "performed oral sex on the claimant. . ."; that the claimant had sent the defendant various messages "about having sex together"; that the claimant "sent the defendant explicit images, including photographs of his erect penis, and video of himself masturbating". All of this, one would have thought, was inherently deserving of prima facie legal protection. Not so, said the court.

The balancing test provides another important means of ensuring legal certainty since it allows competing public interest claims to control the reach of intrusion-dominated claims. This can be seen from the few proto-intrusion decisions in the MOPI jurisprudence. *Leeds City Council v Channel 4 Television Corporation*[146] concerned surreptitious filming, evidencing poor discipline in several failing schools. Dismissing the claim for injunctive relief, the court concluded that the public interest in knowing of these conditions was stronger than the corresponding privacy interest, especially since the film also evidenced a conspiracy, of sorts, to deceive OFSTED into believing the school was performing better than it was. Similarly, in *BKM Ltd. v BBC*,[147] the court held that the public interest in knowing about failing care homes outweighed any invasion of privacy caused by surreptitious filming in the home. In both cases, the proportionality principle was applied. The fact that faces were pixellated (to prevent identification being readily discoverable) ensured that any interference with privacy was minimised. This can also be seen in the more recent case of *Ali v Channel 5*,[148] in which the defendant broadcaster was found liable having broadcast the claimants' and their children's emotional reaction to eviction from their home without prior notice. Although the court accepted that the fact of eviction could be broadcast, as matter of public record, the graphic depiction of their reaction could not. To do so was not proportionate to that legitimate interest.

In this way, the court's concern in *Wainwright v Home Office*[149] that the (then recent) introduction of the Human Rights Act 1998 did not create a "high-level" privacy tort,[150] such as some "general" right to privacy, does not prevent recognition of an intrusion-dominated claims under MOPI. This concern is narrower than it may appear; it is no more than this: the court recognised that it could not take an enigmatic concept like privacy (or freedom of speech) and treat it as a legal principle. There was insufficient detail in such a bald proposition (to say the law should protect "privacy") "to enable one to deduce specific rules to be applied in concrete cases. That is not the way the common law works".[151] But it was

[146] *Leeds City Council v Channel 4 Television Corporation* [2005] EWHC 3522.
[147] *BKM Ltd. v BBC* [2009] EWHC 3151.
[148] *Ali v Channel 5* [2018] EWHC 298.
[149] *Wainwright v Home Office* [2003] UKHL 53.
[150] Ibid., at para. [30].
[151] Ibid., at para. [31].

accepted that there is nothing to stop the law developing existing actions to bridge gaps in the common law.[152] *Wainwright*, itself, was about a prison strip-search which the claimant visitors, mother and son, objected to. Aside from the son experiencing intimate touching (which, it had been conceded, amounted to a battery), there was nothing in the manner of the search that would justify compensating the claimants. Since, in the court's view, the only wrong committed by the prison had been some "sloppiness" in adherence to its own rules (battery aside), the claimants' complaint spoke only to the offence principle, not the harm principle; they had been appalled rather than abused. Moreover, since it was accepted that the search served an important function, in ensuring contraband (especially drugs) was not smuggled into prison, privacy was compromised proportionately to this legitimate aim. Consequently, even if MOPI had existed at that time, the decision would have been consistent with its principles; the claim would either have failed the threshold test or else (more likely) the balancing test, since the public interest in preserving prison security, through strip-searches, outweighed the public interest in prohibiting intrusion (providing the interference is proportionate to this legitimate aim).

This analysis, though, is only intended to show that their Lordships' prohibition on the creation of a general tort does not prevent recognition of the intrusion-dominated tort recommended in this article. In more prosaic terms, the inclusion of intrusion-dominated claims under the auspices of MOPI is not in contravention with the *Wainwright* injunction, if it is remembered that the range of privacy actions is much greater than misuse of private information and intrusion: not only does it extend to misappropriation of image rights and false light publicity, according to Prosser,[153] it also includes both prosecutions and legal actions generated through legislation, such as the Protection from Harassment Act 1997 and the General Data Protection Rights. In that sense, it cannot be said that the inclusion of intrusion would be some "'blockbuster' tort vaguely embracing such a potentially wide range of situations".[154] (But even if it did present such a stumbling block, some judicial re-evaluation is in order given the subsequent decision by the ECtHR that the UK had seriously breached the Wainwright's Article 8 rights through the strip-search).[155]

C. An Intrusion-dominated Claim

The logical conclusion of an unwarranted privacy-invasion tort is that it covers three sorts of claim: (1) an information-dominated claim, such as

[152] Ibid., at paras. [18], [34].
[153] Prosser, "Privacy".
[154] As Mummery L.J. put it in the Court of Appeal decision, *Wainwright v Home Office* [2001] EWCA Civ 2081, at [60].
[155] *Wainwright v UK* (2007) 44 EHRR 40.

where both the wrong and the adverse consequences stem wholly from the disclosure of information; (2) a mixed intrusion and information privacy claim; and (3) an intrusion-dominated claim. In this way, there is no need to recognise a new cause of action to protect intrusion claims, but, instead, to recognise the existence of this third sort of claim. It might be said that not enough has been said to define "intrusion" – and that this is necessary if the goal of realising of intrusion-dominated claims under MOPI is to be achieved. In a way, this omission is to be expected from a discussion of mid-level principles since the ambition of the article is to do no more than address the middle ground between the abstract term "privacy" and specific legal rules. This is bound to create a sense of imprecision. Yet, this criticism misses the point. In arguing against intrusion as an exclusively spatial construct, the article attacks rigidity. The current regime achieves certainty by sacrificing flexibility and, consequently, denying meritorious claims based on form. There is, then, great advantage to be gained by adopting a fluid notion of both the term "intrusion" and "seclusion" – not least to ensure that the law can keep pace with technological developments (a criticism made of Prosser's "ossified" tort). Although this may give the impression of intrusion as an intuitive term, this risk should not be overstated, for much certainty is achieved through the triangulation processed described above: of scrutinising the claim on the basis of value engagement, fact-sensitivity and harm.

In hindsight, *Fearn v Tate*[156] represented an excellent opportunity to test the prospect of an intrusion-dominated claim under MOPI – but, if it was ever considered, it was not taken and, instead, the claimants brought claims under section 6 of the Human Rights Act 1998 and in private nuisance. As noted above, the case concerned the creation of a viewing gallery at Tate Modern, which overlooked the claimants' residence. Despite finding that the curiosity of "a very significant number" of visitors had caused them to peer through the flat's predominantly glass exterior and interior, occasionally by means of binoculars; that the intrusion was of a "greater and . . . different order" from that caused by commercial properties overlooking domestic ones; and that the level of intrusion was "material",[157] Mann J. nevertheless concluded that the property owners were to blame for their exposure to intrusion[158] and, to avoid it, should live their lives in the (literal) shade: thus, he concluded, the owners could "lower their solar blinds . . . install privacy film . . . [or] net curtains".[159] His conclusions echo Latham C.J.'s thinking in 1937 in the Australian High Court case of *Victoria Park Racing v Taylor*: "any person is entitled to look over the plaintiff's fences

[156] *Fearn* [2019] EWHC 246.
[157] Ibid., at para. [88].
[158] Ibid., at para. [205].
[159] Ibid., at para. [214].

and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, [he] can erect a higher fence."[160]

In one respect, *Fearn v Tate* is the wrong fact-pattern by which to test the intrusion claim highlighted because, of course, it concerned a traditional and exclusively spatial sense of seclusion – that of the right to privacy in the home. Nevertheless, it represents a missed opportunity given the absence of a strong informational privacy dimension – and perhaps this explains why the claimants did not plead MOPI. Yet the claimants were clearly without an obvious cause of action, hence their (failed) claim that the Tate Modern was a public authority owing them duties under Article 8 and that the intrusion constituted private nuisance. An intrusion-dominated claim under MOPI would have been in keeping with these other experimental claims. It is also surprising that the court did not discuss intrusion as a possible claim when evaluating privacy law in other jurisdictions (given its symmetry with the orthodox view of intrusion into seclusion) – in a decision extending over 72 pages and 233 paragraphs the omission is striking. Whilst Mann J. concluded that the law of nuisance could be extended by virtue of Article 8 to better protect the privacy rights of home-owners,[161] he dismissed the claim: the claimants had unrealistic privacy expectations (home-owners in "an inner city urban environment, with a significant amount of tourist activity … can expect rather less privacy than perhaps a rural occupier might"[162]) and the defendant's use of their property was not unreasonable ("the operation of a viewing gallery [is not] an inherently objectionable activity in the neighbourhood"[163]).

But would an intrusion claim using MOPI principles have changed the outcome in *Fearn v Tate*? Certainly, Mann J. was not convinced that a dwelling comprised mostly of glass in a tourist-heavy part of the metropolis was conducive to a strong privacy claim. Yet, at least an intrusion-based claim should have focused his mind not on what one can do with one's property, but on what one can reasonably expect from others, as an equal, autonomous being. This might have led him to consider that the creation of a viewing platform in such close proximity to a pre-existing residence creates an additional dynamic in the privacy calculus that did not exist previously. The question, then, was not whether it was reasonable for the owners to use their building in this way, but whether it was reasonable for the residents to expect that others would not view them as objects of curiosity and public spectacle, to be spied upon, using binoculars if necessary, without discernible justification for the intrusion. Thought of in this way, the case might have turned out differently.

[160] *Victoria Park Racing v Taylor* (1937) 58 C.L.R. 479, at 494. Mann J. discusses this case in *Fearn* [2019] EWHC 246, at [141]–[144].
[161] Ibid., at paras. [174], [178].
[162] Ibid., at para. [190].
[163] Ibid., at para. [196].

V. Conclusion

Over the past 15 years, the common law has made great strides in its protection of privacy law. The greater protection of intrusion-type claims is, if not the last step, then certainly the next. The signs are positive that the judiciary recognises the need to do so. But the strategy need not be as drastic as the commentary suggests. There is no need to create a new cause of action to achieve this end. To see this requires us to re-evaluate what we mean by "intrusion into seclusion" and what the relationship of this thing is to the informational privacy claim that MOPI secures. If, as claimed in this article, we see the relationship between the informational and physical privacy not as familial but symbiotic then the strategy is much simpler: MOPI already recognises the intrusion-dominated claim, the courts need only apply the existing principles in an appropriate claim. By doing so, English and Welsh law will gain a flexible, dynamic right which recognises that actionable intrusion claims are not defined by the physical location of the unwarranted privacy invasion but by the nature of the act and its effect upon the claimant.