"Quiet" Enjoyment: Uncovering the Hidden History of the Right to Attention in Private and Public

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ABSTRACT

Legal scholars have largely neglected attention as a subject of legal rights, even as it has become one of the most valuable economic resources of the modern era. This Article argues that a right to attention has existed implicitly in American law since the early twentieth century, emerging in response to technological, social, and economic shifts in that period that made attention both increasingly valuable and increasingly impinged upon. A set of court decisions in private law doctrines around property and public law doctrines around free speech emerged in this period that can only be explained by reference to an implicit right to attention. Drawing on these sources, this Article explores the ways in which judges and lawmakers built out a set of legal protections that enabled people to invoke the law to protect their own attention while avoiding stifling the sometimes-disruptive conduct of others. In particular, I show that in private law, courts began recognizing "attentional nuisances," nontrespassory invasions of land that caused only attentional, not physical, harm, thereby creating a framework for protecting a person's attention on her own land. In public spaces, the new right to attention came into conflict with also-emerging free speech rights, which may require the ability to attract others' attention in order to express oneself to them. There, the Supreme Court sought a balance between the interests in controlling one's own attention and attracting the attention of others through the development of frameworks like the time, place, or manner doctrine. These methods allowed governments to try

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to regulate attention-grabbing stimuli without directly regulating speech, and through the uneven development of listeners' rights. In closing, I argue that the right to attention developed in the early twentieth century provides a foundation upon which a modern right to attention addressed to the attention economy could be developed. This modern right should be both rooted in the experience of the past and capable of meeting the novel challenges presented by digital technology and artificial intelligence, which promise another epochal technological revolution like that which gave rise to the right a century ago. Drawing out the right to attention buried in the caselaw gives scholars, lawmakers, and the public a set of tools that they can use to decide how to adapt it to the demands of the present. The future of attention relies upon the lessons of its past, and explicitly recognizing the so-far hidden right to attention provides better ways of shaping its future.

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I. INTRODUCTION

It is a commonplace to say that we live in an attention economy,[1] that we are experiencing an attention crisis,[2] that we are what we pay attention to, that attention is all we need,[3] and that we are attending to the wrong things.[4] On the phones and computers on which we spend so much of our lives, our attention is a scarce resource to be directed, controlled, bought, and sold.[5] And yet, despite much discussion of attention as one of the key economic resources of the digital age[6] and despite its centrality in the tasks that we perform throughout our lives, attention lacks clear legal definition. Is attention a form of property of the kind usually exchanged on markets? If so, what are its

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[1] *See, e.g.*, CHRIS HAYES, THE SIREN'S CALL: HOW ATTENTION BECAME THE WORLD'S MOST ENDANGERED RESOURCE 11–12 (2025) (describing the attention economy as perhaps the key social transformation of our age); George Loewenstein & Zachary Wojtowicz, *The Economics of Attention*, J. ECON. LIT. (forthcoming), https://perma.cc/C9Q2-VUYJ; Casey Schwartz, *Finding It Hard to Focus? Maybe It's Not Your Fault*, N.Y. TIMES (Aug. 14, 2018), https://perma.cc/7H67-W6LA (discussing how the attention economy was created and operated around the use of advertising tools on platforms like Google and Facebook); Elliott Holt, *My Secret Weapon Against the Attention Economy*, N.Y. TIMES (Aug. 17, 2021), https://perma.cc/BN6W-SYJ3 (prescribing reading poetry as a solution to the draining nature of being in the attention economy); JENNY ODELL, HOW TO DO NOTHING: RESISTING THE ATTENTION ECONOMY (2019) (prescribing doing nothing as a similar solution). The famous internet-age dictum "if it's free, you're the product" exemplifies the attention economy framework in which users exchange their attention, taken through advertisements, for access to online services. John Lancaster, *You Are the Product*, 39 LONDON R. BOOKS (Aug. 17, 2017), https://perma.cc/L7TP-ZJ9E.

[2] Johann Hari, *Your Attention Didn't Collapse. It Was Stolen*, THE GUARDIAN (Jan. 2, 2022), https://perma.cc/DB2H-ZLGE.

[3] Ashish Vaswani et al., *Attention Is All You Need*, *in* 30 ADVANCES IN NEURAL INFO. PROCESSING SYS. (2017) (initiating the current era of progress in artificial intelligence and illustrating that even AIs require functioning attention systems).

[4] Maura Thomas, *To Control Your Life, Control What You Pay Attention To*, HARV. BUS. R. (Mar. 15, 2018), https://perma.cc/2NEF-7LGK.

[5] Emilia Kirk, *The Attention Economy: Standing Out Among The Noise*, FORBES (Mar. 23, 2022), https://perma.cc/R7LM-58HJ.

[6] Analysts have long argued that attention is the key resource that underpins the internet economy and that shaping the behavior of people through directing their attention is the main driver of many of the most valuable companies of the internet age, including most prominently Google and Facebook, which collect and sell human attention through advertisements. *See, e.g.*, Michael H. Goldhaber, *The Attention Economy and the Net*, 2 FIRST MONDAY (1997), https://perma.cc/K7RZ-WF3N; SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019). Perhaps the earliest discussion of attention as a scarce economic resource dates to 1971, when Herbert A. Simon wrote that "in an information-rich world, the wealth of information means a dearth of something else: a scarcity of whatever it is that information consumes. What information consumes is rather obvious: it consumes the attention of its recipients." Herbert A. Simon, *Designing Organizations for an Information-Rich World, in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 38, 40 (Martin Greenberger ed., 1971).

contours and associated rights? Who owns it? Do we own our own attention, or can it be freely taken, as if we make it part of the commons for anyone to use simply by opening our eyes and ears? Can we contract over it and bargain for benefits in exchange for giving it away? Does ignoring a tracking cookie pop-up on a website count as such a contract over this essential resource?[7] And if not a kind of property, is attention better conceived of as something else, like privacy, that we might have a different kind of right to under the Constitution or another source of law?[8]

American legal scholarship has mostly neglected attention despite its increasing contemporary importance. What little writing there is on the subject tends to use a normative lens, arguing that a right to attention *should* exist.[9] Other commentators consider attention only insofar as social changes to it affect specific existing doctrinal areas of law.[10] This Article takes a novel

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[7] Tracking cookies allow companies to monitor the behavior of users of the internet to whom cookies are attached, almost always for the purpose of selling advertising that is personalized in a way that seeks to attract and direct the users' attention. Some jurisdictions have required that websites place pop-ups at the bottom of their pages through which users can consent or refuse to have their behavior tracked through cookies. Chris Jay Hoofnagle et al., *Behavioral Advertising: The Offer You Cannot Refuse*, 6 HARV. L. & POL'Y REV. 273, 274–78 (2012).

[8] *See* Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965); Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); William Prosser, *Privacy*, 48 CAL L. REV. 383 (1960). For an argument that privacy can be conceptualized as a kind of property right, see Lawrence Lessig, *Privacy as Property*, 69 SOC. RSCH. 247 (2002).

[9] *See* Jasper L. Tran, *The Right to Attention*, 91 IND. L.J. 1023, 1050–52 (2016) (arguing mostly normatively that a right to attention should be derived from existing rights). *See generally* Anuj Puri, *The Right to Attentional Privacy*, 48 RUTGERS L. REC. 206 (2021) (arguing for an autonomy based moral right to attention); Bartlomiej Chomanski, *Mental Integrity in the Attention Economy: in Search of the Right to Attention*, 16 NEUROETHICS 8 (2023) (arguing for a moral right to attention from bodily autonomy).

[10] *See* Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771 (2019) (discussing the failures of antitrust authorities to deal with the rise of an attention economy in which human attention is bought and resold because of difficulties conceptualizing and measuring consumer harms when products are offered in exchange not for money but for attention); Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, 106 MINN. L. REV. 1901 (2022) (similar, focusing on harms to mental health as a form of consumer harm that antitrust authorities could take up); Jake Linford, *Copyright and Attention Scarcity*, 41 CARDOZO L. REV. 147 (2019) (discussing the changing role of copyright in a time of scarce attention); and JOHN M. NEWMAN, REGULATING ATTENTION MARKETS 1, 21 (Jul. 21, 2019), https://perma.cc/QLN3-YA4S (focusing broadly on how trade-regulating laws treat the question of how to regulate attention); Kaisa Kärki & Visa Kurki, *Does a Person Have a Right to Attention? Depends on What She is Doing*, 36 PHIL. & TECH. 85 (2023) (arguing that some existing legal duties entail regulations of attention). The above short list (including the articles in the preceding footnote) effectively covers the substantive discussion of attention in contemporary legal scholarship, though some legal scholars have taken other angles into the topic, *see e.g.*, TIM WU, THE ATTENTION MERCHANTS (2016) (tracing the history of the

approach, arguing that the accumulated caselaw discloses a right to attention that *already* exists, recognized implicitly by judges of the early twentieth century in different domains of the law.[11] In doing so, it seeks to remedy the broad scholarly neglect of attention in the law by exploring how it has been treated in the past. The implicit right to attention explored here is mostly concerned with the right to direct one's own attention in the way one wants, rather than leaving it open to the taking by others. The historical evolution of

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advertising industry and tying it to the rise of the attention economy), or have addressed issues that are related to attention or the implications of the rise of the attention economy, but have not focused squarely on the issue of attention itself or discussed it in the context of property and ownership, for example in the scholarship around regulations on advertising. *See, e.g.*, ERIC GOLDMAN & REBECCA TUSHNET, ADVERTISING & MARKETING LAW 6, 7, 175 (7th ed. 2024) (discussing attention as one of the key resources that advertising consumes and the effects that might have on how marketing is done), or on the implications of plentiful information and scarce attention for First Amendment doctrine, *see, e.g.*, Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 55–56 (2004); Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018).

[11] The U.S. Supreme Court did consider (and reject) something like a right to attention mostly under the Fifth Amendment in one fascinating mid-twentieth century case about loudspeakers on public streetcars and buses. Pub. Utils. Comm'n of D.C. v. Pollak, 343 U.S. 451, 463–66 (1952). The underlying opinion of the D.C. Circuit overturned in *Pollak* explicitly recognized that "[f]reedom of attention, which forced listening destroys, is a part of liberty essential to individuals and to society" and found that it could sometimes outweigh the free speech rights protected under the First Amendment. Pollak v. Pub. Utils. Comm'n of D.C., 191 F. 2d 450, 456–57 (D.C. Cir. 1951). The loss of freedom of attention created by the listening forced upon riders of streetcars and buses constituted "a serious injury to many passengers" who had "little time to read, consider, or discuss what they like, or to relax." *Id.* at 457. The broadcasts were held to constitute a deprivation of liberty without due process of law. *Id.* at 458. However, on appeal, the Supreme Court transformed the "freedom of attention" of the D.C. Circuit into a facet of the right to privacy, not mentioning the word "attention" once in any of the opinions. *See Pollack*, 343 U.S. at 463 (writing that "[t]he court below has emphasized the claim that the radio programs are an invasion of constitutional rights of privacy of the passengers" despite the D.C. Circuit not mentioning privacy outside of a single quote from another case). The Supreme Court then found that the balancing required between individual privacy and the needs of others to participate in society weighed against banning the broadcasts, *id.* at 464–66, though Justice Frankfurter seems to have hated the practice with such fervor that he recused himself. *Id.* at 466–67 (Frankfurter, J., recusing himself). It also briefly considered whether the First Amendment might have been abridged by the noise preventing conversation but found that the record did not suggest any serious such interference. *Id.* at 463. In dissent, Justice Douglas made a kind of "captive audience" argument that playing government-selected music on streetcars and buses was a threat to liberty because listeners could not easily leave or stop listening. *Id.* at 467–69 (Douglas, J., dissenting). Writing that, "[i]f liberty is to flourish, government should never be allowed to force people to listen to any radio program," *id.* at 469, Douglas rooted his analysis in a "right to be let alone" that, part of and related to privacy, "is indeed the beginning of all freedom." *Id.* at 467. It is unclear why the Supreme Court shifted from the freedom of attention to the right to privacy. That shift represents a missed opportunity for the Court to have directly and seriously considered what a right to attention might have looked like, potentially reshaping this field.

caselaw that implicitly deals with attention is used to begin to fill in the foundations for an explicit definition, bringing attention out of the shadows of decisions and into plain view. Addressing attention's role as a key resource of the digital economy, the Article fills what one scholar has called the "property gap" in the legal scholarship of attention,[12] which has allowed for its commercialization without legal cognizance or constraint. By demonstrating the decisive role that attention has played in different cases and making explicit the implicit contours of duties and obligations that judges have given to the right to attention over time, I hope to help clarify the role of attention in the law. Doing so will make it fit for direct discussion, allowing lawmakers, judges, legal scholars, and the public at large to better understand the role of attention in the digital economy and more effectively address the question of who has a right to it and why.

To provide a concrete basis for this discussion, I focus on the right to attention as it has come to exist in private and public life and law, particularly through private nuisance actions and the Free Speech Clause of the First Amendment.[13] In each of these fields, certain rights and interests are asserted, either by the legal action of individuals against each other (as in private nuisance) or by the assertion of individual rights against state regulation (as in the First Amendment context). Courts then endorse or refuse the assertion of these rights. This process forms a set of something like natural experiments wherein plaintiffs' understandings of what rights they hold are tested in the law. As the law develops through this process, certain rights can emerge from this interplay between asserted rightsholders and courts. For example, private nuisance law protects the use and enjoyment of land from nontrespassory invasions.[14] What qualifies as an actionable impingement on use and enjoyment changes depending on circumstances and over time,[15] and plaintiffs bring a wide variety of nuisance cases seeking to enlarge the scope of their

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[12] Newman, *supra* note 10, at 21.

[13] U.S. CONST. amend. I.

[14] RESTATEMENT (SECOND) OF TORTS § 821D (A.L.I. 1979). *See also* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 409 (1973) ("If any course of conduct produces unreasonable interference with a neighbor's use or enjoyment of his property, then that conduct constitutes a legal nuisance.").

[15] Brenner, *supra* note 14, at 403–420 (tracking the development of nuisance law in England from the medieval period through the industrial revolution and documenting at 409 how "*[d]e facto* changes in nuisance law did not, therefore, require *de jure changes*; a drastically different socio-economic milieu and new levels of tolerance of noise and smoke could accomplish the same thing.")

rights through judicial ratification.[16] Courts traditionally limited findings of private nuisance to nontrespassory invasions of the property of another that caused actual physical harm to that property or the people living on it.[17] Even harm to the person was sometimes insufficient.[18] But over time, as I will show, the ambit of what constituted a private nuisance grew to include interferences that clearly cause no physical harm. Social and economic transformations at the beginning of the twentieth century spurred by electrification, amplification, and other technologies caused more frequent disputes over attention and created new ways for people to distract each other. Many of these new nuisances, as ratified by courts, can best be described as "attentional" nuisances, invasions that affect the ability of the occupier of land to attend to what she wants to attend to, like loud noises (that do not cause physical harm like cracking the brickwork of houses) or bad smells (that do not cause actual sickness in occupiers subjected to them).

The Free Speech Clause of the First Amendment and the government interventions that it regulates provide another kind of natural experiment in which to see the contours of a right to attention, now present in two forms. One is asserted by the public through legislative attempts to regulate attention-grabbing means of expression that affected them, and another is directly tied up in the jurisprudence of the First Amendment as a corollary and implicit counterpart to speech. For many of the same reasons that attentional nuisances came into being, particularly the development of new technologies that allowed people to impinge on the attention of others more easily and the increased importance of sustained attention as an economic and social good, communities in the early and middle parts of the twentieth century began regulating public uses of space that affected their attention. Many of these regulations were challenged on the basis that they prevented free expression in public, implicating the First Amendment. Furthermore, political speech may actually require the ability to attract the attention of others because it is only

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[16] *See infra* Sections II.B-C.

[17] In one typical summation, the Supreme Court of Arkansas wrote that "[t]he general rule [of nuisance] is that, in order to constitute a nuisance, the intrusion must result in physical harm." *Aviation Cadet Museum, Inc. v. Hammer*, 283 S.W.3d 198, 203 (Ark. 2008).

[18] Brenner, *supra* note 14, at 409, 419 ("The man who breathed chlorine gas on the job was not entitled to bring an action in nuisance against his employer. But when he got home at night and found the air was bad there, too, he should have had such a right, as occupier, yet no such actions seem to have been reported."). Brenner ultimately concluded that nuisance law was effectively suspended in much of England, particularly the industrial towns at the heart of the revolution, during this time as part of a general inclination toward economic growth rather than protecting the rights of tenants or landholders.

with those others that politics is possible,[19] raising the question of whether the right to free speech creates a cognizable interest in demanding the attention of others. These practical and philosophical considerations shaped the development of key doctrines like those around time, place, or manner regulations[20] and "listener's rights,"[21] manifesting in leading Supreme Court cases throughout the twentieth century. Combining private nuisance and public speech regulations, this Article lays out some of the hidden features of the right to attention as it influences each of these domains.

More broadly, the story of the right to attention and its role and regulation in the law is tied to the story of the development of technology and the ways in which the law has responded to that development over time. Many of the attentional nuisances that were brought before courts in the early and middle parts of the twentieth century in the United States were caused by the development of new technologies that allowed people to create far more affecting stimuli, like loud noises and bright lights, than they had been able to

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[19] Aristotle argued that humans could only flourish in the context of a political community and gave as the foundation for that political community and participation in it the capacity of speech. Speech allows humans to engage in collective moral reasoning and in fact the foundation of such reasoning, and it also provides the basis for self-government and the government of others. ARISTOTLE, POLITICS Part II (Benjamin Jowett trans., 1908). Hannah Arendt, building on Aristotle, argued that it is through speech that the identity and meaning of personhood can be disclosed to oneself and to others, revealing the distinctness of individual human identity. HANNAH ARENDT, THE HUMAN CONDITION 175–76 (2d ed. 1998). These arguments simultaneously foreshadow and complicate many autonomy- and self-realization-based justifications for the First Amendment. *See, e.g.,* David A. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 68 (1974) (arguing that the value of free expression rests on "deeper moral premises regarding the general exercise of autonomous expressive and judgmental capacity and the good that this affords in human life"); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–54 (1991) (rooting expression in autonomy).

[20] The dispute around the definition of content neutrality under the First Amendment in the cases *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022) is one such place where having a clear definition of attention and the role that it plays would help the Justices more effectively tackle the question of how to regulate speech on billboards.

[21] *See* Cass R. Sunstein, *Artificial Intelligence and the First Amendment*, 92 GEO. WASH. L. REV. 1207, 1221–23 (2024) (arguing that Supreme Court cases like *Kleindienst v. Mandel*, 408 U.S. 753, 762–64 (1972) and others demonstrate that there is a set of listeners' rights in the First Amendment and that these rights help clarify what is happening with the "speech" of generative AI); Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J. L. REFORM 489 (1999) (arguing that there is no obligation to listen and the government can protect the right of people not to have to listen to the speech of others); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009) (arguing similar); James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365 (2019).

before.[22] Similarly, many of the regulations of public spaces that gave rise to First Amendment caselaw came about in response to increasingly disruptive uses of public space that were enabled by new technologies like loudspeakers. With those new capabilities come destructive externalities that people seeking to pursue their desires often impose on others: the amplifier is a great invention for the lover of rock and roll but a terrible one for the elderly neighbor who lives next door. The extension of human capabilities through technology has been met with the imposition of new forms of regulatory control.[23] These means of control have sought to domesticate these expanding powers in ways that allow society to continue to function while ensuring that people are able to reap the benefits that technology has enabled them to gain.[24] In some cases, lawmakers decide that the benefits so outweigh the externalities that regulation is a mistake.[25] In others, they intervene to try to set a better balance. Whichever way they choose, there should be debate over whether such a choice is in the best interest of their constituents, which requires a public recognition of what deal is being struck and what interest are at stake.

Attention has only come into public focus as a key human capacity in the last few decades. While it has grown rapidly in significance in that time, lawmakers, legal scholars, and the public have mostly ceded the debate over it to corporations, echoing the abandonment of environmental regulation during the English industrial revolution.[26] Yet, as I will argue, the law already contains frameworks that define attention that could provide a foundation for a better debate over what our right to attention is and should be. As valuable and scarce as attention is today, it will only become more valuable in the oncoming artificial intelligence-driven era of superabundant information and content production,[27] a new technological revolution echoing the one that gave rise to

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[22] Different cultures and legal systems may deal with attention in different ways, but such divergences are beyond the scope of this article.

[23] *See generally* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

[24] *Id.*

[25] *See* Brenner, *supra* note 14, at 409 (documenting how English courts and lawmakers chose to ignore the pollution caused by industrialization because they weighed economic growth to be more important than the environmental and health harms it caused).

[26] *Id.*

[27] With more and more information, attention becomes the bottleneck that makes that information valuable or worthless. *See* Wu, *Is the First Amendment Obsolete?*, *supra* note 10. Wu's argument dates to before the widespread accessibility of generative artificial intelligence models, which can produce pictures, text, and sounds at near-zero cost. These models may remove the remaining bottlenecks of information production, those related to creation and substantiation of content, shifting us fully into a world in which information is

the right to attention. Large language models like ChatGPT [28] and their oncoming successors, reasoning systems like OpenAI's o1 [29] and o3 [30] and DeepSeek's R1,[31] embody a new explosion of technological capability that will transform human society and upend the ways that we live and work. As the intelligence of these systems increases and their ability to act in the world as agents [32] improves, a key check on their effectiveness will be the human attention that developers need to exploit not just to source training data, but also to find markets for their models.

The law should directly consider the structure of the right to attention, and lawmakers will have to confront hard questions about whether and how human attention should be regulated. Drawing out the ways in which the right to attention has developed in the law will enable this conversation to be grounded in historical precedent. At the same time, it will illuminate how we might construct a coherent regulatory framework for an unprecedented era in which human attention—rather than computational power, data, or algorithmic sophistication—becomes the decisive bottleneck in realizing the transformative potential of artificial intelligence. In this new era, the allocation and protection

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superabundant and only attention is scarce. Ben Thompson, *The AI Unbundling*, STRATECHERY (Sept. 22, 2022), https://perma.cc/88D2-Z2U7.

[28] John Schulman et al., *Introducing ChatGPT*, OPENAI (Nov. 30, 2022), https://perma.cc/5JZQ-8X4F. For a broader explanation of ChatGPT and how it works, see generally STEPHEN WOLFRAM, WHAT IS CHATGPT DOING . . . AND WHY DOES IT WORK? (2023).

[29] *See Learning to Reason with LLMs*, OPENAI (Sept. 12, 2024), https://perma.cc/C6AE-7YHC (describing the breakthrough underlying the new "reasoning" models, of which o1 is the first, and illustrating the significance of this shift with respect to model capabilities).

[30] *See* Nicola Jones, *How Should We Test AI for Human-Level Intelligence? OpenAI's o3 Electrifies Quest*, NATURE (Jan. 14, 2025), https://perma.cc/T7UF-Q94J (discussing the further leap of o3, the successor model to o1, and how it has shifted the race for increasing intelligence). *See also* Francois Chollet, *OpenAI o3 Breakthrough High Score on ARC-AGI-Pub*, ARC PRIZE (Dec. 20, 2024), https://perma.cc/UC54-F3LC (announcing the huge boost in AI performance on the ARC-AGI benchmark, one of the hardest tests for AIs to do well on developed so far).

[31] *See DeepSeek-R1: Incentivizing Reasoning Capability in LLMs via Reinforcement Learning*, DEEPSEEK (Jan. 20, 2025), https://perma.cc/G9CS-MCFL (announcing DeepSeek-R1, a new model that is a near match of OpenAI o1 in quality trained for a significantly lower price). *See also* Shirin Ghaffary & Rachel Metz, *DeepSeek Challenges Everyone's Assumptions About AI Costs*, BLOOMBERG (Jan. 28, 2025, 6:14 AM), https://perma.cc/7TB7-T62X (describing the one trillion dollar market selloff that occurred after DeepSeek-R1 was announced). It is likely that the long-term effect of the DeepSeek breakthroughs will be broader adoption of AI, because decreased cost will enable greater demand and leading American companies will rapidly introduce DeepSeek's innovations to their own stacks.

[32] Will Douglas Heaven, *OpenAI Launches Operator—An Agent That Can Use a Computer for You*, MIT TECH. REV. (Jan. 23, 2025), https://perma.cc/JB7E-7FMY.

of attention will not just be an economic or social concern but a fundamental challenge for legal systems worldwide.

This paper proceeds as follows: In Part I, I lay out some philosophical and psychological elements of attention that suggest alignment with legal and economic modes of analysis. Then, I discuss how attention has been regulated over time in response to shifting faces of technology, economy, and society, focusing on the changes at the beginning of the twentieth century. In Part II, I explore how the common law of private nuisance has historically treated disputes over attention. I use private nuisance to sketch how the law treated attention in the context of land, focusing on what I call "attentional nuisance" cases. In Part III, I consider the right to attention in public, looking at caselaw on the Free Speech Clause of the First Amendment that implicitly or explicitly regulates attention. I show that key parts of First Amendment doctrine have been shaped by the need to balance a hidden right to attention against the interests of speakers, clarify existing doctrinal debates. Finally, in Part IV, I argue that the rise of the AI economy is again transforming the role of attention and its value, and that courts and lawmakers must directly address these transformations and provide a clear concept of attention or risk having this essential human resource stripped away.

II. WHAT IS ATTENTION?

A. Features of Attention, Features of Ownership: Scarcity, Rivalrousness, Excludability, and Value

Before turning to the law, it is important to lay out a few essential features of attention that will underpin our discussion of rights and reasons why the law might be a suitable tool with which to regulate attention. In 1890, William James, a founder of modern psychology,[33] wrote that "[e]very one knows what attention is." But, of course, he went on to define the concept anyway as "the taking possession by the mind, in clear and vivid form, of one out of what seem several simultaneously possible objects or trains of thought . . . It implies withdrawal from some things in order to deal effectively with others."[34] Attention has been widely studied in the time since James gave his definition, and a variety of formulations and theories of the concept have arisen, drawing

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[33] David E. Leary, *William James and British Thought: Then and Now*, 46 BRIT. J. PSYCH. BULL. 53, 53 (2019).

[34] WILLIAM JAMES, PRINCIPLES OF PSYCHOLOGY 403–04 (1890).

on advances in psychology, neuroscience, and cognitive science.[35] Still, as recently as 2019, researchers were arguing that "[n]o one knows what attention is"[36] because the concept has become so overstuffed and unwieldy that it means both too much and too little. For the purposes of this Article, I will draw on the four features of attention laid out by Lowenstein and Wojtowicz in their definition of an attentional resource (though with qualifications, as we will see).[37] For them, attention is scarce (limited or costly in supply), rivalrous (available only for one activity at a time), cognitive (drawing on cognitive information processing), and volitional (at least partly directed by the individual attender).[38]

All parties in the debates over attention agree that attention is limited. One recent survey indicated that "[c]ognitive psychologists have long known that attention is a limited resource, selectively employed to facilitate information processing."[39] The American Psychological Association, in defining attention, emphasizes that humans must "focus[] on certain items at the expense of others."[40] James also underscored attentional limits in his early definition.[41] The exact nature of the limits of attention is disputed. Some researchers argue that attention is limited like a searchlight beam, in that only some things can be selectively processed, or held within the circle of light, at any one time.[42] Others conceptualize it as more like an exhaustible resource that is spent over time. This "mental resources" approach to attention argues that the cognitive system has limited resources that can be divided among different attention-demanding

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[35] For an overview of some of the paths of research on attention and the variety of directions that have been taken and debates that persist, see George Loewenstein & Zachary Wojtowicz, *The Economics of Attention*, J. ECON. LITERATURE (forthcoming) (manuscript at 2–25).

[36] Bernhard Hommel et al., *No One Knows What Attention Is*, 81 ATTENTION, PERCEPTION & PSYCHOPHYSICS 2288 (2019).

[37] Loewenstein & Wojtowicz, *supra* note 35, at 2–3.

[38] *Id.*

[39] Russell Golman, David Hagmann & George Loewenstein, *Information Avoidance*, 55 J. ECON. LITERATURE 96, 100 (2017) (citing DONALD E. BROADBENT, PERCEPTION AND COMMUNICATION (1958), Walter Schneider & Richard M. Shiffrin, *Controlled and Automatic Human Information Processing: I. Detection, Search, and Attention*, 84 PSYCH. REV. 1 (1977), and Herbert A. Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37 (Martin Greenberger ed. 1971)).

[40] *Attention*, AM. PSYCH. ASS'N DICTIONARY OF PSYCH. (Apr. 19, 2018), https://perma.cc/2PHJ-N7VL.

[41] JAMES, *supra* note 34, at 403-04.

[42] Klaus Oberauer, *Working Memory and* Attention – A Conceptual *Analysis and Review*, 2 J. COGNITION art. 36, at 1 (2019). See Harold Pashler, *Processing Stages in Overlapping Tasks: Evidence for a Central Bottleneck*, 10 J. EXPERIMENTAL PSYCH.: HUM. PERCEPTION & PERFORMANCE 358 (1984).

tasks and processes, but that this resource can run out or reach its limit, which prevents effective attending to many things simultaneously.[43] Though the searchlight theory has predominated, there have been recent attempts to reconcile it with the others.[44] Regardless of the model used, the fundamentally limited nature of attention remains.[45]

Attention is limited and, especially today in the era of constant distraction and overwhelming external stimuli,[46] it is scarce. These features of limitation and scarcity suggest that attention can be analyzed as a kind of good or form of property that can be brought into economic and legal schemas.[47] In economic terms, attention can be described as a kind of private good, as it is at least to some extent rivalrous—its consumption by one prevents consumption by another—and excludable—its producer can control the extent to which people are able to consume it.[48] Attention is rivalrous because, putting the possibility of true multitasking aside, it is impossible for a person to attend to multiple stimuli simultaneously, and it is excludable insofar as it is to some extent possible for a person to ignore stimuli and therefore exclude them from the field of attention.

Importantly, however, attention does not have all the characteristics of a private good. In particular, attention is not naturally fully excludable. Attention can be directed by the volition of the attender (who operates as the producer of attention in this framework) but also taken from her by outside stimuli

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[43] Oberauer, *supra* note 42, at 3. *See* DANIEL KAHNEMAN, ATTENTION AND EFFORT 148 (1973). This approach suggests that some degree of multitasking is possible—after all, people can walk and chew gum—but that there are limits to the kind and difficulty of tasks that can be simultaneously attended to.

[44] *See generally*, Irving Koch et al., *Cognitive Structure, Flexibility, and Plasticity in Human Multitasking—An Integrative Review of Dual-Task and Task-Switching Research*, 144 PSYCH. BULL. 557 (2018).

[45] There is some debate as to whether it is possible to attend to multiple different things simultaneously. True multitasking seems to be impossible, as people instead just switch their attention rapidly between the tasks that they have been given to accomplish. Christine Rosen, *The Myth of Multitasking*, 20 NEW ATLANTIS 105 (2008); Derek Thompson, *If Multitasking Is Impossible, Why Are Some People So Good at It?*, ATLANTIC. (Nov. 17, 2011), https://perma.cc/H5AP-KG8G. The selective processing model supports the impossibility of multitasking because in a common form it argues that there is a structural bottleneck in the brain through which only one stream of attention can pass at a given time. *See* Pashler, *supra* note 42.

[46] *See* HAYES, *supra* note 1.

[47] Golman et al., *supra* note 39, at 100.

[48] Eleanor G. Henry & Rebecca Summary, *Private Good*, BRITANNICA MONEY, https://perma.cc/8493-8K7J.

against her will,[49] which limits the extent to which it is possible for a person to fully exclude others from her attention. Few goods are truly fully excludable, though if any of them are, then one would expect that those tied to human bodies would have the greatest chance of achieving that status. Instead, various and often legal modes of regulation are used to enhance the extent to which excludability exists in private goods, facilitating their use.[50] As this paper will argue, as attention became more lucrative, the law played a role in increasing the extent to which it is excludable, making it more like property or the subject of a right.

Attention is also valuable.[51] Today, it is sought, bought, and sold for high prices in the form of advertisements.[52] Even outside the attention economy, attention is clearly valued—in common parlance, we literally "pay" attention.[53] When other people distract us, we feel that we are paying a price, and we are. Because attention is limited, paying attention to one thing, like the person distracting us, means paying less attention to another. There are concrete harms to distraction; for example, consistent distraction can damage our performance on important tasks. Studies have shown that students in classrooms near loud train tracks lose as much as a year of reading ability compared to students who learn in quieter areas.[54] Distraction makes workers

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[49] *See* "attention," AMERICAN PSYCHOLOGICAL ASSOCIATION DICTIONARY OF PSYCHOLOGY, https://perma.cc/PH2F-MHDL (last visited May 7, 2025). This feature of attention is plain to anyone who has found it difficult to focus in a loud coffeeshop or been distracted by a crying baby on an airplane and underlies the necessity of various forms of regulation of attention-grabbing stimuli from shushing in libraries to requests that neighbors "keep it down" to the legal rules that will be discussed throughout this paper.

[50] Laws, norms, markets, and architectures all operate to enhance the extent to which goods are made excludable and therefore more completely integrated into the market. *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 87–90 (1999).

[51] Tim Wu estimates that more than $580 billion was spent on advertising in the year 2017 and argues that advertising provides a reasonable proxy for how at least some businesses value attention. Wu, *Blind Spot*, *supra* note 10 at 784. Given that there is much more human attention exchanged than captured by that metric, we can estimate the total economic value of attention to be even higher.

[52] *See generally* WU, THE ATTENTION MERCHANTS, *supra* note 10 (describing the system of the attention economy and how it operates to create a market in attention).

[53] Note that this idiom inverts the implicit attender-as-producer, stimulus-as-consumer framework that seems to best fit the attention economy but does highlight the extent to which there seems to be a kind of exchange that is going on when a person attends to a stimulus. Under the mental resources model of attention, attending to something results in a reduction of the "store" of attention that a person has, and thus more completely demonstrates the extent to which a cost is being paid.

[54] Mullainathan and Shafir report such a result from a school in New Haven, CT. SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY 42 (2013). A study from 1981 found a nearly identical

less productive, significantly harming economic productivity.[55] And the inability to focus can have broader effects on quality and enjoyment of life.

Finally, because of the aforementioned characteristics of value, scarcity, and imperfect excludability, attention is often contested. If people want to control what they attend to and cannot simply exit a situation in which they are subjected to unwanted stimuli, they must engage with others and attempt to get them to change their behavior to reduce the unwanted stimuli that are grabbing the person's attention. Life is filled with these attentional disputes, both from producers of attention and those who want to consume it. The urges to shush someone talking loudly at the movie theater or to call the police on a neighborhood party are common. The fundamental structure of human attention has remained constant for longer than law has existed,[56] and attention has been the subject of philosophical investigation for centuries before it became the object of scientific study.[57] But as attention has become more valuable over the last century, the law has come to regulate it, seeking to direct these disputes into more rational and predictable channels.

B. Attention and its Regulation from Ur-Nammu to the Industrial

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result: sixth graders on the noisy side of a New York school lagged those on the quiet side of the school by as much as eleven months of reading performance, a gap that disappeared once noise-abatement steps were taken to quiet a nearby train. Arline L. Bronzaft, *The Effect of a Noise Abatement Program on Reading Ability*, 1 J. ENVIRO. PSYCH. 215, 215–16 (1981); *see also* Ari L. Goldman, *Student Scores Rise After Nearby Subway is Quieted*, N.Y. TIMES (Apr. 26, 1982), https://perma.cc/CSN7-DDLL (reporting on that finding). The persistence of this result across time lends support to its significance.

[55] *See* Brian Solis, *Our Digital Malaise: Distraction Is Costing Us More Than We Think*, LONDON SCH. ECON. BLOGS (Apr. 19, 2019), https://perma.cc/5YEM-T6EB (citing several such studies).

[56] The earliest law code that has been discovered, the Code of Ur-Nammu, dates from the twenty-second century BCE, *see* S.N. Kramer, *Ur-Nammu Law Code*, 23 ORIENTALIA 40, 40 (1954), while the faculty of attention (or something roughly like it) likely originated around 500 million years ago during the Cambrian epoch. Hommel et al., *supra* note 36 at 2294.

[57] Daniel E. Berlyne writes that attention has etymological origins in Greek and Roman antiquity, and he attributes the first substantial treatment of attention to the philosopher Nicholas Malebranche in his book *The Search After Truth*, published in 1674. Daniel E. Berlyne, *Attention*, *in* 1 HANDBOOK OF PERCEPTION: HISTORICAL AND PHILOSOPHICAL ROOTS OF PERCEPTION 123, 126 (Edward C. Carterette & Morton P. Friedman eds., 1974). *See also* Addie Johnson & Robert W. Proctor, *Historical Overview of Research on Attention*, *in* ATTENTION: THEORY AND PRACTICE 1, 4 (2003). Attention also plays a highly significant role in Buddhism and has done so for thousands of years. In Buddhism, the selective attending to things during meditation is a common and important practice. Antoine Lutz et al., *Attention Regulation and Monitoring in Meditation*, 12 TRENDS IN COGNITIVE SCI. 163, 164 (2008). Further, some Buddhists, including the philosopher Buddhaghosa, argued that there is in fact no true self but rather only a continual attending to things and placing them within the zone of attention. Jonardon Ganeri, *Attention and Self in Buddhist Philosophy of Mind*, 31 RATIO 354, 361 (2018).

Revolution

While disputes over attention are not new, attention has become an increasingly important resource and the conditions under which it is disputed have changed. Prior to the modern era, there are few traces of direct legal regulations of attention. The earliest law codes that have so far been discovered, like the Code of Ur-Nammu[58] and the Code of Hammurabi,[59] are mostly concerned with physical things, like penalties for violence, theft, and property damage, as well as basic structures of contract and exchange.[60] These early law codes reflect historical periods in which attention was not usually considered to be a key economic resources or something worth protecting through the law. Instead, their focus on physical harm and property damage expresses the key concerns of societies in which the ability to perform physical labor on the land to grow food and extract resources were the foundation of the economy.[61] People in rural societies also lived far apart from each other and thus rarely had occasion to dispute impingements on attention.

Some early traces of attention-related regulations of stimuli do exist in places where the ability to focus and direct attention was particularly valued. One example is the *contemplens silentum*, the elaborate behavioral codes regulating when speech was permitted in Christian monasteries across the medieval period, [62] and in analogous practices in the Buddhist monastic tradition.[63] The role of Christian monks as scribes who performed an early form of knowledge work, passing down literature across generations,[64] provides a hint as to the kinds of economic conditions that we will see engender legal regulation of attention centuries later. However, the law could have little role

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[58] *See* Kramer, *supra* note 56.

[59] *See* J. Dyneley Prince, *The Code of Hammurabi*, 8 AM. J. THEOLOGY 601 (1904).

[60] *See* James Q. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices*, 71 CHI.-KENT L. REV. 41, 42, 44 (1994).

[61] The proportion of people living in rural areas has declined every year since the World Bank began tracking the statistic, from 66% in 1960 to 43% in 2023. *Rural Population (% of Total Population)*, WBG (n.d.), https://perma.cc/C27N-4QX4. Agriculture has declined as a proportion of the world economy for centuries and now makes up only around 4.1% of world GDP. *Agriculture, Forestry, and Fishing, Value Added (% of GDP)*, WBG (n.d.), https://perma.cc/J5Y3-46DC.

[62] Paul F. Gehl, *Competens silentium: Varieties of Monastic Silence in the Medieval West*, 18 VIATOR 125, 138–40 (1987).

[63] Ann Heirman, *Speech Is Silver, Silence Is Golden? Speech and Silence in the Buddhist "Saṃgha,"* 40 E. BUDDHIST 63, 64–68.

[64] Gehl, *supra* note 62 at 139.

in regulating monks' conduct, given the special status of religious organizations outside the jurisdiction of secular authorities in this period.[65]

Even where early urbanization and industrialization increased the value and salience of attention, laws seem to have mostly remained focused on direct harms and disputes over person and property. The *Digest* of Justinian, a codification of Roman Imperial law that sought to simplify and resolve contradictions in the growing Roman legal system developed in the sixth century CE, [66] provides a useful example. Ancient Roman society was significantly urbanized, and the city of Rome itself had at one point likely contained one million inhabitants,[67] with all the difficulties and conflicts that so many people living together would have created. It would reasonably be expected that with the development of widespread urban forms of living, especially in the capital of the empire, that some form of attention regulation would have emerged and made its way into the formal codification of the law. Yet the *Digest* spends little time on what we could consider regulations of attention, again focusing on the physical world and life in it. In property law, where I will later argue key contemporary traces of the right to attention are to be found,[68] the closest the *Digest* comes to the idea that people might have a right to use their property in such a way as to avoid being distracted is in its discussion of servitudes.[69] The only suggestion of something like a regulation of attention comes with the hypothetical case of a smoke-emitting "cheese-factory" that is apparently disturbing the life of a property owner who lives above it. [70] But even here, perhaps the best case for an early version of attentional regulation, there is no claim to attention discussed. The smoke is analogized to water falling from one property onto another, rooting the decision that a servitude can prevent such an invasion in the physical rather than attentional world.[71]

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[65] Harold J. Berman, *Interaction of Spiritual and Secular Law: The Sixteenth-Century and Today*, FULTON LECTURES 2–3 (1997).

[66] Alan Watson, *Preface*, *in* 1 THE DIGEST OF JUSTINIAN at xi (1985) (indicating that the *Digest* was compiled from 530 to 533 CE).

[67] IAN MORRIS, THE MEASURE OF CIVILIZATION 40 (2013).

[68] *See infra* Part II.

[69] *See* JOSHUA GETZLER, ROMAN IDEAS OF LANDOWNERSHIP 26–33 (1998) (discussing the development of land law in ancient Rome across time with a particular focus on the *Digest*).

[70] THE DIGEST OF JUSTINIAN Book 8.5.8.5 (Ulpian) (Samuel P. Scott trans., 1932).

[71] *Id.* It is interesting to note that this finding that smoke can be an invasion of property that has a legal remedy contrasts with the main thrust of modern American caselaw, in which "invasions of property by particulates like noise, smoke, odor, and light are not trespasses." Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1146 (2020).

In the nineteenth century, urbanization and industrialization, with their attendant noises, smells, and pollution, transformed the lives of a huge and growing number of people around the world.[72] The role of agriculture in the economy began to diminish, overtaken by mass production of consumer goods.[73] The early factories that formed the basis of the industrial era caused huge environmental damage, emitting smoke, toxic fumes and waste, loud noises, and bad smells and transforming their surroundings, even as the labor demands of mass production brought people into more cramped living conditions.[74] The new technology driving the creation of these factories enabled the imposition of massive externalities on those who lived nearby.[75] This era would see early stirrings of environmental and social consciousness in response, but the right to attention was still mostly absent. The Industrial Revolution was primarily a physical revolution, a transformation in the real world and its components, as opposed to later revolutions enabled by electricity that shifted the economy toward a focus on mental resources. Factory work demanded a different kind of attention from the creative knowledge work that these later revolutions would enable, based on executing rote and repetitive tasks along an assembly line. As such, the law remained focused on physical invasions and their consequences rather than more abstract harms to attention.

C. Attention in the Twentieth Century: Knowledge Work, Leisure Time, and New Communications

Given the lack of protection of a right to attention across history, why would such a right have eventually emerged, and what conditions could have made the time ripe for it to do so? Most of the remainder of this Article is

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[72] Though the world's population only became majority urban after around 2007, the trend of urbanization starting around the middle of the nineteenth century is quite swift, with the proportion of people living in urban areas taking off from a low of around 10% in 1800 to its current majority level. Hannah Ritchie, Veronika Samborska & Max Roser, *Urbanization*, OUR WORLD IN DATA (Feb. 2024), https://perma.cc/7CZK-KA9H. The United States, which urbanized quickly in the later part of the nineteenth century, became majority urban sometime around 1920. *See 2010 Census of Population and Housing* 20–26, U.S. CENSUS (Sept. 2012), https://perma.cc/8RYV-9ERY.

[73] *See* RICHARD FRANKLIN BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900 4–5 (2000).

[74] *See* ROBERT LEWIS, CHICAGO MADE: FACTORY NETWORKS IN THE INDUSTRIAL METROPOLIS 2–6 (2008) (discussing this phenomenon in the context of Chicago).

[75] Brenner, *supra* note 14, at 417–19 (documenting the truly horrible things factory workers were exposed to at work and at home).

dedicated to exploring the traces of the right to attention that emerged in American caselaw of the twentieth century, but it is worth briefly discussing the social and technological conditions that caused the right to emerge. Much as the right to privacy arose in response to the invention and spread of photography and mass media,[76] the right to attention arose in response to new electrification, communications, and amplification technologies and changing social expectations around work, play, and the role of attention in daily life. These changing conditions affected the law both directly, for example by changing those elements of nuisance that draw on social expectations of what are reasonable activities in a given place,[77] and indirectly, by giving rise to new forms of conduct that could provide the basis for legal action.

The development and widespread distribution of electrical infrastructure and devices and the economic shift away from heavy industry and towards early forms of knowledge work and leisure time gave rise to the social conditions in which attention became a valuable resource that people could invoke the law to protect. Though much of the technology that would enable widespread electrification was invented in the nineteenth century, the infrastructure to allow its effective transmission was only developed towards its end,[78] and it was not until the beginning of the twentieth century that the massive power grids enabling widespread adoption of electricity came into being and the country began to be truly electrified.[79] The transmission of electricity enabled the use of many different novel technologies and, importantly, shifted the locus and form of pollution away from the site of production of goods to generation facilities farther away. No longer was it as economically necessary to destroy the environment around factories for them to be productive, and society could begin regulating pollution more effectively without worrying as much about the harms to growth.

At the same time, and drawing on the benefits provided by widespread electrification, the economy began a transition away from heavy industry and

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[76] *See* Warren & Brandeis, *supra* note 8.

[77] *See* Brenner, *supra* note 14, at 409.

[78] The first electric transmission line in the Americas was constructed in 1889 between the generating station at Willamette Falls and Portland, Oregon. R.S. Nichols, *The First Electric Power Transmission Line in North America-Oregon City, Oregon*, 9 IEEE INDUS. APPLICATIONS MAG. 7, 7 (2003).

[79] The adoption of electricity use in homes across the country during this period provides a useful demonstration of this transition. In 1907, only 8% of homes had electricity, while by the end of the 1920s that number had soared to 68% (reaching 85% of non-farm dwellings). Arthur G. Woolf, *The Residential Adoption of Electricity in Early Twentieth-Century America*, 8 ENERGY J. 19, 20 (1987).

toward the forms of knowledge work and services that today predominate.[80] Between 1900 and 1930, the number of people employed as bookkeepers, typists, and clerical workers more than tripled as the economy became more complex, and technologies like the electric lightbulb facilitated this kind of work.[81] Many of these occupations required precision and focus for accurate record keeping and communication among parts of complexifying businesses. Through this transformation, attention became increasingly necessary for key economic tasks, and conditions began to emerge in which society as a whole might benefit from increases in its protection.

Two more broad shifts also created conditions pushing toward the recognition of a right to attention in the law. First, electrification enabled new technologies of sound amplification and illumination. These new technologies enabled non-physical invasions of property that could still be significant impingements on the ability of others to use and enjoy their property. And second, the democratization of leisure time and the diversifying set of uses to which people put this new technology created conditions for those non-physical invasions to occur.[82] As Maureen Brady has documented, the oldest American case involving a light nuisance is *Akers v. Marsh*,[83] which concerned an oil lamp.[84] But later cases involving light nuisances can almost all be traced to the increased illumination power that electric lighting provided and the kinds of late-night leisure activities, like boxing and baseball, that it enabled.[85] The earliest forms of sound amplification technologies were developed in the late nineteenth century and then became significantly more widespread at the beginning of the twentieth, benefiting from the new capabilities enabled by

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[80] In 2021, the service sector contributed 76.4% of American GDP, while industry contributed only around 17.61% and agriculture a paltry 0.94%. STATISTA RSCH. DEP'T, *Value added to gross domestic product across economic sectors in the United States from 2000 to 2021 (as a share of GDP)*, STATISTA (Jan. 27, 2025), https://perma.cc/DNT2-778J (drawing on World Bank data).

[81] Sharon Hartman Strom, *"Light Manufacturing": The Feminization of American Office Work, 1900–1930*, 43 INDUS. & LAB. REL. REV. 53, 59 (1989) (drawing on David L. Kaplan & M. Claire Casey, *Occupational Trends in the United States, 1900-1950*, U.S. CENSUS BUREAU (1958)).

[82] The fight for an eight-hour workday in particular led to the democratization of leisure from a practice of the rich to one to which everyone could aspire. Factory cities in which many people worked and lived together provided rich sites for the development of a diverse set of leisure occupations in which people could use new technologies to have fun, going to the movies or to concerts and the like. *See generally* ROY ROSENZWEIG, EIGHT HOURS FOR WHAT WE WILL: WORKERS AND LEISURE IN AN INDUSTRIAL CITY, 1870–1920 (1983).

[83] 19 App. D.C. 28 (1901).

[84] Brady, *supra* note 71, at 1150.

[85] *Id.* at 1153.

electricity.[86] These sound amplification technologies enabled large-scale concerts and the broadcasting of voices at levels that were previously impossible, creating conditions in which human-produced sound could itself become a distraction, extending such nuisances beyond the context of industrial activity that also carried with it other physical invasions. Mass consumer culture took off as the economy continued to develop and the rise of advertising at the beginning of the twentieth century created new demands on people's time, money, and attention.[87]

Taken together, these technological, economic, and social changes created conditions under which attention became a much more valuable resource and enabled its being seized, harmed, and exploited in new contexts. This Article argues that in response to those changed conditions, a right to attention began to emerge in U.S. law. This right emerged through private suits that used existing legal frameworks to try to protect the ability of people to attend to what they wanted. Increased demands on attention also led to social regulations that ran into constitutional protections on speech and expression that had been literally amplified by the development of new attention-grabbing technologies. Because of the features of attention discussed above,[88] particularly its scarcity, incomplete rivalrousness, excludability, and value, attention is something that can be protected by the law with relative facility. One of the law's main functions, especially with respect to property, is to exclude others from preventing the owner or occupier of land from enjoying it,[89] and so to exclude others from impinging on one's attention is a reasonable legal function. But because to exist in the social world at all is to have one's attention pulled in all directions by incoming stimuli, legal protections of attention as they emerged could not develop in such an overwhelming way as to stifle all other forms of social and economic activity. To help square this difficult circle, judges began to implicitly recognize a right to attention hidden in the caselaw that shaped the outcomes of key cases without ever directly

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[86] The Telharmonium, one of the first sound amplification devices, was created in 1896, but it is with the spread of electrification that the first widespread forms of sound amplification became available. Harald Bode, *History of Electronic Sound Modification*, 32 J. AUDIO ENG. SOC. 730, 730 (1984).

[87] For a discussion of the importance of the early twentieth century as the origins of the advertising industry see WU, THE ATTENTION MERCHANTS, *supra* note 10, at 26–56.

[88] *See supra* Section I.A.

[89] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (characterizing the "right to exclude" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

stating that such a right existed. Such a compromise, detailed below, worked well enough for the early nineteenth century, when the new technologies causing this transition were emerging. However, the technological revolutions we are presently experiencing call for another approach to the right to attention and its regulation that confronts it more directly. The right to attention that already exists latent in the caselaw can provide a foundation for this reevaluation.

II. ATTENTION IN PRIVATE: RIGHTS IN LAND AND ATTENTIONAL NUISANCES

A. To the Land: Searching for the Roots of Rights

If a right to attention does exist, it must in many cases be constrained to avoid preventing the many normal activities that emit unwanted stimuli. Thus, we will seek this weak right where rights are strongest. A person's rights are likely strongest on the land that she owns or occupies,[90] where the individual's "full protection in person and in property"[91] are combined. According to Hohfeld's influential taxonomy, a thing in the world becomes property when a set of legal entitlements is attached to it that provides at least the rights of ownership, use, and disposability.[92] Key to these rights is the ability to exclude others from the land in order to preserve its enjoyment for oneself, and indeed the Supreme Court has repeatedly invoked the idea that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[93] In the context of land, the legal concept of

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[90] The castle doctrine provides a particularly potent example of how the law will even create exceptions to the typical ban of using force against others in self-help when they are on one's land. *See* Denise Paquette Boots, Jayshree Bihari & Euel Elliott, *The State of the Castle: An Overview of Recent Trends in State Castle Doctrine Legislation and Public Policy*, 34 CRIM. JUST. REV. 515, 516 (2009).

[91] Warren & Brandeis, *supra* note 8, at 193.

[92] See Wesley Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 22–23, 30 (1913).

[93] *Kaiser Aetna*, 444 U.S. at 176; *see also* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1044 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987); Cedar Point Nursery v. Hassid, 594 U.S. 7 (2021). Some legal scholars have gone farther, arguing that the right to exclude others is not just "the most essential stick[]" but actually the *sine qua non* of property. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (making that claim); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275, 277–78 (2008) (characterizing that strand in the literature as the "boundary approach" and arguing that it should be understood as the right to set the agenda for a piece of property rather than as a traditional exclusion right).

trespass replaces self-help ejection to make land more excludable.[94] One influential theory of the origins of property argues that the whole role of property is to facilitate economic exchange by clarifying ownership and thus allowing the internalization of externalities through trade.[95] As discussed,[96] and as anyone fighting distraction knows, attention is not readily excludable simply at the will of the attender. Instead, people can easily seize the attention of others simply be creating a stimulus that attracts it. As such, one key role that the law could play in the domain of attention would be to ensure that people could exclude the unwanted stimuli of others from their property to ensure that they could direct their attention as they chose within that property.

But what framework of property law would be best suited for application to the right to attention? Trespass functions to exclude people from one's property, but others do not have to come near a person to grab her attention, and indeed many of the most potent distractions often originate from just far enough away that the distracted person has no way to stop the distraction. Private nuisance, however, deals with indirect invasions of one's property by other people which can come from quite far away and cause a variety of different kinds of harms.[97] This concept provides the kind of flexible but well-developed framework that a right to attention might have developed in as social demands for such a right grew more significant. As Bernard Rudden wrote regarding the adaptability of property law, "the concepts originally devised for real property have been detached from their original object, only to survive and flourish as a means of handling abstract value."[98] If people did believe that a right to attention might exist, then they might seek recourse in the courts by invoking existing legal concepts, turning their disputes over attention into lawsuits in which their feelings that a valuable resource was being taken from them could be expressed in concrete legal form.[99] If this is so, and if these disagreements have occurred consistently over time, we should expect that the

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[94] Merrill, *supra* note 93, at 747.

[95] *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMER. ECON. REV. 347, 347–48 (1967).

[96] *See supra* Section I.A.

[97] Brenner, *supra* note 14, at 409.

[98] Bernard Rudden, *Things as Things and Things as Wealth*, 14 OXFORD J. L. STUD. 81, 83 (1994).

[99] Property entitlements can consist of various elements of the proverbial "bundle of sticks" that makes up property but are generally structured in terms of the legal relations that one party has with another, governed by the state. *See* Hohfeld, *supra* note 92, at 32 (laying out a set of fundamental legal relations including rights, which are the ability to get the government to enforce some control against others).

doctrine would have to deal with the idea of a right to attention, even if only to reject such claims.[100]

B. Seeking Attention in Private Nuisance

To find the right to attention in land law, we will look for places in the caselaw where attention might be implicated by the facts and where the traditional doctrinal justifications leave a gap that can only be explained by recourse to the existence of a right to attention. If attention is something that people dispute in the context of land, one of the most common forms of these disputes would likely be when one person continually created stimuli on their property or elsewhere that distracted their neighbor on their neighbor's own land. Anyone who has tried to work or read while their neighbor is doing renovations knows how prevalent this issue can be. Such a situation would fit naturally into the framework of private nuisance, but only if the conduct at issue rises to the point where a court will intervene.

The doctrine of private nuisance empowers a landowner or occupier to invoke the aid of a court to stop others from doing things outside the owner or occupier's property that prevent them from enjoying their property.[101] The set of things that can give rise to an actionable nuisance is not unlimited. As the Supreme Court of New Hampshire characteristically wrote, a nuisance must be an "appreciable and tangible interference with a property interest"[102] which exceeds "the customary interferences a land user suffers in an organized society."[103] Nuisances are contextual, and what constitutes a nuisance depends on the set of acceptable social practices in which the activity is taking place.[104] As the face of society and the complex of activities that are acceptable in a given situation change, what constitutes a nuisance will change too. This flexibility

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[100] As Justice Holmes famously wrote, "the life of the law… has been experience," OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881), and the experience of many cases concerning the same kind of dispute should provide some sense of how they should be resolved. While it might be the case that there is no record of this kind of dispute in the law because people decide not to bring such claims to court, that seems extremely unlikely given the variety of things over which people are inclined to sue.

[101] One legal encyclopedia defines it as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." 58 AM. JUR. 2D *Nuisances* § 32.

[102] Robie v. Lillis, 112 N.H. 492, 496 (1972).

[103] *Id.* at 495.

[104] "[A]n interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm." Carter v. Monsanto Co., 212 W. Va. 732, 737 (2002) (quoting Syllabus Point 2, Hendricks v. Stalnaker, 181 W. Va. 31 (1989)).

allows nuisance to reflect the changing mores and norms of the society in which a set of rights exists. While other legal frameworks like trespass might also be implicated in attention cases, nuisance provides a clearer picture of a conflict over attention because it involves a more complete weighing of interests wherein the rights of members of the community will be more clearly established. If a nuisance to attention is held to merit judicial action, that would indicate that the court had found the harm to attention rose to the level of a "appreciable and tangible interference with a property interest"[105] or met some other relatively high bar. And if the case were decided on facts that excluded other nontrespassory interferences that might otherwise have accompanied the distraction or harm to attention from being the reason that the court held the way that it did, then it must be a right to attention that underlay the judge's decision, sitting somewhere in the shadows of the case.

In general, the caselaw of private nuisance distinguishes among three levels of nuisance that might support a ruling in favor of the plaintiff. These levels escalate in seriousness and the third level, on which I will focus, is not always recognized by courts. First, a nuisance might cause actual physical damage to the property or person of the plaintiff. For example, the vibrations generated by the operations of a stone quarry near a house might crack the foundations of that house,[106] or toxic wastewater leaking off one property into another might cause someone who lives on the second property to fall ill from drinking it.[107] Second, a nuisance might cause physical discomfort to a plaintiff. An extremely bad smell might cause an uncomfortable feeling of disgust or nausea without causing actual illness.[108] Finally, a nuisance might distract the plaintiff from being able to use their property in the way that they want to. A loud noise might distract people from reading or writing or prevent them from resting.[109] This third category, I will argue, includes direct costs to attention and is where

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[105] To quote one case from the Supreme Court of New Hampshire. Robie v. Lillis, 112 N.H. 492, 496 (1972).

[106] *See, e.g.*, Benton v. Kernan, 13 A.2d 825 (N.J. Ch. 1940), *decree modified*, 21 A.2d 755 (N.J. 1941) (summarizing various cases finding that vibrations could constitute nuisances and concluding that they did so in the case at issue).

[107] *See, e.g.*, Kane v. Cameron Int'l Corp., 331 S.W.3d 145 (Tex. App. 2011) (concluding that such a harm could constitute a private nuisance but that there was insufficient evidence for it to do so in that case).

[108] *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178 (1972) (though ultimately deciding that the nuisance here was public, not private).

[109] *See, e.g.*, Virginia Coll., LLC v. SSF Savannah Prop., LLC, 93 F. Supp. 3d 1370, 1377–78 (S.D. Ga. 2015) (concluding that a go-kart racetrack located directly above a vocational college constituted a private nuisance because it was sufficiently distracting to the students).

any right to attention would appear in the law. There is some debate in the caselaw as to whether the third category actually gives rise to a claim of nuisance.[110] However, there are many victorious claimants in cases that do not involve physical harm that illustrate the existence of this third category,[111] and several key secondary sources suggest that private nuisance has been long understood to support such claims.[112] It is this last category of cases that will

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[110] Strict doctrinal interpretations hold that a nuisance must result from physical harm or damage to person or property. The Arkansas Supreme Court, for example, wrote that "[t]he general rule [of nuisance] is that, in order to constitute a nuisance, the intrusion must result in physical harm," *Aviation Cadet Museum, Inc. v. Hammer*, 283 S.W.3d 198, 203 (Ark. 2008), though it clarified that "physical harm does not necessarily mean direct physical damage," *Id.* at n.3, and approvingly cited one case, *Osborne v. Power*, 890 S.W.2d 570 (Ark. 1994), establishing the proposition that noises and smells that do not cause such harm can constitute a nuisance, and three others illustrating that proposition by way of findings of nuisance for barking dogs, *Higgs v. Anderson*, 685 S.W.2d 521 (Ark. Ct. App. 1985), for a smelly landfill, *Se. Arkansas Landfill, Inc. v. State*, 858 S.W.2d 665 (Ark. 1993), and for loud noises from motorcycle racing, *Baker v. Odom*, 529 S.W.2d 138 (Ark. 1975). *Hammer*, 283 S.W.3d at 203 n.3.

[111] *See infra* Section II.C.

[112] For example, American Jurisprudence 2d defines a nuisance as "anything that annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable, and this extends to everything that endangers life or health, gives offense to the senses, violates the laws of decency, or obstructs the reasonable and comfortable use of property," observing further that "[c]ourts will broadly construe an occupant's right to the use and enjoyment of land, and in the nuisance context, the phrase 'use and enjoyment of land' contemplates the pleasure and comfort that one normally derives from the occupancy of land and the freedom from annoyance." 58 AM. JUR. 2D *Nuisances* § 1. The Corpus Juris Secundum gives a similarly broad basic definition of nuisance, defining it as "includ[ing] everything that endangers life or health, or obstructs the reasonable and comfortable use of property." 66 C.J.S. *Nuisances* § 1. The American Law Reports often directly or implicitly use the same three-prong approach elaborated above, as for example in the ALR for "Dairy, creamery, or milk distributing plant, as nuisance," which notes that for noise to be recognized as a nuisance, it must "injure the health of persons, cause actual physical discomfort to persons of ordinary sensibilities, or unreasonably interfere with the comfortable enjoyment of private property..." H.D. Warren, Annotation, *Dairy, Creamery, or Milk Distributing Plant, as Nuisance*, 92 A.L.R.2d 974 at § 4 (1963). These three categories of injury, discomfort, and enjoyment resemble the damage, discomfort, distraction framework established in this essay. *See also* Tracy A. Bateman, Annotation, *Nuisance as Entitling Owner or Occupant of Real Estate to Recover Damages*, 25 A.L.R.5th 568 at § 2[a] (1994) ("The prevailing view seems to be that an owner or occupant of real estate can recover in nuisance actions for sickness or injury to his health as an element of damages in addition to, or separate from, damages recoverable in respect of an injury to property or its use. Likewise, a plaintiff may recover for annoyance, discomfort, and inconvenience."); Warren and Brandeis wrote that nuisance law developed in order to protect "the value of human sensations." Warren & Brandeis, *supra* note 8 at 194 n. 2. Blackstone defined nuisance as "any thing that worketh hurt, inconvenience, or damage" and wrote that things that damage property or prevent people from "enjoy[ing] it so commodiously as [they] ought" constitute nuisances. 3 WILLIAM BLACKSTONE, COMMENTARIES *217. Blackstone's old English law demonstrates a much more expansive understanding of

best illustrate the thesis of this Article because it is there that a dispute might appear that can only be understood in terms of a right to attention. If a harm to attention is combined with actual physical damage or harm to a person from illness caused by a nuisance, then courts will be able to resolve the dispute simply on the level of the more serious forms of nuisance without recourse to the concept of attention. But if those more serious harms are absent, then the court will have to focus on the question of attention itself.

However, one difficulty with neatly categorizing the relevant cases into the framework of nuisance harms laid out above is that there is a substantial incentive for plaintiffs to inflate the severity of their suffering, as more harm means more damages. Judges who rule in their favor are probably also incentivized to engage in such harm inflation to strengthen their decision because there is more consensus that physical harms are sufficient to ground nuisance claims than there is that attentional claims are. For example, in one case in Nebraska, the plaintiffs claimed that the noise from remote-controlled model airplanes, "caused them to become anxious or frustrated, thereby causing stomach problems, headaches, and/or loss of sleep," even though the defendant and four neighbors testified that they were unbothered by the noise.[113] The alleged stomach problems and headaches seem like an attempt to harm inflate over the category line from distraction into discomfort or physical harm in order to win sympathy and fit strict doctrinal interpretations of private nuisance. Another amusing example of this kind of harm inflation comes from the case *Gilbough v. West Side Amusement Co.*, concerning a baseball game, in which many of the plaintiffs directly recited the relevant legal standards for "physical" interference in their affidavits complaining of loud noise. Mr. Gilbough: "[the noise was so] great as to disturb the *enjoyment* of my home by myself and the members of my family, and also to cause a *physical annoyance*." Mr. Vredenburgh: "[the noise] annoyed myself and family in the *enjoyment* and comfort of our home, and in fact became a *physical annoyance*." Mrs.

nuisance than our own. He wrote that the setting up of a market or fair within seven miles of an existing such market or fair, if they are on the same day, is prima facie a nuisance, as is the erection of a new ferry across a river near an old one. On the other hand, the establishment of mills (so long as they draw from a different source of water), schools, and tradesmen near existing such operations does not constitute a nuisance as these will inure to the benefit of the public. *Id.* at *220. We see then that this early conception of nuisance expands to include the rights of people to the use of their property read very broadly.

[113] Kaiser v. W. R/C Flyers, Inc., 477 N.W.2d 557, 561 (Neb. 1991).

Humphreys: "[we were] so disturbed in the *enjoyment* of the comfort of my home as to make the nuisance become almost a *physical annoyance*."[114]

An interesting and common tactic in harm inflation that blurs the lines among the categories is lost sleep, which is a commonly claimed harm of nuisance.[115] To be sure, poor sleep can have serious negative health consequences. Sustained sleep deprivation has been linked with heart disease, stroke, and depression, among other things.[116] But it is also a useful harm inflation tactic for a plaintiff because it is hard for the defendant to contest—how can the defendant know how much the plaintiff has or has not slept in their home, especially before the invention of sleep tracking apps? More broadly, however, loss of sleep might be an example of a merely "annoying," and therefore attentional, infringement on property that does give rise to health problems or discomfort. Anyone who has found themselves lying awake late into the night because of the sound of dripping water or occasional bursts of conversation from a party next door can attest to how even a little noise can make chasing sleep impossible because of how it draws the attention.[117] In general, then, we should assume that there are more nuisance cases actually about attention than is obvious at first glance.

C. Attentional Nuisances

What kinds of situations might give rise to claims in private nuisance in which the right to attention is the main issue that is under contention? The caselaw of property, especially in the early twentieth century, contains a menagerie of nuisance claims that have been brought under the flag of distraction or harm to attention, many of them related to the innovations in electrification, lighting, and sound amplification and the social transformations that those innovations created discussed above.[118] Although these "attentional

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[114] Gilbough v. West Side Amusement Co., 53 A. 289, 291 (N.J. Ch. 1902) (emphasis added).

[115] *See, e.g.*, *Kaiser*, 477 N.W.2d at 561.

[116] Eric J. Olson, *How Many Hours of Sleep Are Enough for Good Health?*, MAYO CLINIC (Feb. 21, 2023), https://perma.cc/R5XZ-YSXF.

[117] Courts mostly confront the problem of this kind of claim through the application of objective standards of harm, determining whether a reasonable person would suffer from whatever tort is alleged to be occurring against the victim. That has not stopped claimants from trying. Professor Maureen Brady, for example, discusses "a strange case where light waves emanating off a neighbor's middle finger (that the plaintiff's eyes received) constituted the possible trespass" as it offended the plaintiff. Brady, *supra* note 71, at 1161 n. 120 (discussing Wilson v. Parent, 365 P.2d 72, 75 (1961)).

[118] *See supra* Section I.C.

nuisances" vary in seriousness and in how they are received by courts over time, there is a consistent thread of acknowledgement by courts that harms to attention are actionable that begins to emerge with force in the early twentieth century.

One early case that recognized that harms to the right to attention could merit legal remedy is *Hurlbut v. McKone*, an 1887 case from the Supreme Court of Errors of Connecticut in which the defendants owned a noisy steam-powered factory near the plaintiff's house.[119] Among the harms that the judge enumerated that were caused by the noise of the steam engine was that it made it "impossible for the plaintiff or the members of his family to read, write, or carry on conversation without great difficulty."[120] While the inability to converse might have been caused by the engine's noise simply overwhelming the noise of the voices in conversation, it seems clear that the other tasks must have been interrupted by the inability to focus. The opinion in *Hurlbut* also lists a variety of health problems apparently caused by the loud noise, including an old woman's death,[121] though these may be examples of harm inflation as discussed above.[122]

In 1925, the Court of Chancery of New Jersey directly held that distraction and disruption of work were sufficient to constitute a nuisance absent death or physical injury. Writing of another nuisance caused by the vibration of engines, the Court found that "[t]he proof is unmistakable that the [plaintiffs] are seriously hampered in their work, varying in degree according to their occupation; all by distraction, some physically as well. Study of problems and observations of tests are carried on with increased difficulty."[123] This disruption of the plaintiffs' ability to work was sufficient to ground an action in private nuisance. The economic activity that the Court was protecting here, the "[s]tudy of problems and observations of tests" is a clear example of the kind of attention-related knowledge work that became more valuable during the beginning of the twentieth century. Many of the cases brought during this period involved physical harm along with attentional conflict.[124] However, over

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[119] Hurlbut v. McKone, 10 A. 164, 166–67 (Conn. 1887).

[120] *Id.* at 165.

[121] *Id.*

[122] *See supra* Section II.B.

[123] Wallace & Tiernan Co. v. U.S. Cutlery Co., 128 A. 872, 873 (N.J. Ch.1925), *aff'd*, 98 N.J. Eq. 699, 130 A. 920 (1925).

[124] *See, e.g.*, Weinberg v. Rodgers & Hagerty, Inc., 165 N.Y.S. 483 (N.Y. Sup. Ct. 1917), *aff'd*, 165 N.Y.S. 1118 (N.Y. App. Div. 1917) (citing noxious steam and vapors traveling onto the plaintiff's property along with noises and vibrations).

time, many of these physical harms were eliminated through health and environmental regulations. More generally, many of the conflicts between factories and residences were resolved by zoning ordinances.[125]

The landmark English case *Sturges v. Bridgman*,[126] which established that "reasonable use" in nuisance depends on the character of the locality and that "coming to the nuisance" is not a defense, also turns on an attentional nuisance. In that case, the plaintiff, a doctor, moved in next door to the defendant, a confectioner who used industrial mortars and pestles to create his products.[127] The plaintiff built a small shed in which he wanted to practice his profession, but he was disrupted in doing so by the noise of the mortars and pestles.[128] The Court found that the operations of the confectioner did cause a nuisance despite the fact that the nuisance only began after the plaintiff erected his shed.[129] In his opinion, Lord Justice Thesiger was clear that there was no physical harm being done to the plaintiff's property, for example by vibrations from the mortars and pestles, which had been found to be negligible.[130] Instead, it was the plaintiff's interruption of his ability to engage in the work of doctoring, which requires attention to the patient and her needs, that was being harmed.[131]

The spread of sound amplification technologies is another domain in which attentional nuisances are evident. In theory, these technologies allow sounds made by human voices, instruments, and the like to cause physical harm, as anyone who has attended certain types of concerts knows. But usually, noise levels are set to more enjoyable (and non-harmful) volumes. As such, most cases involving amplifiers would also be excluded from the two serious levels of nuisance, which involve physical injury, and would instead operate at the level of distraction or harms to attention. Widespread electrical amplification of sounds (using what we would now call speakers) only became possible in the early twentieth century, and though there was some use of amplification in the

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[125] Early zoning ordinances attempted to solve the imposition of "nuisance-like costs on the quiet enjoyment of land by residential users." ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS CASES AND MATERIALS 59 (4th ed., 2013). These nuisance-like costs likely included the kind of attentional nuisances discussed in this paper.

[126] Sturges v. Bridgman (1879) 11 Ch D 852.

[127] *Id.* at 852–53.

[128] *Id.* at 866.

[129] *Id*. at 862–63.

[130] *Id.* at 863.

[131] *Id.* at 862.

1920s and 1930s, only with the invention of the transistor in 1947 did this technology become truly widespread.[132]

Attentional nuisance cases related to the use of amplification began appearing by the 1930s. In one such case, *Meadowbrook Swimming Club v. Albert*,[133] the Court of Appeals of Maryland found that "the blare of the brasses, the beating of the drums [of the defendant's jazz band] is, so penetrating and loud that it cannot be seriously questioned that witnesses, who are doubtless normally constituted, and of exceptional integrity and intelligence, who live on the sides of the hills and the plateau [around the club], are unable to sleep, to study, or otherwise lead normal lives in their own homes."[134] The Court's reference to studying provides a clear link to attention. Unlike sleeping, the deprivation of which may harm health, or conversation, which can be rendered impossible by loud noises because they drown out the other person's voice, studying is fundamentally about the ability of a person alone to direct their attention toward the materials they intend to focus on.

In *Corbi v. Hendrickson*,[135] a later case from Maryland that illustrates yet another social revolution, plaintiffs complained of the "'wailing', 'howling', 'repetitious', 'a penetrating boom', 'a thump', 'a kind of BOOM, BOOM, BOOM', or 'brr-ump, brr-ump, brr-ump'" of rock music on the basis that it rendered them "unable to sleep, concentrate on work or study, or practice the piano—perhaps Beethoven," in the words of Judge Digges.[136] Though the Judge is here clearly writing with tongue slightly in cheek, the litany of harms that the plaintiffs deemed worthy of legal remedy through an injunction is mainly a list of activities that require "concentrat[ion]." The plaintiffs understood the ability to focus to be a core ingredient of many of their activities, and they claimed that disruption by rock music from a nearby nightclub was enough to constitute a severe harm to them. And the court agreed, upholding an injunction against the playing of rock music in the nightclub because it disturbed the plaintiffs in

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[132] Andy Coules, *The History of Live Sound – Part 1*, HARMAN (2021), https://perma.cc/5HW3-NPAW.

[133] 197 A. 146 (Md. App. Ct. 1938).

[134] *Id.* at 147.

[135] 302 A.2d 194 (Md. App. Ct. 1973).

[136] *Id.* at 196. This case is particularly interesting because it involves both the electrical amplification devices used to produce the noise that is the subject of the nuisance complaint and also an electrical recorder that was used quantify the amount of noise created by the nightclub, the results of which were entered into evidence, which the defendants argued was not acceptable.

their quiet enjoyment of their property, including in their ability to focus on practicing their Beethoven.[137]

Similar cases involving attentional nuisances appeared with the advent of drive-in movie theaters, which initially broadcasted the noise of the movies directly into the air, before later switching to a model in which each car was given its own speaker, probably to reduce the risk of nuisance lawsuits.[138] In *Anderson v. Guerrein Sky-Way Amusement Co.*, a typical case, a movie theater was enjoined from broadcasting the "music, singing, talking, shouting, shrieking, gun play, raucous laughter, 'mob scenes', amplified airplane noises and other types of sounds" that emanated from its grounds because they disturbed the rest of neighbors and "distract[ed] them from reading and working," among other things.[139]

A classic set of cases involving attentional nuisances relates to the playing of baseball games and other outdoor activities.[140] Baseball was invented and popularized in the nineteenth century and became one of the main popular leisure activities of American society by the beginning of the twentieth century.[141] The game is a useful context for analyzing attentional nuisances because, especially before the advent of loudspeakers, the noise generated by a baseball game could only be the noise generated by humans, and if that noise were to become physically intolerable for humans, then the people making it would stop. Electrification allowed for baseball games to be played at night beneath bright floodlights, but these lights, which must shine directly on the players and fans so that they can see the game, similarly cannot be too hot or bright or they would be turned off, making it unlikely that they could cause physical damage far away from the place where the game is being played.[142] As such, it is difficult for baseball games alone (or even with amplification) to create the kinds of physical harms to person or property necessary for the more serious degrees of private nuisance, meaning that they must be at least in part

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[137] *Id.* at 200.

[138] 29 A.2d 682 (Pa. 1943).

[139] *Id.* at 684.

[140] *See, e.g.*, Alexander v. Tebeau, 116 S.W. 356 (Ky. Ct. App. 1909) (holding that the gathering of noisy and boisterous persons constituted a nuisance to the neighbors); Warren Co. v. Dickson, 195 S.E. 568 (Ga. 1938) (holding same and finding that noisy night games could be enjoined).

[141] *See generally* BENJAMIN G. RADER, BASEBALL: A HISTORY OF AMERICA'S GAME (2008).

[142] See Brady, *supra* note 71, at 1150–56 for a discussion of light nuisances and how they have been treated historically.

attentional.[143] In *Hansen v. Independent School Dist. No. 1 in Nez Perce County*, the Supreme Court of Idaho found that the operations of a baseball field at night were a private nuisance in part because of the bright lights and the noise that was created by fans who were attending the game.[144] This light and noise, along with some other externalities apparently imposed on those who lived nearby by the operations of the field, was held to "deprive[] these plaintiffs of the quiet and peaceable enjoyment of their property," among other things depriving them of the ability to easily sleep when the night games were being played.[145] Neither illness nor bodily harm to the plaintiffs is mentioned by the judges as a reason for their decision that loud noise can be a kind of nuisance in this case, and the idea of "quiet and peaceable enjoyment" quoted above suggests that the judges saw themselves as being interested in protecting the ability of the occupiers of land to use that land as they saw fit, including not being distracted, rather than simply preventing harm.

Similarly, in *Gilbough*, groups of "young, hilarious, and enthusiastic" persons gathered every Sunday to watch games at a set of baseball fields, and, "when excited by witnessing the baseball games, indulged in loud shouts and stamping on the steps of the grand stand, thereby producing a noice [*sic*] so loud that it was heard at the complainants' houses."[146] These complainants all attested that they were disturbed by the noise so as to be unable to fully enjoy their property, complaining further that the noise contributed to ill health.[147] The judge noted, "[t]hat the subjection of a human being to a continued hearing of loud noises tends to shorten life, I think, is beyond all doubt,"[148] and enjoined the games. It seems unlikely that the noise of people cheering at a baseball game more than one thousand feet away from the plaintiffs' dwellings (as the facts disclose was the case here) could actually shorten the lives of the plaintiffs, despite the judge's decision. This case presents a useful example of the theme of harm inflation discussed above. The judge might have felt that the baseball game was creating some kind of actionable nuisance but was uncomfortable directly addressing the plaintiffs' more reasonable claim that they might be distracted in their Sunday rest by the noise of the games. In these and similar baseball cases, the noisy cause of the alleged private nuisance is (despite the

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[143] See *supra* Section II.B. for a discussion of the three levels of private nuisance.
[144] Hansen v. Indep. Sch. Dist. No. 1 in Nez Perce Cnty., 98 P.2d 959 (Idaho 1939).
[145] *Id*. at 961 (quoting Ralph v. Orleans Par. Sch. Bd, 104 So. 490, 490 (La. 1925).
[146] Gilbough v. W. Side Amusement Co., 53 A. 289, 290 (N.J. Ch. 1902).
[147] *Id.* at 291.
[148] *Id.* at 289.

Gilbough judge's protestations) far from causing physical harm to the plaintiffs or their property, but a claim in nuisance is still upheld. As such, the judges must be deciding these cases on other bases than the traditional versions of nuisance that rely on the presence of physical harm.

Later judges were less sympathetic to plaintiffs complaining about baseball games. As one Justice of the Supreme Court of Montana wrote in the 1968 case *Kasala v. Kalispell Pee Wee Baseball League*[149] dismissing a similar baseball-related claim of nuisance,

> "in the spirit of 'Casey at the Bat', Oh, somewhere in this favored land dark clouds may hide the sun. And somewhere bands no longer play and children have no fun. And somewhere over blighted lives there hangs a heavy pall. But in Kalispell, hearts are happy now, for the Pee Wee's can play ball."[150]

Nonetheless, Justice Harrison acknowledged that there was an important social balancing required between the Pee Wees and the enjoyment interests of the neighbors, and that although the kids' lights and noises did not amount to an overwhelming interference in this case, a worse interference could justify intervention.[151]

These baseball cases show that private nuisance law was understood in the twentieth century to encompass harms that did not reach the level of physical damage to property or person that was at the core of the earlier doctrine of private nuisance.[152] Instead, indirect invasions of property from sources that could not have caused such harms were understood to be sufficient grounds to find and enjoin private nuisances in many cases. This shift responded to changing social conditions in which masses of people could spend time enjoying leisure activities like baseball and could use new technologies like electric lighting to do so at night and in large numbers. With these increased human capabilities came increased externalities of a variety of different forms, and it is clear that the law was beginning to recognize that nuisance could go beyond physical harms.

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[149] 439 P.2d 65 (Mont. 1968).

[150] *Id.* at 69. *See also* Casteel v. Town of Afton, 287 N.W. 245, 245–47 (Iowa 1939) (holding that baseball games held at night should not be enjoined given the limited harms that their playing seemed to cause).

[151] *Kasala*, 439 P.2d at 68–69.

[152] Brenner, *supra* note 14, at 409.

Some of these sports cases also involved the use of sound amplification systems and their regulation. For example, in a softball case from 1951, the Supreme Court of Kansas upheld an injunction against the use of public address systems by a set of recreational fields after 10:00 P.M., though, in contrast to the baseball cases discussed above, the unaided human noise produced by the use of the fields was apparently not a nuisance even after that time.[153] The Court did not spend much time on the question of why the loudspeaker might constitute an enjoinable nuisance, writing only that "[w]e can very readily see how plaintiffs could be annoyed by [the public address system] continuing through a ball game several nights a week."[154] The theme of regulations of sound amplification technology used for communications is one that we will return to in more detail below with regard to the First Amendment, but it is interesting to note that this regulation of the use received so little discussion. It was apparently so obvious to the judges that sufficiently loud noises could constitute private nuisances that they did not feel they had to explain why that is so, despite the common understanding in the doctrine that physical harms are necessary for private nuisances.

Taken together, these cases begin to show the contours of a true right to attention emerging in the caselaw of private nuisance. Across the twentieth century (and even a bit earlier), the set of harms that private nuisance could cognize expanded from the physical damage of the Industrial Revolution era to a broader variety of interferences in the use of land by landowners and occupiers. Many of the activities that judges deemed worth protecting are ones in which attention plays a key role, and the interferences that these judges were preventing were interferences to attention. Reading and studying, mentioned in several of the examples just discussed,[155] were not interfered with physically. There is no mention of the books being obscured or damaged by the defendants in these cases. Instead, it is the plaintiffs' inability to attend to what they are reading that must have been the obstacle to their effectively doing so. Libraries have strict rules about noise levels for this reason. As attention began to play a greater role in economic and social activities like clerical work and reading, and as new technologies enabled new ways that others could interfere with it, the law responded. It expanded the framework of private nuisance to recognize, implicitly and sometimes explicitly, the idea that the ability to concentrate on

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[153] Neiman v. Common Sch. Dist. No. 95, Butler Cnty., 232 P.2d 422, 430 (Kan. 1951).
[154] *Id.* at 429.
[155] *See* Hurlbut v. McKone, 10 A. 164, 166–67 (Conn. 1887).

what one chose, to direct one's attention how one wants to, is a right protected by the law. The right to attention latent in private nuisance law is a relatively narrow one, limited to the confines of one's property and only preventing unreasonable interferences in attention by others. But as the above cases show, judges were relatively restrained in their efforts to carve out a right to attention, careful that in doing so they did not fully prevent others from pursuing their own ends in the world. In contrast, some legislators in the twentieth century went further, seeking to protect attention in public spaces in ways that occasionally conflicted with core constitutional guarantees meant to enable the loud and messy speech at the core of civic life.[156]

III. ATTENTION IN PUBLIC: SPEECH REGULATION AND DEMANDS UPON OTHERS

A. Public Attention Regulations in the Early Twentieth Century

The technological and social transitions discussed above,[157] which had such ramifications for the development of a right to attention in the context of private nuisance, also changed the face of public life. The rise of mass advertising, the ability to broadcast light and sound with greater ease, and the public's increased ability to engage in civic life during their leisure time created conditions in which people's attention was bombarded with stimuli in many public spaces. The public square has always been understood as a place where people go to interact with others. As Justice Roberts wrote in *Hague v. Committee for Industrial Organization*,[158] public spaces, "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[159] But during the early twentieth century, increasing demands were placed on the attention of members of the public when they went into those spaces.

In response, communities around the United States began passing regulations that sought to control certain kinds of public conduct that might

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[156] *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

[157] *See supra* Section I.C.

[158] Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939) (Roberts, J., concurring).

[159] *Id.* at 515.

affect that attention.[160] Noise, which is often the target of regulation even when it cannot rise to the level of causing physical harm, usefully demonstrates this trend.[161] New York City, one of the loudest places in the world in that era (and perhaps still today), provides an instructive set of examples of this kind of community activism and its successes. In 1906, Julia Barnett Rice, a wealthy New Yorker, founded the Society for the Suppression of Unnecessary Noise, which, she wrote in an article in *The New York Times*, counted among its members and supporters various notables including hospital superintendents, law professors, an archbishop, and Mark Twain.[162] The next year, the U.S. Congress passed a law quieting the whistles of steamboats in federal waters in part based on Rice's activism, and the Society was instrumental in establishing quiet zones around schools and hospitals.[163] In the next column over of that edition of the *Times*, Dr. Thomas Darlington, Commissioner of Health of New York City, wrote that people complained daily to the Board of Health about a litany of noises[164] and discussed the city noise ordinances that New York has put into place to regulate these sounds.[165] In her article, Rice discusses a strict new noise regulation that had just come into force in Newark.[166] The mention of the schoolhouse and place of worship in Darlington's list and of the

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[160] A set of court cases upholding various ordinances regulating sound devices and advertising around the country cited by the Supreme Court in Kovacs v. Cooper, 336 U.S. 77, 81 (1949) illustrates the spread of these regulations and the extent to which they were upheld: "Ordinances regulating or prohibiting sound devices were upheld in People v. Phillips, 147 Misc. 11, 263 N.Y.S. 158 (1993); Maupin v. City of Louisville, 284 Ky. 195, 144 (1940); Hamilton v. City of Montrose, 109 Colo. 228, 124 P.2d 757 (1942). Injunctions have also dealt with nuisances from the playing of mechanical music for advertising purposes. Weber v. Mann, 42 S.W.2d 492 (Tex. App. 1931); Stodder v. Rosen Talking Machine Co., 241 Mass. 245, 135 N.E. 251, 22 A.L.R. 1197 (1922); *Id.*, 247 Mass. 60, 141 N.E. 569 (1923)."

[161] *See supra* Section II.C.

[162] Isaac L. Rice, *The Anti-Noise Society*, N.Y. TIMES (Dec. 23, 1906), https://perma.cc/JEV4-JWBA.

[163] Peter Andrey Smith, *The Society for the Suppression of Unnecessary Noise*, NEW YORKER (Jan. 11, 2013), https://perma.cc/C43R-54A6.

[164] Including those made by "parrots, pianos, amusement halls, machines of dynamos …. howling dogs, cars with so-called flat wheels pounding the tracks in the stillness of the night, the blowing of whistles …. and hucksters' voices." Dr. Thomas Darlington, *Noise and the Law*, N.Y. TIMES (Dec. 23, 1906), https://perma.cc/CGC3-JABN.

[165] *Id.* Darlington's list is distinguished by its specificity ("[n]o person is permitted to use any hand-organ in any of the streets or public places in the city before 7 A.M. or on Sunday or within 500 feet of a schoolhouse or place of worship during school hours or hours of worship, or …") and by the extent to which the framework of noise regulation is clearly a work in progress—he mentions a new ordinance that had just been passed. Notably, Darlington also recommended suit in private nuisance as another recourse that people could make to try to deal with noises where the public ordinances did not cover the offending source.

[166] Rice, *supra* note 162.

regulation of phonographs in open windows in Rice's discussion suggest that at least part of what these ordinances aimed to accomplish was the regulation of interferences with attention, not actually harms to health. It is unlikely that a hand-organ played outside a school would physically hurt anyone therein. Notably, they also focus not on private spaces, but on public streets and gathering places, pointing to a growing view that these interferences should be regulated beyond just how they affected people at home.

By the 1930s, the campaign against urban noise in New York had expanded beyond private activism into the policy of the city government, and officials sought to provide a scientific basis for broad noise ordinances that went beyond the patchwork character of the earlier regulatory regime. These regulators, like all of the anti-noise activists discussed so far, often claimed that they were acting to prevent the ill effects of noise upon health,[167] but the targets of their regulation were often not just the extremely loud sounds created by construction or industry but also noises from people engaging in recreation or commercial activities. In 1934, for example[168] Mayor Fiorello La Guardia drew inspiration from a public study in amending the city's code to restrict the use in public places of "radios, phonographs, and other sound devices" without the permission of the police commissioner.[169] A few years later, a ban on the use of loudspeakers in public places without permission was added to the growing set of noise ordinances.[170] This was a move into direct, means-based regulation of communication that demonstrates how these regulations could conflict with constitutional rights. These sources of noise could not genuinely have been believed to cause serious physical harm, and the regulation of them in public spaces like parks, which people could simply leave if they felt upset, shows that the opposition to noise had extended far beyond protecting people in their homes, where they could not escape incoming stimuli. Instead, these distracting or annoying noise sources like phonographs prevented people from engaging in desired public activities because others were interfering with their

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[167] *See, e.g.*, *La Guardia Backs Anti-Noise Drive*, N.Y. TIMES (May 17, 1935), https://perma.cc/8A25-XKXX (quoting Mayor La Guardia as saying that many noises have been "ascertained by physicians" to "physically injure thousands of people").

[168] *See* NOISE ABATEMENT COMMISSION, CITY NOISE; THE REPORT OF THE COMMISSION APPOINTED BY DR. SHIRLEY W. WYNNE, COMMISSIONER OF HEALTH, TO STUDY NOISE IN NEW YORK CITY AND TO DEVELOP MEANS OF ABATING IT (Edward F. Brown et al. eds., 1930).

[169] Lilian Radovac, *The "War on Noise": Sound and Space in La Guardia's New York*, 63 AM. Q. 733, 737 (2011) (quoting BLANSHARD AND COOPER, LAWS AND ORDINANCES). For the text of this amendment, see LXII NEW YORK CITY RECORD 8297, 8299 (Dec. 13, 1934).

[170] Radovac, *supra* note 169, at 741.

ability to focus on those activities. To be robbed of one's attention is no small matter and, especially if such impositions are regular, can disrupt a person's life. But, in seeking to regulate stimuli that might interfere with the right to attention in public spaces, these new noise regulations being introduced in New York and around the country began to run up against other key rights.

B. Regulating Stimuli and Regulating Content: Free Speech and Noise Regulations

Perhaps the clearest example of the conflict between the growing set of protections accorded to the right to attention in the early twentieth century and other core rights is its conflict with the right of freedom of speech. As various legal scholars have argued, the Free Speech Clause of the First Amendment only took on the prominence it now possesses in the early twentieth century, around the same time that the right to attention discussed herein was coming into being; the 1919 case *Schenck v. United States*[171] is often considered to be a key starting point of this transformation.[172] Speech entails an audience and the ability to attract an audience, which often requires making sounds. And speech in public must receive protections that sometimes impinge upon the preferences of others who would prefer not to have to hear that speech.[173] Many early free speech cases involved efforts to attract attention from people who may not have wanted to give it, through direct mailings, the publishing of leaflets, and loud public demonstrations.[174] La Guardia's loudspeaker regulation quickly ran into conflict with speech rights. In 1937, striking employees of the *Brooklyn Daily Eagle* were convicted for violating a noise ordinance because, while they had gotten a license to use a loudspeaker during their strike rallies, the license was for "talks on politics and not about

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[171] Schenck v. U.S., 249 U.S. 47 (1919).

[172] *See* THE FREE SPEECH CENTURY 1 (Geoffrey R. Stone & Lee C. Bollinger eds., 2019) (gathering a collection of preeminent law scholars to make this argument and explore its implications).

[173] As the Supreme Court noted in *Cohen v. California*, 403 U.S. 15, 21–22 (1971), the interest to be free from unwanted expression is strongest at home while in different public spaces it is weaker. Indeed, those subjected to the message on Cohen's jacket against their will could simply "avert[] their eyes" and so escape the unwanted stimulus. *Id.* at 21.

[174] *See, e.g.*, Abrams v. U.S., 250 U.S. 616, 618 (1919) (printing and distributing leaflets); Gitlow v. New York, 268 U.S. 652, 655–56 (1925) (printing and mailing a manifesto); Whitney v. California, 274 U.S. 357, 363–65 (1927) (among other things speaking at a political conference); Chaplinsky v. New Hampshire, 315 U.S. 568, 569–70 (1942) (distributing leaflets and making a speech criticizing religion and the government).

strikes."[175] Under modern First Amendment doctrine, such a decision would straightforwardly violate the First Amendment as a content-based regulation.[176] And, given the extent to which this and many of the other cases cited concerned government reactions against the speech of left-wing political organizations, it is likely that questions of viewpoint discrimination would come into play as well.[177] The social desire to regulate unwanted stimuli that impinged on the right to attention was running into the development of the key principles of free speech.

1. Distinguishing Speech and Attention in Time, Place, or Manner Doctrine

How could courts reconcile these competing interests of free speech and the right to control one's own attention as they were coming into being in the early twentieth century? The development of time, place, or manner (TPM) regulations[178] provides one potential answer that illustrates the role of the right to attention in public law. Restrictions that are aimed at where and how speech is occurring are subject to weaker constitutional scrutiny than content- and viewpoint-based regulations.[179] This distinction maps reasonably well onto a distinction between stimuli, which draw attention, and speech, which communicates content. Thus, the TPM doctrine can be understood to be distinguishing between laws that protect attention (but must leave some way for people to get through to each other) and laws that seek to control speech itself. Here, the right to attention might be playing a quiet role in changing how the doctrine works. Though it is impossible to speak without giving off some stimuli, regulations aimed at limiting those stimuli without fully suppressing them might be able to thread the needle of allowing free speech while protecting the right to attention.

The history of the TPM doctrine supports the connection to attention. The earliest mentions of the doctrine come from the 1940s and are in the context of regulating marches and doorbell solicitations, often by religious groups.

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[175] Radovac, *supra* note 169, at 746 (quoting *Hearing Is Ordered in Eagle Strike Case: Magistrate Pinto to Take Up Charges Monday - One Striker Guilty under Noise Law*, N.Y. TIMES (Nov. 4, 1937), https://perma.cc/Z6H9-ALNL).

[176] *See* Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

[177] *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992); Rosenberger v. Rector and Visitors of the Uni. of Va., 515 U.S. 819, 828–29 (1995).

[178] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (laying out the modern three-prong test).

[179] *Mosley*, 408 U.S. at 99. For the full modern test, see *Ward*, 491 U.S. at 798–99.

These actions disturbed the quiet of the residential areas in which they took place, leading to attempts by the government to restrain them. The first time TPM doctrine appears in the U.S. Reports seems to be in 1940, in *Cantwell v. Connecticut*,[180] and *Cantwell* is frequently cited in support of restrictions on speech in subsequent cases.[181] In that case, the Court wrote that, while conditioning the ability to evangelize religious views on the receipt of a license to do so from the state is unconstitutional, it was "clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon."[182] *Cantwell* again surfaces the theme of changing technology and the new interferences that it allowed, as the solicitation at issue in that case involved a portable phonograph.[183] The next year, in *Cox v. New Hampshire*,[184] the Supreme Court affirmed a decision of the Supreme Court of New Hampshire which had held that requiring a license for a parade conditioned on changes in "time, place, and manner" was constitutional.[185] Where upheld in the caselaw, TPM restrictions were generally justified as legitimate exercises of government power to protect "the peace, good order, and comfort of the community,"[186] which were apparently undermined by "annoyance[s]"[187] like noises and solicitations. Instructively, in *Martin v. City of Struthers*, the Supreme Court drew a direct analogy to the land law context that this Article has discussed.[188] The majority wrote that "[c]onstant callers… may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard,"[189] and explicitly called obnoxious solicitors "a nuisance."[190] In *Martin*, the Court held that restrictions on soliciting by Jehovah's Witnesses were too broad and thus impinged on their rights of free exercise.[191] However, Justice Jackson, writing in a concurrence in a connected case and dissenting in *Martin*, noted that the Court agreed that such a restriction could be permissible for non-

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[180] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[181] *See, e.g.*, Hamilton v. City of Montrose, 124 P.2d 757, 762 (1942) (Bock, J., dissenting); Martin v. City of Struthers, 319 U.S. 141, 143 (1943).
[182] *Cantwell*, 310 U.S. at 304.
[183] *Id*. at 300.
[184] 312 U.S. 569, 575 (1941).
[185] *Id.* at 575–76 (citing State v. Cox, 16 A.2d 508, 515 (1940)).
[186] *Martin*, 319 U.S. at 143.
[187] *Id.* at 144.
[188] *See supra* Part II.
[189] *Martin*, 319 U.S. at 144.
[190] *Id.* at 145.
[191] *Id.*

religious speech and argued that it should also be permissible for religious speech.[192] His analysis suggests that here the combination of the free exercise and free speech rights outweighed the right to attention but that speech alone might not have.

By the late 1940s, the TPM doctrine began to cohere and expand its reach from marches and door-to-door solicitation to include restrictions on amplified speech,[193] mirroring the development of the private nuisance doctrine from industrial uses to amplified noise. One case, *Kovacs v. Cooper*,[194] directly explored the relationship between public speech and attention in the context of noise. Kovacs was convicted of violating an ordinance of the city of Trenton, New Jersey, prohibiting the use of sound amplification devices making loud and raucous noises because he was playing music and making political speeches from a truck-mounted speaker.[195] He challenged the ordinance on First Amendment grounds, but the Court upheld it as a legitimate regulation of the use of public space. The Court discussed the increasing prevalence of this kind of municipal ordinance in response to the growing use of sound amplification devices, noting a variety of cases in which such ordinances were upheld,[196] on the basis that the noise made was an "interference with the business or social activities in which [townsfolk] are engaged or the quiet that they would like to enjoy,"[197] what Justice Jackson termed in concurrence the "quiet enjoyment of home and park."[198] The Court wrote that "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention,"[199] but that here the restriction on "loud and raucous" noise did not impinge on that right.[200]

Explicit in the Court's argument in *Kovacs* is the idea that there are different "phase[s] of freedom of speech"[201] and that the phase concerned in *Kovacs* was

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[192] *See Martin*, 319 U.S. at 157 (Jackson, J., dissenting); Douglas v. City of Jeannette (Pa.), 319 U.S. 157, 182 (1943) (Jackson, J., concurring).

[193] Some earlier cases discussed amplified speech. For example, Jehovah's Witnesses, who were the subject of cases like *Cantwell v. Connecticut*, 310 U.S. 296, 301 (1940), proselytized through phonographs. And *Hamilton v. City of* Montrose, 124 P.2d 757 (Colo. 1942), a case from the Supreme Court of Colorado, concerned preaching through a loud-speaker. But the rise of amplification led to a new wave of caselaw concerned with such expression.

[194] 336 U.S. 77 (1949).

[195] *Id.* at 78–79.

[196] *Id.* at 81 n.2.

[197] *Id.* at 81.

[198] *Id.* at 97 (Jackson, J., concurring).

[199] *Id.* at 87.

[200] *Id.*

[201] *Id.*

the phase of attracting attention of "willing listeners" who might be the subjects of the communication.[202] It is in the later phases that information could actually be communicated to listeners and ideas expressed, and the Court found that regulations of the ability to attract attention are less harmful to the right to freedom of speech than regulations of the speech itself.[203] This is consistent with the broader distinction between TPM, content-neutral, and content-based regulations in First Amendment doctrine. The conception of free speech in *Kovacs* is two-sided, requiring both a speaker and a listener, and includes the "freedom to communicate information and opinions to others"[204]—at least implying the presence of interlocutors receiving that information. By breaking down the exchange of ideas in speech into phases, *Kovacs* underscores the necessity of considering how the desire to enter into an expression or exchange is initially communicated and what the effects of that initial contact are.

In an attentional framework, we can conceptualize this distinction as one between the regulation of stimuli, which attract attention, and speech itself, which conveys content and is the actual means of expression. The right to attention is in this framework protected at the level of the stimulus: once that has been received, attention is taken from the attender without her consent. Thus, TPM regulations aimed at controlling the ways in which people are exposed to stimuli in public can be easily distinguished from attempts to control the contents of speech itself. Such a distinction provides a clear justification for why TPM regulations receive less constitutional scrutiny than content-based regulations and supports the idea that there is a right to attention implicit in the caselaw of the Free Speech Clause that judges are seeking to honor as they also seek to protect the freedom of speech.

But *Kovacs* also presents the paradox of attention in speech. How can a listener know if she is "willing" or not before she hears attends to the incoming stimulus and hears the speech? Is it the case that simply by exiting her house, she has decided to be willing to listen to whatever is presented to her? To decide that simply going out in public constitutes consent to having one's attention grabbed by anyone on the street would be inconsistent with other caselaw and the general scheme of legislation that regulates public speech. It also conflicts with the idea that consent cannot be given simply by performing

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[202] *Id.*
[203] *Id.* at 87–88.
[204] *Id.* at 79.

everyday activities, such as grocery shopping. The Court in this period seemed to care greatly about preserving the ability of speakers to reach listeners with their messages in private or public. *Kovacs* itself concerned regulation of public speech that reached people in their homes (the sound truck at issue drove on public roads through residential neighborhoods). Seven years earlier, in the solicitation cases like *Martin*, the Court had held that a regulation barring solicitors from ringing people's doorbells to get their attention was unconstitutional, in part because an explicit trespass warning would have been sufficient to show lack of consent.[205] Yet, simultaneously, the Court upheld the *Kovacs* regulation on "loud and raucous" noise as a way of getting the attention of residents of these neighborhoods because it was too much of an interference.[206]

Subsequent cases reiterated this dilemma as well as the importance of attention. In a leading case, Heffron v. International Society for Krishna Consciousness, Inc.,[207] the Court upheld regulations limiting the ability of solicitors at the Minnesota State Fair to sell or distribute any merchandise except for from a booth rented from the Fair.[208] In summing up the majority opinion, Justice White wrote that, because the members of the International Society for Krishna Consciousness retained other avenues for attempting persuasion, including stopping people on the grounds of the fair, the rule at issue was valid as a TPM regulation.[209] While "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and, to do so, there must be opportunity to win their attention' . . . . [The rule at issue] does not unnecessarily limit that right within the fairgrounds."[210]

In Heffron, the government relied on three interests to support its use of TPM regulations, but the Court only analyzed the interest of crowd control, finding it sufficient to support the regulation,[211] and explicitly did not reach the sufficiency of the other two proposed interests. The first of these was "the State's interest in protecting the fairgoers from being harassed or otherwise

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[205] Martin v. City of Struthers, 319 U.S. 141, 143–45 (1943).

[206] *Compare Kovacs*, 336 U.S. at 87 (upholding a noise regulation that limited the use of sound trucks broadcasting political messages against First Amendment challenge) *with Martin*, 319 U.S. at 143–45 (holding an attentional regulation of solicitation unconstitutional).

[207] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

[208] *Id.* at 655–56.

[209] *Id.* at 654–55.

[210] *Id.* at 655 (quoting *Kovacs*, 336 U.S. at 87).

[211] *Id.* at 650 n.13.

bothered, on the grounds that they are a captive audience."[212] This captive audience interest suggests a desire on the part of the government to ensure that its citizens have the ability to choose what they listen to, or direct their attention towards, rather than being forced to attend to things that they would prefer not to hear. However, Justice Brennan, concurring in part to argue that the ban on distribution of literature outside of the designated zone was unconstitutional even if the rest of the regulation was acceptable, directly addressed the sufficiency of the captive audience interest in this context.[213] Citing Martin, the doorbell solicitation case from 1942, and Schaumburg v. Citizens for a Better Environment,[214] another solicitation case from 1980, Brennan wrote that "[b]ecause fairgoers are fully capable of saying 'no' to persons seeking their attention and then walking away, they are not members of a captive audience. They have no general right to be free from being approached."215 It is unclear from his analysis whether the interest would have been sufficient if the fairgoers had actually been a captive audience, but it seems to be at least plausibly the case that this would be so.

Sound and attention regulations lie at the heart of the modern TPM doctrine. Ward v. Rock Against Racism, the 1989 case that established the modern test for TPM regulations, concerned the use of music amplification systems in Central Park that disturbed other parkgoers from their enjoyment of the Park.[216] In it, the Court directly recognized that government has "a substantial interest in protecting its citizens from unwelcome noise"[217] and that while that interest is at its greatest "when government seeks to protect 'the wellbeing, tranquility, and privacy of the home,'"[218] it extends also to "city streets and parks."[219] This substantial interest justified the regulation of the sound system used at events presented at the Naumberg Acoustic Bandshell in Central Park in New York City as a TPM regulation, even though the regulation limited the ability of musicians and others to speak from the stage.[220] The Court mentioned the protection of Sheep Meadow, a nearby area of Central Park designated "a quiet area for passive recreations like reclining, walking, and

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[212] *Id.*
[213] *Id.* at 657 n.1 (1981) (Brennan, J., concurring in part and dissenting in part).
[214] Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 638–39 (1980).
[215] *Heffron*, 452 U.S. at 657 n.1 (Brennan, J., concurring in part and dissenting in part).
[216] Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).
[217] *Id.* at 796 (1989) (quoting City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984)).
[218] *Id.* (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)).
[219] *Id.* (citing Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949)).
[220] *Id.* at 796–797.

reading,"[221] as a particularly compelling interest of the government. By also requiring that TPM regulations be content-neutral, the Court focused on their application not to speech itself but to the content-neutral stimuli that attract attention to speech. Echoing Kovacs's phases of speech, the Court could avoid the problems that would emerge from direct speech regulation by aiming higher up in the chain of communication, protecting a right to attention while also preserving the right to speak. The dissent in Ward argued that this case "eviscerate[d] the First Amendment,"[222] claiming that it stripped out the core of the balance between the interests of the speakers with the effectiveness of the regulation.[223] But the existence of an implicit right to attention that was being counterbalanced against the speech interests of the rock musicians helps make sense of why the Court came to its conclusion and upheld the noise regulation. The rock music being played in the Naumberg Acoustic Bandshell, like that found a private nuisance in Corbi v. Hendrickson's Maryland nightclub,[224] was unlikely to be causing physical damage to anyone in or around Central Park. Instead, it was the ability to relax and read that the Supreme Court was protecting when it laid out the core elements of the TPM doctrine.

There remain open questions about how this reconceptualization of the TPM doctrine around the right to attention would affect other elements of First Amendment law, such as with respect to arguments that the form of the message matters for the meaning that it conveys.[225] In many protests and other forms of political communication, the subjection of people to disruption and annoyance is a key part of the message that is being conveyed, and certain kinds of protest art are intentionally loud, garish, and annoying by their nature. If the medium is the message,[226] is it truly possible to distinguish among the phases of speech, as the Court attempted to do in Kovacs? As this subsection has shown, the Court has been much more willing to uphold regulations that restrict the kind of stimuli that distract others without contributing much to the message, such as the volume of music or of sound trucks. Conceptualizing these decisions as protecting a right to attention would provide a useful framework

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[221] *Id.* at 784.

[222] *Id.* at 812 (Marshall, J., dissenting).

[223] *Id.*

[224] *See* Corbi v. Hendrickson, 302 A.2d 194, 200 (Md. 1973). *See supra* Section II.C.

[225] The famous statement in *Cohen v. California* that "one man's vulgarity is another's lyric," for example, implies that the form of the message and the way that it is conveyed matters for both the speaker and the listener. 403 U.S. 15, 25 (1971).

[226] *See generally* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1964); MARSHALL MCLUHAN, THE MEDIUM IS THE MASSAGE: AN INVENTORY OF EFFECTS (1967).

for discussing why this trend exists, especially in combination with the private right to attention discussed earlier in this Article.[227]

2. Listeners' Rights and Speaking to Others

The question of whether the Free Speech Clause covers the rights of listeners is a contested one without a clear doctrinal answer.[228] This Article does not seek to resolve that debate but rather suggests that the right to attention might help diffuse some complications in the existing debates. The question of the role of the listener in free speech doctrine can be divided into two categories: first, whether listeners have a right to receive speech that others are making[229] and second, whether speakers have a right of access to listeners (and thus by implication whether listeners have a right to refuse speech).[230] The first category does not seem very relevant to the right to attention because it implies that the listeners want to receive the speech of others and thus would willingly direct their attention in that direction.

The second category of listener's rights, in contrast, is closely tied up in many of the cases that this Article has discussed, and the addition of the angle of the listener helps flesh out another dimension of the right to attention. In particular, the solicitation cases discussed above,[231] like *Martin* and *Heffron*, suggest that there may be some First Amendment-relevant interest in at least attracting the attention of others with the goal of speaking with them even

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[227] *See supra* Part II.

[228] *See* the discussion *supra* note 21 for a survey of this dispute.

[229] A variety of traditional justifications of the First Amendment imply some variation of such a right. For example Alexander Meiklejohn's argument on self-government, which requires that people receive information that they can use for such self-government, *see* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPR. CT. REV. 245, 255–57 (1961) and Justice Holmes's argument for a marketplace of ideas, which assumes both sellers (speakers) and buyers (listeners), *see* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Cass R. Sunstein recently revived the idea of a right of listeners to certain kinds of speech as a potential source of First Amendment protections for text generated by artificial intelligence. Sunstein, *supra* note 21 at 1221–23.

[230] This version of the right is often summarized with the pithy phrase "free speech does not mean free reach." *See* Renee DiResta, *Free Speech Is Not the Same as Free Reach*, WIRED (Aug. 30, 2018, 4:00 PM), https://perma.cc/6G73-8KF8. Whether the First Amendment in fact covers restrictions of reach is a matter of debate that the right to attention could help clarify. *Compare* Evelyn Douek, *Governing Online Speech: From 'Posts-as-Trumps' to Proportionality and Probability*, 121 COLUM. L. REV. 759, 816 (2021) (arguing that speech and reach are distinct such that the government can regulate reach without violating the First Amendment) *with* Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 229, 243-47 (2021) (arguing that many forms of reach-based regulation would implicate First Amendment protections).

[231] *See supra* Subsection III.B.i.

when those people would prefer not to be spoken with. Attracting the attention of another is a necessary antecedent to speaking with them, and thus speech rights might require some right to attracting attention that conflicts with the right to direct one's attention as one chooses discussed elsewhere in this article. Courts seem to have sought a middle ground, where the right of the solicited party to direct her own attention is attenuated by the interest of a political speaker in attracting attention so as to speak. If such an interest exists, it would not be unlimited and may not apply when there is already an express revocation of consent or the audience is captive. *Cohen v. California*,[232] another landmark in First Amendment law, presents a similar picture. In that case, Cohen was convicted of disturbing the peace for wearing a jacket with the slogan "Fuck the Draft" in the Los Angeles Halls of Justice.[233] The Supreme Court held that, though people do have a right not to be disturbed, that right is relatively weak in public places where they can expect to be accosted by others and the disturbances that they make.[234] Significantly, the Court found that Cohen's message was itself worth protecting despite the obscenity, writing that "one man's vulgarity is another's lyric,"[235] which raises complicated questions of whether it would be possible to convey his message without the attendant shocking stimulus.

There are a variety of simple political reasons why a right to the attention of others might be an essential part of having a full right to free speech. For example, if members of a small and disfavored political community are to be able to communicate their ideas to a community that would prefer to ignore them, then courts might have to step in to ensure that they have a way to get their voices to be heard.[236] Getting the attention of others is the first step to saying anything to them, and thus courts should balance the right to attention of the listener with the (overriding) interests in political participation of the speaker. Other justifications for hijacking others' attention might concern deeper questions about what actually constitutes a speech act. For example, it is obviously possible to talk to oneself, but political speech is of the kind that

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[232] 403 U.S. 15 (1971).
[233] *Id.* at 16.
[234] *Id.* at 21–22.
[235] *Id.* at 25.
[236] For a general version of this kind of argument, see JOHN HART ELY, DEMOCRACY AND DISTRUST (1981).

the First Amendment is designed to protect[237] and in a significant sense, political speech demands other people to talk to. As far back as Aristotle, philosophers have argued that political reasoning is a social act which must be done in the company of other people.[238] In Aristotle's framework, a person alone cannot reach the highest potential of humanity but is instead more like a wild animal, pursuing ends of bare survival alone.[239] For Hannah Arendt, speech does not just enable social life and the creation of a community, it is also necessary for the full disclosure of an individual to herself and others.[240] Many societies throughout history, including the ancient Athenians, used forms of shunning as punishments for violations of positive or customary rules.[241] Being unable to get others' attention was seen as a severe punishment not just because it foreclosed access to cooperation and resources but also to social and emotional life. As such, a right to attention could include a right to control one's own attention as well as at least some right to the attention of others in public contexts where they have implicitly consented to give attention to other people.

IV. ATTENTIONAL FUTURES

This Article has focused its own attention mostly on the period in the late nineteenth and early twentieth centuries in which new technologies and social transitions created the conditions for a right to attention to develop. The caselaw that it has traced indicates that lawmakers and society at large saw the need for some kind of right that protected individuals' control over their attention. This right to attention was never explicitly described as such, but its presence shaped how courts adjudicated disputes between parties in both private and public law. In private nuisance and free speech cases alike, courts invoked activities that required sustained attention and various restrictions on distractions. In other words, courts were willing to recognize a right to attention that could stand in the balance against other rights and interests, helping

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[237] Some have argued that political speech should actually get a privileged position in First Amendment doctrine above all other types of speech on precisely this basis. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262–63 (1992).

[238] ARISTOTLE, *supra* note 19, at 28–29.

[239] *Id.*

[240] ARENDT, *supra* note 19, at 175–76.

[241] For a catalogue of such societies and their practices, see Reinhold Zippelius, *Exclusion and Shunning as Legal and Social Sanctions*, 7 ETHOLOGY & SOCIOBIOLOGY 159, 159–165 (1986).

transform the inchoate and wild faculty of attention into something legally protectable.

Efforts to control and exploit attention have only intensified in the period since the beginning of the last century, and attention has become one of the key resources of the digital economy. However, because of the new technologies that enabled that revolution, tracing a right to attention in the modern caselaw is much more difficult. In the early doctrine, attempts by individuals to attract each other's attention in public or accidental disturbances in private life were of paramount importance. But in the digital era, attention control primarily takes place online, on websites and apps often governed by corporations via non- or quasi-legal means. The key relationships now are not between people engaging with each other but between people engaging with products controlled by corporations. As Lawrence Lessig has argued, when a person is online, code is often an even stronger kind of law than the contents of the U.S. Reports.[242] When cases about the activities of corporations do reach courts, judges frequently defer to the lengthy contracts that users are supposed to have read before they used the service in question, rather than asking whether the law could be applied to protect their rights.[243] While it could be argued that people are in fact contracting over their attention consensually, it seems at least plausible that the addictive nature of these services[244] and the informational asymmetries involved prevent true consent.

This shift toward corporate control of the rules around attention limits the extent to which the private and public law doctrines that this Article has examined can be used to regulate attention. Potential litigants who would like to develop a modern right to attention lack the kinds of creative legal resources that their predecessors found in tort, for example. Channeling the debate into questions of contract limit the range of avenues that these litigants could pursue and significantly advantage the companies who are benefitting from

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[242] *See* LESSIG, *supra* note 23, at 87–90.

[243] This is not to say that creative invocations of the law around attention do not exist. For example, see Intel Corp. v. Hamidi, 71 P.3d 296 (2003), in which Intel brought suit against a disgruntled former employee who sent emails to current employees criticizing Intel. These emails caused discussions and apparent disruption among the current employees, and Intel argued that Hamidi had committed trespass to chattels and a nuisance. Intel dismissed the nuisance claim but the trial court found in its favor on the trespass claim, as did the appellate court. The Supreme Court of California reversed, finding that there had been no actual injury.

[244] See Troy Smith & Andy Short, Needs Affordance as a Key Factor in Likelihood of Problematic Social Media Use: Validation, Latent Profile Analysis and Comparison of TikTok and Facebook Problematic Use Measures, 129 ADDICTIVE BEHAVIORS 1, 7–9 (2022) (measuring addictive use patterns of TikTok and Facebook).

harvesting the attention of users. This change explains why much of the existing legal scholarship on attention focuses on questions of antitrust, a domain in which the government can intervene to prevent harms to consumers in their interactions with large corporations,[245] and consumer protection, which has similar concerns.[246]

Despite increased public focus on the attention economy, regulation has mostly failed to address the expropriation of attention. Existing laws seeking to give people back the right to control how their attention is directed, such as the CAN-SPAM Act of 2003,[247] which tried to ban certain forms of email spam, or the GDPR's provisions on mass email marketing,[248] have mostly failed or created even more distractions. For example, the GDPR's cookie "consent" pop-ups were intended to protect users but have largely led to frustration and fatigue.[249] New regulation that fully addresses the deep problems of the attention economy does not seem to be forthcoming.

However, the recognition that a right to attention already exists and can be drawn upon might lead to a better path forward. The decisions of judges and lawmakers at the beginning of the twentieth century provide useful lessons about attention. Scholars, lawmakers, and the public could draw on this history to focus their advocacy and give a doctrinal root to current demands for rights. The shifting of disputes over attention into private spaces controlled by corporations does not make the rights involved in those disputes disappear, and, as the caselaw of the right to attention shows, the government has experience balancing the interests involved in conflicts over attention.

The rise of AI over the past few years has brought the question of the future of the right to attention to a head. We again face a technological transformation that will change the operations of society and the economy in ways that make attention even more valuable and worth protecting. Generative AI systems may increase the facility with which attention can be expropriated by generating personalized content for users. Furthermore, as new AI agents are able to perform an increasing variety of tasks for their users,[250] the attention of those

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[245] *See, e.g.*, Wu, *Blind Spot, supra* note 10; Day, *supra* note 10; Newman, *supra* note 10.
[246] *See, e.g.,* Wu, *Blind Spot*, *supra* note 10, at 778–80.
[247] 15 U.S.C. §§ 7701–7713.
[248] *See* Ben Wolford, *How Does the GDPR Affect Email?*, GDPR.EU, https://perma.cc/8YXB-GHQN.
[249] Christine Utz et al., *(Un)informed Consent: Studying GDPR Consent Notices in the Field*, ACM CCS '19 973, 973 (2019), https://perma.cc/G83S-ZYLZ.
[250] *See* Heaven, *supra* note 32; Alan Chan et al., *Visibility into AI Agents*, ACM FAccT '24 (2024), https://perma.cc/8WQX-AHWZ.

users will become a capabilities bottleneck. It will also become the main mechanism whereby outside groups will be able to influence how those capabilities are used.

AI also presents a tremendous opportunity to retake control over attention. Personal AI models could soon act as superpowered assistants, controlling what outside stimuli the user is exposed to and helping them process and act in the world. This kind of relationship could end up developing like the recommendation algorithms powering Facebook, Instagram, TikTok, and Google serving up to the user what is ultimately in the best interest of the company providing the model and directing the user's attention to things that benefit that provider. Or it could develop differently, with the AI acting as a kind of whole-world spam filter, giving users back the ability to control their attention. The right to attention described in this paper should help guide us down this second path, providing a set of legal tools that people can use to advocate for control of their own attention rather than ceding it to corporations. In the digital economy, attention was a valuable resource that could be harvested and directed. In the AI economy, attention will be the key bottleneck that allows or forces people to direct their resources and engage with the world. Reinventing the right to attention by drawing on its twentieth century doctrinal roots is a key step toward building a future in which people are free to act, think, and pay attention to what they choose.

V. CONCLUSION

The right to attention plays a key role in the development of caselaw across legal domains and in shaping the ways that the law balances individuals' interests in protecting their attention and in interacting with others. The great technological, social, and economic transitions of the beginning of the twentieth century created conditions in which a right to attention would emerge to help regulate this increasingly valuable and scarce personal resource. That emergence is apparent in the appearance of attentional nuisances in private nuisance law, extending the coverage of that doctrine particularly around the protection of knowledge work and the development of new technologies of sound amplification and illumination. As legislators and public activists also sought to respond to increasing value of and impingements on attention, they passed laws that conflicted with key constitutional rights like the freedom of speech. In response to this conflict, the Supreme Court found ways to balance the right to attention with these other rights, including by

seeking to distinguish between regulations of stimuli and of speech in time, place, or manner doctrine and in listeners' rights.

Today, attention is even more scarce and valuable than it was at the beginning of the twentieth century, providing the foundation for the attention economy and much digital commerce. But its protection has declined as the domain of contestation has shifted inside commercial instead of judicial frameworks. The AI revolution presents a new opportunity to revitalize the right to attention while respecting other rights where conflict exists. Along with the law itself, future research should focus on how the law might respond to the growing use of non-litigation mechanisms to resolve consumer-company disputes. More complete explications of the right to attention, particularly with respect to how legislators have sought to create attentional regulations, could also provide useful lessons for government intervention today. The history of the right to attention and its regulation can help us understand how to best structure it for the new technological world.