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# The Right to Attention

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# The Right to Attention

JASPER L. TRAN\*

*“In the future, our attention will be sold.”<sup>1</sup>*

*What marketing, contracts, and healthcare—specifically informed consent and mandatory ultrasounds—have in common is the right to attention from the information receiver. However, scholarship most often focuses on the communicator’s perspective (e.g., how much information the communicator discloses) or on the information itself, but surprisingly, not much on the receiver’s perspective.*

*This dearth of scholarship from the information receiver’s perspective is problematic, because the information receiver is often the “little guy” in the conversation. We own and are entitled to our attention because attention is a property right and part of our individual dignity. Yet advertisement companies and scam artists freely bombard us with their “products” daily, resulting in our own time and monetary loss. Without recognizing the right to attention, contract formation and informed consent (just to name a few) are hollow and superfluous: contracting parties have no meeting of the minds, and informed consent is giving consent without being informed. States could continue to freely mandate ultrasounds for pregnant women against their wills as though their attentions were not really theirs in the first place. Similarly, other problems in our daily lives that involve attention would likely continue to go unaddressed. New emerging technologies make this an issue of increasing importance.*

*This Article proposes legislation to recognize the right to attention as a statutory right, or alternatively, suggests that the courts recognize the right to attention as a common-law right based on the U.S. Constitution. Specifically, the right to attention’s much larger, as-yet-poorly-defined bundle of rights includes, for example, the right to deny attention when demanded, the right to be left alone, the right to not be spammed and the right to not receive ads when such advertisement is unwanted or uninvited, the right to waive the understanding of an agreement, the right to give consent without being informed, and the right to not be required to receive information against one’s will.*

*This Article is the first to identify the right to attention, including its much larger, as-yet-poorly-defined bundle of rights. This Article hopes to identify and illuminate the right to attention in hopes of generating further discussion and exploration of this novel bundle of rights.*

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\* Humphrey Policy Fellow, Google Policy Fellow. I am grateful to June Carbone for helping me develop this topic. Sincere thanks to Lawrence Solum, Eric Goldman, Galen Williams and Mai Moua for their helpful feedback. All views are mine alone, not my employer’s, sponsor’s or other affiliations’. Contact me at [tran4lr@gmail.com](mailto:tran4lr@gmail.com).

1. Mark Manson, *In the Future, Our Attention Will Be Sold*, MARK MANSON (Dec. 4, 2014), <http://markmanson.net/attention> [<https://perma.cc/6THB-CRSE>].

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### INTRODUCTION

Imagine how you would feel if you were on a dinner date (things are going smoothly) then, all of a sudden, a Mariachi group stops by your table and plays their music for the next five minutes, interrupting your conversation and the enjoyment of your meal.<sup>2</sup> That same feeling occurs when you are watching TV and a series of advertisements comes up; or when you are browsing the Internet and a series of pop-up ads appears; or when you are checking your e-mails, only to find out that more than half of your e-mails are spam ads; or worst of all, when you are using an iPhone app and an ad pops up demanding you to either pay for an ad-free version or have to watch the ads to continue using the app. We all feel bothered by unwanted and unwelcomed instruction of our attention, yet this occurs daily.

In *Stuart v. Camnitz*,<sup>3</sup> the U.S. Court of Appeals for the Fourth Circuit invalidated a provision of North Carolina’s new law<sup>4</sup> requiring physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions, “even if the woman actively ‘avert[s] her eyes’ and ‘refus[es] to hear.’”<sup>5</sup> Interestingly, the Fourth Circuit found this provision unconstitutional because it violated physicians’ free speech rights,<sup>6</sup> but not because it violated the rights of the women subjected to mandatory ultrasounds against their will. Ironically, this new law is titled, “Woman’s Right to Know Act.”<sup>7</sup> Rather than focusing on patient attention, North Carolina’s new law for mandatory videos or other forms of delivering information impermissibly compelled patients’ attention and distorted the information.<sup>8</sup> This is neither the first time nor the only time<sup>9</sup>

2. Assuming you did not expect or welcome the Mariachi group’s presence.

3. 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015). Similar types of cases with an implied issue dealing with the right to attention will be likely to come up before the Supreme Court again soon. *See infra* Part II.

4. N.C. GEN. STAT. ANN. § 90-21.85(b) (West Supp. 2014) (“display of real-time view requirement”), *invalidated by* *Stuart*, 774 F.3d 238.

5. *Stuart*, 774 F.3d at 242 (alterations in original) (quoting § 90-21.85(b)).

6. *Id.*

7. §§ 90-21.80 to -21.92 (West Supp. 2014).

8. *See infra* Part I.C.2.

9. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (addressing Pennsylvania law that, among other things: (1) required doctors to inform women about detriments to health in abortion procedures, (2) required women to give prior notice to their

that states have freely mandated pregnant women's attention against their will—here, mandatory ultrasounds—but the women's attention does not belong to the states.<sup>10</sup>

Without recognizing the right to attention, contract formation and informed consent, just to name a few, are hollow and superfluous<sup>11</sup>: contracting parties have no meeting of the minds,<sup>12</sup> and informed consent is giving consent without being informed.<sup>13</sup> States could continue to freely mandate ultrasounds for pregnant women against their will as though their attention were not really theirs in the first place. Similarly, other problems in our daily lives that involve attention, for example, contract formation and informed consent, would likely continue to go unaddressed. New emerging technologies make this an issue of increasing importance.<sup>14</sup>

In 1890, U.S. Supreme Court Associate Justice Louis D. Brandeis and his former classmate Samuel D. Warren published an article titled “The Right to Privacy” in the *Harvard Law Review*'s fourth volume.<sup>15</sup> Little did they know that, 125 years later, their article would give rise to and shape a substantial body of constitutional law that inspired many civil rights movements and gave rise to many of the constitutional rights each individual has today.<sup>16</sup> That article also inspired the writing of this Article, which celebrates the 125th anniversary<sup>17</sup> of Brandeis's and Warren's article.

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husbands, (3) required minors to receive consent from a parent or guardian prior to an abortion, and (4) imposed a twenty-four-hour hold before obtaining an abortion).

10. See *infra* Part I.C.2. Note that pregnant women could bring their problems to courts, but without the recognition of the right to attention, courts seem to struggle in addressing their concerns. See, e.g., *Stuart*, 774 F.3d 238 (invalidating North Carolina's mandatory ultrasound law as unconstitutional because it violated physicians' free speech rights).

11. See *infra* Part II.C.

12. See *infra* Part II.C.2.

13. See *infra* Part II.C.1.

14. See *infra* Part II.A.2.

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

16. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas violated the liberty of two gay men when it enforced against them a state law prohibiting homosexual sodomy); *Cruzan v. Mo. Dep't. of Health*, 497 U.S. 261 (1990) (recognizing that individuals have a liberty interest that includes the right to make decisions to terminate life-prolonging medical treatments); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (finding privacy protection for an extended family's choice of living arrangements, and striking down a housing ordinance that prohibited a grandmother from living together with her two grandsons); *Kelley v. Johnson*, 425 U.S. 238 (1976) (upholding a grooming regulation for police officers, and illustrating the trend toward limiting the scope of the “zone of privacy”); *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right of privacy to include a woman's right to have an abortion); *Stanley v. Georgia*, 394 U.S. 557 (1969) (unanimously concluding that the right of privacy protected an individual's right to possess and view pornography in his own home); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a state law prohibiting the possession, sale, and distribution of contraceptives to married couples); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (applying *Meyer*'s principles to strike down an Oregon law that compelled all children to attend public schools, a law that would have effectively closed all parochial schools in the state); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a state law that prohibited the teaching of German and other foreign languages to children until the ninth grade); *Ravin v. State*, 537 P.2d 494 (Alaska 1975) (finding constitutional protection for the right of a citizen to possess and use small quantities of marijuana in his own home).

17. Coincidentally, 2015 also marks the 800th birthday of Magna Carta, one of the

What marketing<sup>18</sup> and mandatory ultrasounds<sup>19</sup>—in addition to contract formation<sup>20</sup> and informed consent<sup>21</sup>—have in common is the information receiver’s right<sup>22</sup> to attention. Attention, by definition, is “the concentration of awareness on some phenomenon to the exclusion of other stimuli.”<sup>23</sup> It seems so easy to disregard attention as something trivial. Things remain small when there is no discussion of them, but once we talk about them, they become big deals. Many things happen this way; for example, the current movements of feminism<sup>24</sup> and #BlackLivesMatter<sup>25</sup> all started like this, that is, with attention redirected to something that had previously been neglected.<sup>26</sup>

Every exchange of information involves at least two parties, where one side communicates the information and the other side receives the information. Legal scholarship most often focuses on the communicator’s perspective (e.g., how much information the communicator discloses) or on the information itself,<sup>27</sup> but

world’s great symbols of rights and the rule of law.

18. See *infra* Part I.C.1.

19. See *infra* Part I.C.2.

20. See *infra* Part II.C.2.

21. See *infra* Part II.C.1.

22. This Article does not get into the debate between rights and freedoms. Compare, e.g., RICHARD MCKEON, ROBERT K. MERTON & WALTER GELLHORN, *THE FREEDOM TO READ: PERSPECTIVE AND PROGRAM* (1957) (discussing the freedom to read), with Warren & Brandeis, *supra* note 15 (discussing the right to privacy). Nonetheless, the right to attention belongs in the “right” category.

23. 1 THE NEW ENCYCLOPÆDIA BRITANNICA: MICROPÆDIA 685 (15th ed. 2005) [hereinafter MICROPÆDIA] (describing early psychologists’ definition of “attention”). For a discussion on the competing definitions of attention, see *infra* Part I.A.

24. See generally MARY E. HAWKESWORTH, *GLOBALIZATION AND FEMINIST ACTIVISM* (2006).

25. See generally *About the Black Lives Matter Network*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [<https://perma.cc/X989-88NZ>]. The #BlackLivesMatter movement is a recent example of the race-color distinction as evidence of discussion of previously infrequently discussed issues. “Distinguishing color—light, black, in between—as the marker for race is really an error: It’s socially constructed, it’s culturally enforced and it has some advantages for certain people,” Toni Morrison says. “*I Regret Everything*”: Toni Morrison Looks Back on Her Personal Life, NPR (Apr. 22, 2015, 12:15 PM), <http://www.npr.org/2015/04/20/400394947/i-regret-everything-toni-morrison-looks-back-on-her-personal-life> [<https://perma.cc/26AM-AP2B>]. “But this is really skin privilege—the ranking of color in terms of its closeness to white people or white-skinned people and its devaluation according to how dark one is and the impact that has on people who are dedicated to the privileges of certain levels of skin color.” *Id.*

26. The pervasive racism and lack of women’s rights were unnoticed in the past, but in recent years, the movements have gained much momentum in the media, and people are taking notice.

27. There is, however, some research on the effectiveness of the information in reaching the recipient in the advertisement literature. See, e.g., ALBERT A. REED, KATE E. GRISWOLD, GEORGE FRENCH, JAMES BARRETT KIRK & LEROY FAIRMAN, *ADVERTISING AND SELLING*, VOLUME 24 (2011) (discussing attention, in terms of the timing to reach the recipient, in the context of advertisement). Also, attention’s effectiveness has been researched in the context of eyewitness testimony’s reliability. See, e.g., Roger B. Handberg, *Expert Testimony on*

surprisingly, not much on the receiver's perspective. This lack of discussion and dearth of scholarship from the receiver's perspective is problematic, because the information receiver is often the "little guy" in the conversation. We own and are entitled to our attention because attention is a property right and part of our individual dignity.<sup>28</sup> Yet advertisement companies and scam artists freely bombard us with their "products" daily, resulting in our own time and monetary loss.<sup>29</sup> For example, "we've gone from being exposed to about 500 ads a day back in the 1970's to as many as 5,000 a day [in 2006],"<sup>30</sup> and that number is still climbing. Of course, the degree of intrusiveness of advertisements and spam varies depending on their platform, whereas the more time consumed (or the more money lost), the higher the intrusiveness and vice versa.<sup>31</sup> Furthermore, giving up the right to attention cannot be a condition of, for example, forming a contract.<sup>32</sup>

This Article proposes legislation to recognize the right to attention as a statutory right or, alternatively, suggests that the courts recognize the right to attention as a constitutional right. Specifically, the right to attention's much larger, as-yet-poorly-defined bundle of rights includes, for example, the right to deny attention when demanded, the right to be left alone, the right not to be spammed and the right not to receive ads when such advertisement is unwanted or uninvited, the right to waive the understanding of an agreement, the right to give consent without being informed, and the right not to be required to receive information against one's will.<sup>33</sup>

The right to attention could be in the form of: (1) a constitutional right, (2) a statutory right, (3) an economics/property right, or (4) a human right.<sup>34</sup> It would primarily be a negative right rather than a positive right.<sup>35</sup> To infringe on an individual's right to attention, the government would probably be subject to some level of intermediate-scrutiny review, rather than rational basis or strict scrutiny.

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*Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1018–19 (1995) (discussing that violent events reduce the ability to focus attention, which makes recall of the details of an attack difficult); Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, 52 LAW & CONTEMP. PROBS. 43 (1989). However, there is not much legal scholarship on the information receiver's side.

28. See *infra* Part II.A.1.

29. See *infra* Part I.C.1. Consumers make significant expenditures to stop the bombardment. See, e.g., Justin M. Rao & David H. Reiley, *The Economics of Spam*, J. ECON. PERSP., Summer 2012, at 87, 100 (estimating the annual costs of spam to consumers at nearly \$14 billion and estimating firm spending on antispam solutions at \$6.5 billion (citing Richi Jennings, *Cost of Spam is Flattening—Our 2009 Predictions*, MUSEUM EMAIL & DIGITAL COMM. (Jan. 28, 2009), <http://email-museum.com/2009/01/28/cost-of-spam-is-flattening-our-2009-predictions/> [<https://perma.cc/QF37-RYGW>])).

30. Caitlin Johnson, *Cutting Through Advertising Clutter*, CBS NEWS (Sept. 17, 2006, 8:34 AM), <http://www.cbsnews.com/stories/2006/09/17/sunday/main2015684.shtml> [<https://perma.cc/WX8M-WZWY>].

31. See *infra* Part I.C.1.

32. See *infra* Part II.A.2.

33. See *infra* Part II.A.2 & notes 213–219.

34. See *infra* Part II.A.3.

35. See *infra* Part II.A.2 & note 220.

The right to attention generally would not arise if an individual were under an obligation<sup>36</sup> or were to gain a privilege.<sup>37</sup> Although it is hard to tell whether an individual is paying attention, his or her attention can be demanded through, for example, the administration of an exam.<sup>38</sup> Even so, the demanding party would still need a legitimate interest to override an individual's right to attention and require his or her attention for a finite amount of time.<sup>39</sup> Another exception to the right to attention is that there is no right to attention in a human relationship, for example, in a domestic dispute.<sup>40</sup>

This Article proceeds in two parts. Part I defines "attention" and analyzes its value as a currency along with money and time. Part I then discusses the problems in marketing and mandatory ultrasounds when there is no right to attention. Part II explores the justifications for the right to attention and when the right to attention does and does not arise. Part II further applies the right to attention to contract formation and informed consent, and rebuts common criticisms.

## I. ATTENTION AND ITS VALUE

### A. Defining "Attention"

The plain meaning of attention is "the act or state of attending esp. through applying the mind to an object of sense or thought; a condition of readiness for such attention involving esp. a selective narrowing or focusing of consciousness and receptivity."<sup>41</sup> Psychologists define attention as "the concentration of awareness on some phenomenon to the exclusion of other stimuli."<sup>42</sup> Economists<sup>43</sup> define attention as "focused mental engagement on a particular item of information."<sup>44</sup> Given the lack of dispute in what attention means, this Article adopts psychologists' attention definition—"the concentration of awareness on some phenomenon to the exclusion of other stimuli."<sup>45</sup>

Some claim to have an ability to multitask (i.e., splitting their attention to perform multiple tasks at once).<sup>46</sup> Others are cynical of this ability, and claim attention cannot

36. North Carolina's mandatory ultrasound requirement is not an obligation to pregnant women because the new law interferes with the pregnant woman's right to abort. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

37. The quid pro quo for demanding an individual's attention would be to give him or her a privilege in exchange.

38. Assuming he or she wants to pass, of course. Without paying attention, one would not likely pass an exam.

39. *See infra* Part II.A.3.

40. This human relationship is a personal relationship rather than a commercial one like in the case of advertisement, spam, and scams. *See infra* Part I.C.1.

41. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 79 (11th ed. 2003).

42. MICROPÆDIA, *supra* note 23, at 685.

43. The economists mentioned here are ones who study "attention economics." For a discussion on attention economics, see generally *infra* note 86.

44. THOMAS H. DAVENPORT & JOHN C. BECK, THE ATTENTION ECONOMY: UNDERSTANDING THE NEW CURRENCY OF BUSINESS 20 (2001) (emphasis omitted).

45. MICROPÆDIA, *supra* note 23, at 685.

46. *E.g.*, William H. Gladstones, Michael A. Regan & Robert B. Lee, *Division of*

be divided.<sup>47</sup> To simplify the matter, this Article proceeds by only addressing an individual's undivided attention. In short, having an individual's attention means having his or her (full) focus.

Humans can detect whether someone they are talking to is paying attention to them. It is not hard to tell whether an individual is paying attention in a conversation, either in person or over the phone/FaceTime/Skype. In other words, people value one another's attention. But how is attention's value measured?

### B. Attention's Value

"[A]ttention is what creates value."<sup>48</sup>

The most desired gift of love is not diamonds or roses or chocolate. It is focused attention. . . . Attention says, "I value you enough to give you my most precious asset—my time." Whenever you give your time, you are making a sacrifice, and sacrifice is the essence of love.<sup>49</sup>

Viewing attention as an asset is not new—scholars have already studied attention for almost a century now.<sup>50</sup> In brief, attention has value,<sup>51</sup> and its value is increasing as the demands for our attention are increasing.<sup>52</sup>

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*Attention: The Single-Channel Hypothesis Revisited*, 41 Q. J. EXPERIMENTAL PSYCHOL. 1, 2 (1989).

47. Multitasking would likely decrease productivity and performance quality. *See, e.g., id.*; Harold Pashler, *Dual-Task Interference in Simple Tasks: Data and Theory*, 116 PSYCHOL. BULL. 220 (1994).

48. DAVID HOULE & JONATHAN FLEECE, *THE NEW HEALTH AGE: THE FUTURE OF HEALTH CARE IN AMERICA* \_\_\_\_ (2011).

49. RICK WARREN, *THE PURPOSE DRIVEN LIFE* 127 (2002).

50. In the past, Karl Marx studied labor certificates, which arguably were a form of spending attention for money. *See, e.g.,* KARL MARX, *CRITIQUE OF THE GOTHIA PROGRAMME* 8 (C. P. Dutt ed., Int'l Publishers Co. 1938) (1875) (discussing labor certificates—as a form of spending attention for money—as a "certificate from society that [the laborer] has furnished such and such an amount of labour," which "draws from the social stock of means of consumption as much as the same amount of labour costs"). In modern time, the entire marketing and advertisement industry is based on how much its ads can grab and retain the viewers' attention. *See* Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151, 1194–97 (discussing attention markets as marketplace alternatives to regulation); *see also* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014) (discussing the realities of a marketplace as mediated by technology and how digital market manipulation reveals the limits of consumer protection law and exposes economic and privacy harms).

51. *See infra* Parts I.B.1–3.

52. *See infra* Part I.B.4.



### 1. Attention as Currency

Nowadays, people associate currency with money.<sup>53</sup> In fact, the definition of “currency” contains the word “money.”<sup>54</sup> Money generally takes the form of bills, coins, and checks or credits through a financial institution (i.e., a bank). Starting in 2008, money can take a new form, called “Bitcoin,” as a digital currency.<sup>55</sup>

In the early nineteenth century, people attempted to use time as currency through the form of labor.<sup>56</sup> Lately, the concept of time-based currency is making a comeback.<sup>57</sup> Indeed, people can theoretically spend time and money interchangeably: people exchange their time for money and money for others’ time.

Besides money and time, a third form of currency is attention.<sup>58</sup> In fact, the word “attention” is used in conjunction with the word “pay” in the phrase “to pay attention,” signaling its value as a currency. Like time, attention is scarce. Scholars are discussing that our attention span is getting shorter and shorter in the information age<sup>59</sup> and even speculate that, in the future, our attention will be sold.<sup>60</sup> In fact, we can spend attention like time<sup>61</sup> or money<sup>62</sup> interchangeably.

53. *E.g.*, *CTR. FOR FIN. TRAINING, BANKING SYSTEMS* 38 (2d ed. 2010) (“Most people associate the word [“currency”] with paper money . . .”).

54. *See, e.g.*, *Currency*, *DICTIONARY.COM*, <http://dictionary.reference.com/browse/currency?s=t> [<https://perma.cc/KMF9-JZH9>] (defining “currency” as “something that is used as a medium of exchange; money”).

55. *See generally* SATOSHI NAKAMOTO, *BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM* (2008), available at <https://bitcoin.org/bitcoin.pdf> [<https://perma.cc/CS78-2YJD>] (identifying bitcoin as “[a] purely peer-to-peer version of electronic cash [that] would allow online payments to be sent directly from one party to another without going through a financial institution”).

56. *See* MARX, *supra* note 50, at 8 (discussing labor certificates as a “certificate from society that [the laborer] has furnished such and such an amount of labour,” which “draws from the social stock of means of consumption as much as the same amount of labour costs”); JOSIAH WARREN, *TRUE CIVILIZATION: AN IMMEDIATE NECESSITY AND THE LAST GROUND OF HOPE FOR MANKIND* 184 (Boston, J. Warren 1863) (discussing that, in 1827, Josiah Warren established the Cincinnati Time Store where people could purchase goods with labor notes representing an agreement to perform labor); JONATHAN R. ZATLIN, *THE CURRENCY OF SOCIALISM* 24–25 (2007) (discussing that Robert Owen established marketplaces and banks that accepted labor notes in London in 1832, but his efforts failed in 1834).

57. *See, e.g.*, *IN TIME* (Regency Enterprises 2011) (fictional movie where time has become a universal currency that can be used to pay for day-to-day expenses and can be transferred between people or capsules).

58. *See* James G. Webster, *User Information Regimes: How Social Media Shape Patterns of Consumption*, 104 *NW. U. L. REV.* 593, 594 (2010) (“In this world, attracting and managing attention is a prerequisite for achieving almost any economic, political, or cultural objective. Attention might thus be thought of as the currency of a new economy.”).

59. *See, e.g.*, RICHARD A. LANHAM, *THE ECONOMICS OF ATTENTION*, at xi–41 (2006) (arguing that our attention has decreased in the information age and discussing attention economics).

60. *E.g.*, Michael H. Goldhaber, *Attention Shoppers!*, *WIRED* (Dec. 1, 1997, 12:00 PM), <http://www.wired.com/1997/12/es-attention/> [<https://perma.cc/SFDE-ZNS4>]; Manson, *supra* note 1.

61. *See infra* Part I.B.2.

62. *See infra* Part I.B.3.

## 2. Attention vs. Time

“A leader’s most precious resource is not their time. It’s their *focused attention*. Time merely passes, while focused attention makes things happen.”<sup>63</sup> An individual with focused attention “can have a significant impact in a minimal amount of time.”<sup>64</sup> Conversely, “all the time in the world is insufficient” for an individual without attention.<sup>65</sup>

Both time and attention are scarce commodities. Worldwide, women have an average life expectancy of 71 years, while men have an average life expectancy of 66.5 years,<sup>66</sup> and there are only about 365 days per year and 24 hours per day. “No matter how much money you have, you can’t buy more time. There are only 24 hours in everyone’s day,” says Bill Gates.<sup>67</sup> Like time, each individual only has a limited amount of attention to “spend.”<sup>68</sup>

Some view time and attention interchangeably; others view attention as time’s subcategory—attention’s outer limit is time.<sup>69</sup> For example, when an attorney charges her client for her time, that attorney supposedly pays attention to the client.<sup>70</sup> However, this is not necessarily true all the time. An individual can give people the time of his or her day but, at the same time, not pay any attention to what is going on.<sup>71</sup> For employees in a factory, time equates to opportunity cost

63. Ed Batista, *To Stay Focused, Manage Your Emotions*, HARVARD BUS. REV. (Feb. 2, 2015), <https://hbr.org/2015/02/to-stay-focused-manage-your-emotions> [<https://perma.cc/X2CH-MTR6>] (emphasis in original).

64. *Id.*

65. *Id.*

66. See Dep’t of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2012 Revision, Highlights and Advance Tables*, 17, U.N. Doc. ESA/P/WP.228 (2013).

67. Bill Gates, *Three Things I’ve Learned from Warren Buffett*, LINKEDIN PULSE (June 12, 2013), <https://www.linkedin.com/pulse/20130612065727-251749025-three-things-i-ve-learned-from-warren-buffett> [<https://perma.cc/2R22-F2QX>].

68. Thus, attention economics treats attention as a scarce commodity. See *infra* note 86 and accompanying text.

69. As such, they view attention as time’s subcategory by measuring attention under time’s unit. See, e.g., Jason Fried, *What’s the Difference Between Time and Attention? A Lot.*, OBSERVER (Dec. 9, 2015, 10:01 AM), <http://observer.com/2015/12/whats-the-difference-between-time-and-attention-a-lot/> [<https://perma.cc/JER8-ZE5P>] (“Attention is a far more limited resource than time. . . . [For instance,] I may have 8 hours a day for work, but I probably have 4 hours a day for attention.”).

70. Cf. Demetrios Dimitriou, *The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?*, 45 S.C. L. REV. 965, 973 (1994) (“The failure to focus on the client, forgetting that the value of the services rendered is measured by the client and not the lawyer, has resulted in clients’ perceiving lawyers as being interested only in making money, not meeting client needs.”).

71. Some call this not “being [mentally] present” or “being in the presence.” The opposite would be “being absent” despite one’s physical presence. See, e.g., Roger Fransecky, *Are You Really Paying Attention? The Importance of Being Present*, HUFFPOST HEALTHY LIVING: THE BLOG (Oct. 19, 2010, 8:27 AM), [http://www.huffingtonpost.com/roger-fransecky/are-you-really-paying-att\\_b\\_758025.html](http://www.huffingtonpost.com/roger-fransecky/are-you-really-paying-att_b_758025.html) [<https://perma.cc/3VVSQ-4YPL>].

(i.e., the inability to be doing something else).<sup>72</sup> The employer thus pays for the employee's time even if the employee could just stand around waiting.<sup>73</sup> The Fordism/Taylorism literature from the 1920s focused on how to optimize use of the employee's time for the employer, largely through refinements of the assembly line idea.<sup>74</sup> The allocation, though, was clear: employers paid for time, and they got to decide how to allocate the time they paid for. In some ways, routinization makes the value of the employee's time less dependent on the employee's level of attention (or skill).

With lawyers, on the other hand, time spent without attention is valueless; yet, the attorney, not the client, controls the allocation of attention. This presents an intrinsic conflict of interest. For example, when an attorney bills his or her client for traveling time, that attorney could be spending his or her attention during this time to read up on materials for another client—an ethical issue of double or fraudulent billing.<sup>75</sup> An attorney could also unethically bill for sleeping time, where he or she was not paying attention to the client's matter per se. Thus, attention is arguably more valuable than time, even if time without attention is part of the price of accomplishing a task—attention is an assumed feature of time billed, at least for attorneys.

### 3. Attention vs. Money

“In the future, our attention will be sold.”<sup>76</sup> Unsurprisingly, others can make money using our attention. The marketing industry preys on our attention through advertisement.<sup>77</sup> Advertisement demands our attention through many shapes and forms: newspaper ads, TV commercials, spam e-mails, spam phone calls, website pop-up ads, in-person sales pitches, etc. YouTube video posters and bloggers make money based on the number of views. Writers desire to formulate “attention-grabbing” sentences. Statistically, “we’ve gone from being exposed to about 500 ads a day back in the 1970’s to as many as 5,000 a day [in 2006],”<sup>78</sup> and that number is still climbing.

We can also save or make money by “spending” our attention. For example, coupon clippers spend their time—and thus pay attention to—collecting coupons to

72. See, e.g., Emily Oster, *Time Is Money: So How Much Is Yours Worth?*, SLATE (Feb. 6, 2013, 6:30 AM), [http://www.slate.com/articles/double\\_x/doublex/2013/02/time\\_is\\_money\\_opportunity\\_cost\\_can\\_help\\_you\\_figure\\_out\\_how\\_much\\_your\\_time.html](http://www.slate.com/articles/double_x/doublex/2013/02/time_is_money_opportunity_cost_can_help_you_figure_out_how_much_your_time.html) [<https://perma.cc/5VMX-YC2C>].

73. See *id.*

74. See generally BERNARD DORAY, *FROM TAYLORISM TO FORDISM: A RATIONAL MADNESS* (David Macey trans., Free Ass'n Books 1988) (1981).

75. See generally Kevin Hopkins, *Law Firms, Technology, and the Double-Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95, 102 & n.42 (1998).

76. Manson, *supra* note 1.

77. In fact, grabbing and keeping potential customers' attention is the foundation of the entire marketing industry. See e.g., CAROL MCCLELLAND, *GREEN CAREERS FOR DUMMIES* 184 (2010) (stating that marketing is about “[g]rabbing and keeping the customer's attention”).

78. Johnson, *supra* note 30.

save money.<sup>79</sup> Furthermore, some mobile apps<sup>80</sup> even pay users in-app rewards to view thirty-second advertisements.<sup>81</sup>

Although attention's value increases with increasing demands and inelastic supply,<sup>82</sup> the exact value for each individual's attention might be difficult to quantify. The value to an advertiser of the ability to command attention has a discoverable price, but we lack an attention market<sup>83</sup> that would reveal how much an individual is willing to pay to be free from such intrusions. Fortunately, at least one thing is certain: attention has value.

#### 4. The Economics of Attention<sup>84</sup>

The term "attention" came to economists' attention in the latter half of the twentieth century,<sup>85</sup> and the study of attention economics treats attention as a scarce commodity to solve information-management problems.<sup>86</sup> In fact, Nobel Laureate Herbert Simon<sup>87</sup> warned:

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79. See Matthew A. Edwards, *The Law, Marketing and Behavioral Economics of Consumer Rebates*, 12 STAN. J.L. BUS. & FIN. 362, 366 (2007) (defining consumer rebates and coupons).

80. See generally Daniel Parisi, Recent Development, *Mobile App Privacy: Developing Standard and Effective Privacy Tools for Consumers*, 15 N.C. J.L. & TECH. ONLINE 240, 240–45 (2014).

81. J.J. Colao, *Watch Ads, Get Paid: Is This the Future of Ad-Supported Content?*, FORBES (Mar. 1, 2013, 3:13 PM), <http://www.forbes.com/sites/jjcolao/2013/03/01/watch-ads-get-paid-is-this-the-future-of-ad-supported-content/> [<https://perma.cc/DHX2-AS9D>].

82. See *infra* Part I.B.4.

83. See generally Goldman, *supra* note 50, at 1194–97 (discussing attention markets as marketplace alternatives to regulation); see also Eric Goldman, *Data Mining and Attention Consumption*, in PRIVACY AND TECHNOLOGIES OF IDENTITY: A CROSS-DISCIPLINARY CONVERSATION 225, 230–32 (Katherine J. Strandburg & Daniela Stan Raicu eds., 2006) (analyzing targeted marketing based on its costs in attention consumption).

84. For an in-depth discussion on the economics of attention, see generally LANHAM, *supra* note 59, at xi–41 (arguing that our attention has decreased in the information age and beginning the discussion of attention economics).

85. See, e.g., Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (Martin Greenberger ed., 1971).

86. See DAVENPORT & BECK, *supra* note 44, at 2 (“What’s in short supply is human attention.”); TOM HAYES, JUMP POINT 73 (2008) (calling attention “the new crude oil”); LANHAM, *supra* note 59, at 8–9; Josef Falkinger, *Attention Economics*, 133 J. ECON. THEORY 266, 268–69 (2007); Webster, *supra* note 58, at 594; Michael H. Goldhaber, *The Attention Economy and the Net*, FIRST MONDAY (Apr. 1997), <http://journals.uic.edu/ojs/index.php/fm/article/view/519/440>.

87. See generally Herbert A. Simon—*Facts*, NOBELPRIZE.ORG (last updated 2016), [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1978/simon-facts.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1978/simon-facts.html) [<https://perma.cc/HN8N-QNBQ>] (winner of the Nobel Prize in Economics in 1978).

[I]n an information-rich world, the wealth of information means a dearth of something else: a scarcity of whatever it is that information consumes. [Information] consumes the attention of its recipients[,] . . . creat[ing] a *poverty of attention* and a *need to allocate that attention efficiently* among the overabundance of information sources that might consume it.<sup>88</sup>

Early use of labor (i.e., labor certificates) as currency was closely associated with attention.<sup>89</sup> Economist Karl Marx’s labor theory of value explains that the value of a “thing” depended on the human time it took to produce it. Other economists’<sup>90</sup> price theory explains that price reflects supply and demand.<sup>91</sup> Attention’s “value”—to put a price on attention—is increasing<sup>92</sup> as the demands for our attention are increasing<sup>93</sup> because the supply of our attention is finite and largely inelastic.<sup>94</sup> Figure 1<sup>95</sup> illustrates this point, showing the effects of a positive demand shock with an elastic supply curve versus an inelastic supply curve, wherein the intersection near D<sub>2</sub> on the inelastic curve has a higher price point than the intersection near D<sub>1</sub> on the elastic curve as the demands increase from the starting point at the intersection near D<sub>0</sub>.

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88. See Simon, *supra* note 85, at 40–41 (emphasis added).

89. See *supra* note 56 and accompanying text.

90. Other economists often derided Marx and his theories. See, e.g., Joseph V. Femia, *An Image in a Curved Mirror: Pareto’s Critique of Marxist Science*, in THE LEGACY OF MARXISM: CONTEMPORARY CHALLENGES, CONFLICTS AND DEVELOPMENTS 25, 26 (Matthew Johnson ed. 2012) (“Opponents of Marxism have found [Marx’s] claims laughable. Karl Popper, one of the more prominent critics, derided Marx and his followers as scientific imposters, whose vague and elastic terminology allowed them to ‘explain away’ whatever phenomena that might seem to render their theory erroneous.”).

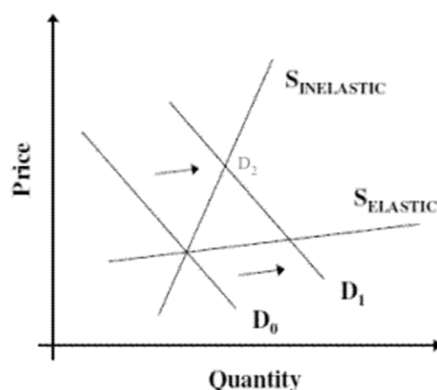
91. E.g., JOSEPH E. STIGLITZ & CARL E. WALSH, PRINCIPLES OF MICROECONOMICS 69–71 (4th ed. 2006) (using the law of supply and demand to explain how prices are determined in competitive markets).

92. See Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 722 (2010) (“The ‘market’ for speech faces problems of access (or supply) intimately tied to problems of attention (or demand) . . .”).

93. See, e.g., *id.* at 721; Manson, *supra* note 1.

94. See *supra* Part I.B.2 (discussing attention’s outer limit as time, which itself is limited).

95. Jesse Edgerton, *Estimating Machinery Supply Elasticities Using Output Price Booms* 3 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2011-03, 2010). The figure has been modified by adding D<sub>2</sub> and its corresponding arrow.



**Figure 1.** Effects of a positive demand shock with elastic and inelastic supply curves

### C. The Problems Associated with Attention

Attention has increasing value, yet an individual's attention is up for grabs or demanded freely by advertisement, spam, and scams.<sup>96</sup> In a recent Fourth Circuit case, doctors demanded the attention of women seeking abortions through mandatory ultrasounds based on North Carolina's new law, "even if the woman actively 'avert[s] her eyes' and 'refus[es] to hear.'"<sup>97</sup> The problems demonstrated here call for recognizing the right to attention.<sup>98</sup>

#### 1. Marketing: Advertisement, Spam, and Scams

Attention has value,<sup>99</sup> yet people treat attention as though it is free to grab.<sup>100</sup> Individuals presumably own their attention and can give it out at their free will. However, whether individuals can actually give attention out at their free will can depend on how disciplined they are. The underlying assumption is that individuals can control their own attention<sup>101</sup> when, in reality, that might not be the case. An

96. See *infra* Part I.C.1.

97. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (alterations in original) (quoting N.C. GEN. STAT. ANN. § 90-21.85(b) (West Supp. 2014)).

98. See *infra* Part II.A.2.

99. See *supra* Part I.B.

100. See MCELLELAND, *supra* note 77, at 189. Note that individuals could try to be insulated from distractions if they wanted to (e.g., by wearing earplugs or (noise-cancellation) earphones), but this would require them to put in their own efforts.

101. This Article assumes no use of pharmaceutical supplements to boost an individual's focused attention (e.g., caffeine or Adderall). For a discussion on pharmaceuticals, see generally Jasper L. Tran, *Timing Matters: Prior Art's Age Infers Patent Nonobviousness*, 50 GONZ. L. REV. 189 (2014/2015). For a discussion on patents, see generally Jasper L. Tran, *Rethinking Intellectual Property Transactions*, 43 S.U. L. REV. 149, 152–57 (2015) (discussing components of a patent license); Jasper L. Tran, *Software Patents: A One-Year Review of Alice v. CLS Bank*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 532, 534, 539–40 (2015). This Article also does not account for illnesses that affect an individual's ability to control his

individual's attention can be demanded through his or her sense of audio (through speech)<sup>102</sup> or sense of vision (through images<sup>103</sup> or video).<sup>104</sup>

We live in an era of unstoppable distractions,<sup>105</sup> where we are constantly bombarded with e-mails, text messages, Facebook,<sup>106</sup> music, vehicle noises, etc. “[T]he power of marketing . . . is eroding from lack of attention.”<sup>107</sup> The marketing industry is built on attracting and keeping people's attention.

A distraction<sup>108</sup> is, by definition, “something that makes it difficult to think or pay attention.”<sup>109</sup> Thus, a distraction is essentially an unwanted and unwelcomed intrusion on an individual's attention.<sup>110</sup> In fact, advertisements and spam<sup>111</sup> are simply large-scale distractions that affect many people.<sup>112</sup> Spam comes in many shapes and forms including spam e-mails and spam phone calls—especially with the

or her attention (e.g., Attention-Deficit/Hyperactivity Disorder (ADHD)). For a discussion on pharmacotherapy and ADHD, see generally Jefferson B. Prince, Timothy E. Wilens, Thomas J. Spencer & Joseph Biederman, *Pharmacotherapy of ADHD in Adults*, in ATTENTION-DEFICIT HYPERACTIVITY DISORDER: A HANDBOOK FOR DIAGNOSIS AND TREATMENT 826 (Russell A. Barkley ed., 4th ed. 2015). See also Eric Lindenfeld & Jasper L. Tran, *Beyond Preemption of Generic Drug Claims*, 45 SW. L. REV. 241 (2015) (discussing generic drugs); Eric Lindenfeld & Jasper L. Tran, *Prescription Drugs and Design Defect Liability: Blanket Immunity Approach to the Increased Costs and Unavailability of Prescription Medication*, 64 DRAKE L. REV. 111 (2016) (discussing prescription drugs).

102. See, e.g., Tushnet, *supra* note 92, at 724. Note that Tushnet does not limit her commentary to demands for aural attention. Many of her other examples are visual.

103. Cf. *id.* at 775–76 (discussing puffery in visual advertising and whether that puffery should be regulated).

104. See, e.g., *id.* at 739 (discussing example of a video ad); see also *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (invalidating North Carolina's mandatory ultrasound law as unconstitutional because it violated physicians' free speech rights).

105. However, the availability of 3D printing in the near future might mitigate these distractions because we will depend less on, and thus interact less with, other people for manufactured goods. For a discussion on 3D printing, see generally Jasper L. Tran, *The Law and 3D Printing*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 505 (2015); Jasper L. Tran, *To Bioprint or Not To Bioprint*, 17 N.C. J.L. & TECH. 123 (2015).

106. See generally James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1144–49 (2009).

107. KEN SACHARIN, ATTENTION! HOW TO INTERRUPT, YELL, WHISPER, AND TOUCH CONSUMERS 3 (2001).

108. Some also call this “noise.” See, e.g., W. Trammell Neill & Richard L. Westberry, *Selective Attention and the Suppression of Cognitive Noise*, 13 J. EXPERIMENTAL PSYCHOL.: LEARNING MEMORY & COGNITION 327 (1987).

109. *Distraction*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/distraction> [<https://perma.cc/BQN9-VST3>] (last updated 2015).

110. Note that wanted distractions also exist (often from our loved ones), but this Article focuses solely on unwanted and unwelcomed distractions.

111. “Spam[ming]” means sending the same message indiscriminately to a large number of recipients. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1195 (11th ed. 2003).

112. People use advertisements and spam interchangeably. The term “spam” carries a negative connotation. People generally view advertisements in a more positive light.

high frequency of advertisements in landline phones, more and more Americans are dropping landline phones to use cell phones exclusively.<sup>113</sup>

When individuals become distracted, they lose their productivity and become inefficient at completing the task(s) at hand. The economic loss from advertisements and spam is enormous: for example, a lawyer with a billing rate of \$150/hour who receives 2200 spam messages in a year would lose \$900/year in billing to spam e-mails.<sup>114</sup> In 2010, valid e-mail addresses around the world received about 100 billion e-mails per day, 88% of which were spam.<sup>115</sup> Companies spent about \$6.5 billion/year on anti-spam technology.<sup>116</sup> Assuming an average person's time is worth \$25/hour and that it takes an average of five seconds to delete spam, spam costs users about \$14 billion/year.<sup>117</sup> Yet, advertisements and spam occur daily, and are in fact a multi-billion dollar industry.<sup>118</sup>

The problem<sup>119</sup> worsens in the cases of scams (i.e., fraudulent advertisements<sup>120</sup>) or spam. Although the unfortunate victim<sup>121</sup> could initiate a legal action under fraud laws<sup>122</sup> against the scammer, the scammers can “easily . . . cover their tracks,” leaving scams “widespread, difficult to detect, and hard to prosecute.”<sup>123</sup>

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113. See, e.g., STEPHEN J. BLUMBERG & JULIAN V. LUKE, NAT'L CTR. FOR HEALTH STATISTICS, WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY–DECEMBER 2013 1 (2014) (“Preliminary results from the July–December 2013 National Health Interview Survey (NHIS) indicate that the number of American homes with only wireless telephones continues to grow.”).

114. Don Passenger & Jeff Kirkey, *Un-Canned Spam: Getting It Back in the Tin*, MICH. B. J., Mar. 2003, at 36, 36. Note that this assumes an average person can expect 2200 spam e-mails a year and that readers would look at the e-mails to ensure their legitimacy.

115. Rao & Reiley, *supra* note 29, at 87 (citing MESSAGING ANTI-ABUSE WORKING GRP., EMAIL METRICS REPORT #14 – THIRD AND FOURTH QUARTER 2010 (2011), available at [https://www.m3aawg.org/sites/default/files/document/MAAWG\\_2010\\_Q3Q4\\_Metrics\\_Report\\_14.pdf](https://www.m3aawg.org/sites/default/files/document/MAAWG_2010_Q3Q4_Metrics_Report_14.pdf)) [<https://perma.cc/5SRQ-BTZA>].

116. *Id.* at 100.

117. *Id.*

118. See William B. Baker, *The Complications of Doing Mobile Marketing Legally*, J. INTERNET L., Feb. 2014, at 13, 13 (2014) (“A study for the Mobile Marketing Association (MMA) in 2013 estimated that mobile marketing communications expenditures will reach \$9.2 billion by 2015.”).

119. Note that the Federal Communications Commission (FCC) has attempted to tackle this problem with the Telephone Consumer Protection Act. For a detailed discussion, see generally *infra* Part II.D.1.

120. Fraudulent misrepresentation includes, but is not limited to, “bait-and-switch advertisement” and “deceptive advertisement.”

121. Hebe R. Smythe, Note, *Fighting Telemarketing Scams*, 17 HASTINGS COMM. & ENT. L.J. 347, 365–69 (1994) (common victims are consumers, legitimate telemarketers, credit card companies, and lenders).

122. See, e.g., *id.* at 369–76 (discussing current prosecution mechanisms, including their limitations).

123. *Id.* at 363.



Most people do not want to be disturbed by advertisements, spam, or scams.<sup>124</sup> Interestingly, advertisements and spam are mostly unregulated,<sup>125</sup> yet scams are protected against by fraud laws<sup>126</sup>—consumers can go after scammers but not advertisers or spammers. But scams result in monetary and time loss, whereas advertisements and spam result in time loss, at the very least—spam imposes costs tied to the extent of the distraction that it causes. Money and time are both forms of currency.<sup>127</sup>

The degree of intrusiveness of advertisement and spam varies depending on its platform, whereas more time or monetary loss means more intrusiveness and vice versa. For example, listing from the least to the most intrusive, there are billboard ads, junk mail, e-mail-based ads, cell phone texts, and phone calls.<sup>128</sup>

Our attention would really be in danger the day technology enables marketing companies to tell whether consumers view their ads (e.g., whether a viewer is watching a television advertisement). When marketing companies know we are not paying attention, they can come up with new ways to demand our attention. For example, they can pause their television ads with a warning sign to resume viewing the ads—if consumers do not comply or are not paying attention, such ads could remain paused rather than played until skipped.

The contrast between normal daily advertisements or spam versus fraudulent advertisements or spam begs the question of whether an individual should be entitled to initiate a legal action against the advertisement and spam companies for his or her economic losses.

## 2. Healthcare: Mandatory Ultrasound

The doctor in *Stuart v. Camnitz* testified, “‘forcing this experience on a patient over her objections’ in this manner interferes with the decision of a patient not to receive information that could make an indescribably difficult decision even more traumatic and could ‘actually cause harm to the patient.’”<sup>129</sup> At the very least, physicians should owe an ethical obligation to honor their patients’ wishes,<sup>130</sup>

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124. See, e.g., John Reed Stark & Carolyn E. Kurr, *Using the Securities and Exchange Commission’s Statutory Weaponry To Combat Spam*, 37 U. TOL. L. REV. 271, 271 (2006) (“I do not want your worthless spam.” (quoting *Spam I Am*, STRANGECOSMOS.COM, <http://strangecosmos.com/content/item/102649.html> [<https://perma.cc/MV4T-TXHS>] (last updated 2016)).

125. But see Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2012).

126. See Smythe, *supra* note 121, at 369–76.

127. See *supra* Parts I.B.2, I.B.3.

128. For example, it takes longer to answer a phone call than, say, to read a billboard advertisement.

129. 774 F.3d 238, 255 (4th Cir. 2014) (quoting declaration of Dr. Gretchen S. Stuart).

130. E.g., *id.* (“The information is provided irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy.”).

especially their requests to be let alone<sup>131</sup>—this is deeply rooted in the principle of patient autonomy.<sup>132</sup>

Also, the physician has an ethical obligation not to “touch” the patient without the patient’s consent, which is what the ultrasounds really is—probing the patient for the fetus’s information. The right not to be touched is separate from the right to abortion. Interestingly, the Fourth Circuit distinguished *Stuart* from typical “undue burden”<sup>133</sup> cases because the Court analyzed North Carolina’s mandatory ultrasound law under the First Amendment.<sup>134</sup> Had the Fourth Circuit analyzed *Stuart* according to the pregnant mother’s rights, the “undue burden” standard would have and should have come up.

Furthermore, it is questionable whether the mandatory ultrasound ruling applies only because the state is involved or because it is rooted in physicians’ ethical obligations generally.<sup>135</sup> The Fourth Circuit brought up physicians’ therapeutic privilege, which “permits physicians to decline or at least wait to convey relevant information as part of informed consent because in their professional judgment delivering the information to the patient at a particular time would result in serious psychological or physical harm.”<sup>136</sup> The Fourth Circuit then concluded that North Carolina’s mandatory ultrasound law, without a therapeutic-privilege exception, interfered with physician’s professional judgment and ethical obligations.<sup>137</sup>

Imagine being in the 1970s, when people first heard about the concept of the right to abortion.<sup>138</sup> Most would likely say, “what is that?” and disregard it as nonsense. Imagine that the Supreme Court analyzed *Roe v. Wade*<sup>139</sup> differently (e.g., under the physician’s constitutional right<sup>140</sup>—to perform or not perform an abortion—instead of under the pregnant woman’s right). Then, more than fifty years later, without *Roe v. Wade* decided as it was, we still might not have the right to abortion or the progress

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131. “The right to be let alone” is a right under the right to privacy’s bundle of rights. See Warren & Brandeis, *supra* note 15, at 195.

132. For a discussion on the principle of patient autonomy, see generally Mary Anne Bobinski, *Autonomy and Privacy: Protecting Patients from Their Physicians*, 55 U. PITT. L. REV. 291, 330–74 (1994).

133. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–79 (1992) (plurality opinion).

134. *Stuart*, 774 F.3d at 249 & n.4.

135. For a general description of doctors’ ethical obligations in the abortion context, see generally Michelle Oberman, *Mothers and Doctors’ Orders: Unmasking the Doctor’s Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 469–78 (2000).

136. *Stuart*, 774 F.3d at 254.

137. *Id.*

138. *Roe v. Wade*, 410 U.S. 113 (1973) (extending the right of privacy to include a woman’s right to have an abortion).

139. *Id.*

140. There may be room to argue that the Court decided the case on these grounds. Writing for the majority, Justice Blackmun explicitly held that the right “is not unqualified.” *Id.* at 154. More significantly, the Court held, “For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.” *Id.* at 164.

of the feminism movement.<sup>141</sup> There could be a similar story for the right to attention in *Stuart*.<sup>142</sup> *Stuart* presented an interesting issue and opportunity for the Supreme Court to recognize the right to attention for pregnant women—an opportunity the Court refused when it denied certiorari.

When a pregnant woman actively averted her eyes and refused to hear,<sup>143</sup> she chose to not pay attention to the information from the mandatory ultrasound. The ultrasound would be pointless and useless because the underlying reason of displaying a sonogram and describing the fetus to the mother is for her to make an informed decision. But her objection (e.g., her acts of averting her eyes and refusing to hear) flies in the face of the legislature's objective behind North Carolina's new law—to assure the mother's decision to have an abortion is deliberate and well-informed, or to dissuade the mother through an attempt to spur creation of an emotional bond with the fetus.<sup>144</sup> Ironically, most women who pay attention to the ultrasound report being relieved to see the fetus because, in most cases, it is very early in the pregnancy and the fetus does not look like a child at this stage, reinforcing the women's decisions to abort.<sup>145</sup>

North Carolina justified its mandatory ultrasounds based on the idea that the fetus information is relevant to the mother's decision making.<sup>146</sup> Sure, a patient has the right to know<sup>147</sup> about the fetus she is about to abort, information that the physicians would be happy to provide. But what about when the patient does not want to know? Forcing such images of her soon-to-be-aborted fetus into her head is quite something else—it might have an opposite effect: rather than being fully informed to make a decision about abortion, the mother might be traumatized after the abortion for having seen her fetus's images when she did not want to know such information.

A patient arguably has the right not to know<sup>148</sup> information about her fetus when she does not want to. If the state argues that it is providing information relevant to the decision—as opposed to the information that serves the supposed state interest in preserving the life of the fetus—then it raises the question of why the patient can

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141. Note that the feminism movement preceded the right to abortion era, but the *Roe v. Wade* decision helped the feminism movement move forward.

142. See *Stuart*, 774 F.3d at 255–56.

143. *Id.* at 242.

144. See generally Paul Stam, *Woman's Right to Know Act: A Legislative History*, 28 ISSUES L. & MED. 3 (2012).

145. Cf. *One Week Later, Women Denied an Abortion Feel More Regret and Less Relief than Those Who Have One*, GUTTMACHER INST. (Aug. 5, 2013), <http://www.guttmacher.org/media/nr/2013/08/05/index.html> [<https://perma.cc/775Y-9DZN>] (discussing that 90 percent of women who were able to obtain an abortion reported that they were relieved afterward).

146. See Stam, *supra* note 144, at 36 (“[I]f the woman is denied information such as the opportunity for an ultrasound and the information relevant to her decision such as provided for in this [mandatory ultrasound] bill, she stands little chance of being able to make a fully informed choice.”) (quoting testimony of Monsignor David Brockman).

147. See *Woman's Right to Know Act*, N.C. GEN. STAT. ANN. §§ 90-21.80 to -21.92 (West Supp. 2014).

148. Cf. Gert Helgesson, *Autonomy, the Right Not To Know, and the Right To Know Personal Research Results: What Rights Are There, and Who Should Decide About Exceptions?*, 42 J.L. MED. & ETHICS 28, 28 (2014) (describing the right not to know in research).

reject relevant information. The core of this question relies on how an individual reaches decisions. If information presented in particular ways (e.g., mandatory ultrasounds) affects the person in a way that changes her mind (e.g., creates an indelible image in her mind that triggers emotions that permanently affect her), then the information coupled with attention is arguably a factor in making the person who she is. This deep notion of autonomy—the right to construct the person that you are through control, where possible, is one of the factors that affects personal growth. In *Wisconsin v. Yoder*,<sup>149</sup> a case about compulsory school attendance, the Supreme Court respected a similar kind of right. Under the Free Exercise Clause of the First Amendment, Amish parents claimed the right to control the factors that would make their children who they would become as adults.<sup>150</sup> In short, the patient's right not to know falls within her bundle of attention rights—the right not to know<sup>151</sup> and the right to look away.<sup>152</sup>

## II. RECOGNIZING THE RIGHT TO ATTENTION

### *A. When the Right to Attention Arises*

At one time, a person engaged with others outside of the household only by intentionally leaving home. Even then, the individual ordinarily interacted with a bounded universe of others when he or she attended school, entered a store, etc. The universe expanded only if he or she entered a public square (e.g., a town center, shopping area, public street, etc.). Today, even if we live alone and do not leave our homes, we are bombarded with unwanted messages through unsolicited phone calls and on the Internet, through pop-ups, spam, and other actions that are hard to ignore. These intrusions, which demand attention and are designed to be difficult to ignore, impose costs on individuals and invade what can be thought of as personal spaces that should be subject to personal control.

Technology has changed so that today we are constantly and often involuntarily bombarded with demands on our attention,<sup>153</sup> and the form the demands take—vivid images, constant interruptions of online experiences, etc.—have become harder to ignore. This bombardment has made attention more valuable: advertisers will certainly pay for the ability to command attention.<sup>154</sup> The change in technology has made the right to attention both integral to and distinct from the right to privacy. The right to be free from unwanted demands on our attention is necessary to allow individuals to assemble what they see as the relevant inputs in constituting their lives, in reaching appropriate decisions, and in achieving a measure of happiness. At the

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149. 406 U.S. 205 (1972).

150. *See id.* at 221–22.

151. *See, e.g.,* Helgesson, *supra* note 148, at 28 (describing the right not to know as the “right to be ignorant by having forgotten”).

152. *See infra* Part II.A.2.

153. *E.g.,* Johnson, *supra* note 30 (stating that “we’ve gone from being exposed to about 500 ads a day back in the 1970’s to as many as 5,000 a day [in 2006],” and that number is still climbing).

154. For a discussion of the potential for attention markets, see Goldman, *supra* note 50, at 1194–97.

extreme, constant bombardment with unwanted images can result in sleep deprivation or even death, if distracted by the images at critical moments. Short of that, it interferes with the individual's ability to create the self as a coherent whole, capable of reaching decisions in accordance with consideration of chosen values and factors that reflect such values.

The law recognizes a number of concepts that give the individual the right to control unwanted intrusions into personal "spaces." These include (1) property concepts such as trespass and nuisance,<sup>155</sup> (2) privacy concepts that create zones of autonomy and freedom from intrusions,<sup>156</sup> and (3) rights to personality that give an individual the ability to control certain aspects of personhood or personal freedom such as the use of one's name, likeness, reputation, etc.<sup>157</sup> The law ought to respond to the increased external demands for attention though recognizing a right to be free from intrusion if one chooses or to allocate attention in particular ways.<sup>158</sup>

The idea of a right to privacy, which is not mentioned in the U.S. Constitution, arose during a period of urbanization in which the intrusions of daily life on personal zones of residence and behavior were increasing.<sup>159</sup> Today, new technology intensifies the assaults on our personal zones of existence not through physical proximity, but through more subtle intrusions that either compete with each other for notice (e.g., pop-up ads<sup>160</sup>) or take the form of commands that we prioritize particular messages (e.g., mandatory ultrasounds<sup>161</sup>) over others we might choose.

The idea of a right to attention is a necessary counterpoint to these technological changes that take the form of demands for our attention.<sup>162</sup> It addresses the imbalance between companies' ability to use technology to command greater portions of our attention for profit and our inability to avoid those commands. It thus aids the "little guy" who may not otherwise be able to fight back. It also preserves for the individual the freedom to assemble the inputs that allow the construction of a coherent self capable of making appropriate decisions on the basis of chosen, rather than imposed, values.<sup>163</sup>

President Franklin D. Roosevelt said, "The country needs and, unless I mistake its temper, the country demands bold, persistent experimentation. It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something."<sup>164</sup> He further explained, "The millions who are in want will not stand by

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155. See, e.g., Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457 (1959).

156. See, e.g., Warren & Brandeis, *supra* note 15, at 195.

157. See Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 50–55 (2005) (proposing recognition of the fundamental right to personality).

158. See, e.g., *supra* Part I.C.

159. See Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1385–86.

160. See *supra* Part I.C.1.

161. See *supra* Part I.C.2.

162. See *supra* Part I.C.1.

163. See Benson, *supra* note 157, at 50–55 (proposing recognition of the fundamental right to personality).

164. Franklin D. Roosevelt, U.S. President, *The Country Needs, the Country Demands Bold, Persistent Experimentation*, Address at Oglethorpe University (May 22, 1932), in 1 THE

silently forever while the things to satisfy their needs are within easy reach.<sup>165</sup> Following this line of thought, we will not have a right to attention unless we demand it.

### 1. Why? Justifications for the Right to Attention

#### a. Attention Has Value, and Its Value Is Increasing<sup>166</sup>

Attention is a form of currency,<sup>167</sup> and, like time, we only have a limited amount of it.<sup>168</sup> Attention can be converted to money.<sup>169</sup> One commentator has already speculated that in the future, our attention will be sold.<sup>170</sup> Not only does our attention have value, but its value is increasing with increasing demands for our attention.<sup>171</sup> Therefore, we deserve the recognition of our right to attention.<sup>172</sup>

Our right to attention is similar to the right to our time<sup>173</sup> or the right to our money.<sup>174</sup> Anyone in their right mind would most likely not allow others to take their time or money freely, in fact, they would probably at least charge some handsome money for their time. Similarly, others should not be able to take our attention freely. In fact, it is rather unethical to abridge others' attention without compensating them in some way or another. We should be able to take back our attention, which was rightfully ours in the first place.

We live in a world where advertisement and social media<sup>175</sup> populate the Internet.<sup>176</sup> The Internet is everywhere, and everything is happening on the Internet.

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PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, at 639, 646 (Samuel L. Rosenman ed., 1938).

165. *Id.*

166. *See supra* Part I.B.

167. *See supra* Part I.B.1.

168. Of course, pharmaceutical supplements (e.g., Adderall) can enhance an individual's focused attention beyond his or her typical daily limit. *See generally* Jasper L. Tran & Derek Tri Tran, (*De*)*Regulating Neuroenhancement*, 37 U. LA VERNE L. REV. 179, 186–90 (2015) (discussing neuroenhancements, including Adderall).

169. *See supra* Part I.B.3.

170. *See, e.g.*, Manson, *supra* note 1.

171. *See supra* Part I.B.

172. *See supra* Part II.A.

173. The right to our time means the right to the ownership of our time—to spend it however we see fit. This implied right has not been formally recognized yet, but Justice Holmes commented that a case has no right to the Court's time. *See Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 460 n.32 (1959).

174. The right to our money means the right to the ownership of our money—to spend it however we see fit. Similar to the right to our time, the implied right to our money has not been formally recognized yet. *Cf.* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927, 1976 (2000) (discussing the right to relief in the context of an action for lost wages).

175. The term “social media” itself implies the use of the Internet as the communication platform. *See, e.g.*, THE SOCIAL NETWORK (Columbia Pictures 2010).

176. *See, e.g.*, Colin M. Leonard & Tyler T. Hendry, *From Peoria to Peru: NLRB Doctrine in A Social Media World*, 63 SYRACUSE L. REV. 199, 201–03 (2013) (discussing the proliferation of social media in the labor context); *supra* text accompanying note 30.

We use the Internet every day. If the law does not recognize our right to attention, we may become so easily distracted with all of the advertisements that we might never get anything done. Now is the perfect time to recognize the right to attention. Otherwise, law will again move slower than technology.<sup>177</sup>

#### b. Attention as a Utilitarian Right

Attention belongs to each individual. Attention is valuable, and its value is increasing.<sup>178</sup> Each individual has certain rights and freedoms. The right to attention is like the right to sleep.<sup>179</sup> Does an individual have a right to sleep because it is valuable to him or her alone?<sup>180</sup> Indeed, an individual has a “right” to have a dog<sup>181</sup> or to play music.<sup>182</sup> Does he or she have a right to say that a neighbor’s dog cannot bark in the yard at 4 a.m.? Is this different from the question of whether the government can use sleep deprivation as a means of interrogation? The argument that attention is valuable is like the idea of freedom. Right-wing people could assert the claim to freedom in the name of discriminating against others or skewing the political system to advance their own ends. Their “freedom” comes at the expense of the freedom of others. This is the Hohfeldian idea<sup>183</sup>: assertion of a property right is not absolute; it occurs in the context of personal relationships.<sup>184</sup>

Property law is, to an extent, based on the notion of Hohfeldian assignment of rights. It complements the bundle of rights idea.<sup>185</sup> One of the notions is that the

177. Cf. Jasper L. Tran, *Press Clause and 3D Printing*, 14 NW. J. TECH. & INTELL. PROP. 75, 77 (2016) (“Technology is progressing at an extraordinary speed. New disruptive technologies are emerging every year. The government has attempted to regulate many emerging technologies . . . .” (footnotes omitted)). The law lags in other ways too. For example, it lags behind other disciplines in addressing certain subjects. See Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 959 (2007) (“[F]or many years ideas originating in other disciplines, such as the sciences and social sciences, faced a huge lag time before legal academics addressed them.” (citing Kathleen M. Sullivan, *Foreword: Interdisciplinarity*, 100 MICH. L. REV. 1217, 1225 (2002))).

178. See *supra* Part I.B.

179. Courts have recognized the right to sleep as a form of protest, tied to a First Amendment purpose. See Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155, 1157 (2012) (discussing the right to sleep in public parks).

180. Cf. *id.* (discussing the right to sleep in public parks for purposes of protest).

181. “At least one [state] court stated (while quoting Am. Jur.) that all people have a right to own a pet.” Bruce A. Levin & Michael Spak, *Lions & Lionesses, Tigers & Tigresses, Bears & . . . Other Animals: Sellers’ Liability for Dangerous Animals*, 58 NOTRE DAME L. REV. 537, 554 (1983) (citing *Collins v. Otto*, 369 P.2d 564, 566 (Colo. 1962)).

182. Cf. Amanda Reid, *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233, 258–59 (2012) (discussing the right of webcasters to distribute playlists and the dissemination of compilations of non-original speech as within the First Amendment’s protections).

183. See Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 986–87.

184. *Id.* at 988 (“Just as privileges do not imply rights, rights do not imply privileges.”).

185. See, e.g., Gormley, *supra* note 159, at 1335 (discussing components of the right to

assertion of a property right against someone else limits their freedom and vice versa.<sup>186</sup> The question of how best to enforce rights then follows from seeing the rights in terms of personal relationships rather than relationships between properties. According to the Hohfeldian construct, a right to attention would not be created until there has been an infringement of that right;<sup>187</sup> for example, an advertisement seeking our attention. But this is a scenario that would almost always be true given the amount of ads we receive per day.

The Coase theorem deals with this, too.<sup>188</sup> Under the Coase theorem, consider whether the individual should have to pay for a right to be free from intrusion (e.g., whether there should be a market for distraction-free electronic products) or whether the advertiser should have to pay for the right to intrude.<sup>189</sup> Our current model is that to have access to an ad-free version of an iPhone app, one has to pay a nominal fee like \$5 or \$10 per app. This could eventually get too costly and is not an option for everyone, which creates a distinction based on wealth or socioeconomic class.<sup>190</sup> Because this Article focuses on the “little guy,” it assumes that most customers—ones with not much money for extra expenses—would likely not pay for an ad-free version and would instead put up with the ads.

Furthermore, the debate on the right to attention mirrors the classic exchange between University of Texas Law Professor John Robertson<sup>191</sup> and University of California Hastings Law Professor Radhika Rao<sup>192</sup> about the right to reproduce.

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privacy).

186. See Singer, *supra* note 183, at 987 (“[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” (alteration in original) (quoting Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 32 (1913))).

187. *Cf. id.* at 1005 (discussing Bentham’s theory that liberties impose a duty “‘where the subject, having seen his liberty infringed in any point or seen cause to apprehend its being infringed, stands in need of an express declaration, an assurance on the part of the law to ease him of his fears’” (quoting JEREMY BENTHAM, OF LAWS IN GENERAL 99 (H.L.A. Hart ed. 1970))).

188. See generally Goldman, *A Coasean Analysis*, *supra* note 50, at 1194–97 (discussing attention markets as marketplace alternatives to regulation).

189. See *id.*

190. See Robert Reich, *Why So Many Americans Feel So Powerless*, HUFFPOST POLITICS: THE BLOG (Apr. 27, 2015, 8:10 AM), [http://www.huffingtonpost.com/robert-reich/why-so-many-americans-fee\\_b\\_7150874.html](http://www.huffingtonpost.com/robert-reich/why-so-many-americans-fee_b_7150874.html) [<https://perma.cc/CX56-NK26>] (noting that less consumer choice leads to less consumer power). See generally INEQUALITY FOR ALL (72 Productions 2013).

191. See, e.g., John A. Robertson, *The Right To Procreate and in Utero Fetal Therapy*, 3 J. LEGAL MED. 333 (1982); see also Elizabeth Price Foley, *Human Cloning and the Right To Reproduce*, 65 ALB. L. REV. 625, 627–30 (2002) (discussing whether we have an affirmative right to reproduce).

192. See, e.g., Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1080 (1998) (discussing “the claim that the Constitution guarantees reproductive autonomy but finds no general right to procreate or not procreate; instead, the rights of, privacy, bodily autonomy, and equal protection work together in certain contexts to afford protection to discrete acts involved in procreation”).



Robertson argued many years ago that there was an affirmative right to reproduce.<sup>193</sup> He argued that reproduction was valuable to the individual<sup>194</sup> and that the line of the mandatory sterilization cases infringe the right to procreate.<sup>195</sup> On the other hand, Rao argued against an affirmative right to reproduce but in the form of a negative privacy right—a right to be free from offensive government intrusions.<sup>196</sup> What made the intrusions, like mandatory sterilization, offensive was a combination of the degree of intrusion (surgery or other physical invasions of the body are definitely intrusive) and extent of impact (here, deprivation of the ability to reproduce affects a substantial life activity).<sup>197</sup> Rao thus claimed, in effect, that the real constitutional interest was the privacy one; the right to be free from certain kinds of interventions and that any “right to reproduce” was derivative.<sup>198</sup> Given that Rao had the better read of the Supreme Court cases,<sup>199</sup> the right to attention is a negative right under the right to privacy’s umbrella of rights.

### c. Attention as Individual Dignity

Under the Kantian approach,<sup>200</sup> an individual’s ability to control that to which he pays attention is an important component of his ability to determine who he can become as a person, the type of life he wishes to lead, and his meaningful consent (or lack thereof) to individual transactions.<sup>201</sup> Wholesale deprivation of the ability to

193. See Robertson, *supra* note 191.

194. See *id.* at 338–39.

195. See *id.* at 339 & n.38.

196. See Rao, *supra* note 192, at 1113–16.

197. See *id.*

198. See *id.*

199. My reading of the cases supports Rao’s assertion. The cases do not necessarily support the right to attention, but the underlying idea of the right to attention could be found under the cases’ framework—as a negative privacy right.

200. See Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1251 (1990) (discussing “Kantian norms of individual dignity and worth”). Baker summarizes the Kantian approach:

For rational beings all stand under the *law* that each of them should treat himself and all others, *never merely as a means*, but always *at the same time as an end in himself*. But by so doing there arises a systematic union of rational beings under common objective laws—that is, a kingdom. Since these laws are directed precisely to the relation of such beings to one another as ends and means, this kingdom can be called a kingdom of ends (which is admittedly only an Ideal).

*Id.* at 1251 n.246 (emphasis in original) (quoting IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* § 75 (H.J. Paton trans. 1948), in H.J. PATON, *THE MORAL LAW* 95 (1978)). For more discussion of the Kantian approach, see generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* § 75 (H.J. Paton trans. 1948), in H.J. PATON, *THE MORAL LAW* 95 (1978); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 357–67, 367 (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 172, 198 (1978); AMY GUTMANN, *LIBERAL EQUALITY* (1980); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 262 n.83 (1983); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 912–21 (1981).

201. See sources cited *supra* note 200.

control attention is torture; thus, government interrogators often use sleep deprivation or bombard suspects with unwanted distractions, such as loud music,<sup>202</sup> to make it hard for the suspects to focus attention in ways that allow them to resist interrogators. These acts, which involve both the deprivation of the ability to direct attention and the forced direction of attention, are torture.<sup>203</sup> And when the government allows them, it violates a person's rights in many contexts, rights that go to bodily integrity and freedom from coerced confessions.<sup>204</sup> Attention is thus part of what we treat as a right to individual dignity (or exercise of free will in making choices or other formulations you may choose), called for by natural law.<sup>205</sup>

#### d. Freedom of Choice

We each have the freedom of choice<sup>206</sup> to spend our attention however and whenever we want. The right to choose (also referred to as the right of choice) has been enumerated in many forms.<sup>207</sup> Why not the right to attention? As argued, the right to attention is already a part of the privacy right's bundle of rights.<sup>208</sup> Recognizing the right to attention gives the "little guys" more privacy and control over their lives and their daily decisions.

Like the right to privacy, the right to attention is arguably a fundamental personal right.<sup>209</sup> Justice Brandeis articulated, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material

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202. *E.g.*, *Vance v. Rumsfeld*, 701 F.3d 193, 196 (7th Cir. 2012) (noting that plaintiffs were detained and interrogated in Iraq and were allegedly, among other things, "subjected to sleep deprivation, prolonged exposure to cold, [and] intolerably loud music").

203. *See, e.g., id.* (noting that the Army Field Manual forbids several of the interrogation techniques at issue as "torture" but declining to address whether these practices are a crime).

204. An example of freedom from coerced confessions is the *Miranda* warning requirement in custodial interrogation under the Fifth Amendment. *See generally* *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

205. *See supra* note 200.

206. *Cf.* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 672 (1980) (discussing limits on a child's freedom of choice in seeking a mate).

207. *See* David H. Gans, *The Unitary Fourteenth Amendment*, 56 *EMORY L.J.* 907, 911 (2007) (discussing the right to choose abortion); Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 *HARV. L. REV.* 1550 (2011) (discussing the right to choice of counsel).

208. *See generally supra* Part II.A.2.

209. *Cf.* *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) ("[T]he right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" (quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting))). *But see* Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (holding that a fundamental right needs to be not just "'fundamental'" but also "an interest traditionally protected by our society"). The focus on attention is still new; thus, it is unknown whether attention is an interest our society should protect. But this Article takes the stand that attention should be a protected asset. *See also* Goldman, *supra* note 50, at 1194–97 (discussing attention markets as marketplace alternatives to regulation).

things.”<sup>210</sup> Attention is a resource that can lead to an individual’s happiness, whereas distraction is rarely welcomed. The freedom of choice to spend one’s attention must be respected and protected to the utmost.

## 2. What? To Recognize the Right to Attention

We own and are entitled to our attention, yet advertisement companies and scam artists freely bombard us with their “products” daily, resulting in our own time and monetary loss.<sup>211</sup> If the right to attention is not recognized, states could continue to freely mandate ultrasounds for pregnant women against their will, as if their attention were not really theirs in the first place.<sup>212</sup> Similarly, other problems in our daily lives that involve attention would likely continue to go unaddressed. New, emerging technologies make this an issue of increasing importance.

Given the situation, this Article proposes legislation to recognize the right to attention<sup>213</sup> as a statutory right<sup>214</sup> or, alternatively, suggests that the courts recognize the right to attention as a constitutional right. Specifically, the right to attention’s much larger, as-yet-poorly-defined bundle of rights<sup>215</sup> includes, for example, the right to deny attention when demanded, the right to be left alone,<sup>216</sup> the right not to be spammed<sup>217</sup> and the right not to receive ads when such advertisement is unwanted

210. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

211. See *supra* Part I.C.1; Rao & Reiley, *supra* note 29, at 100 (estimating the annual costs of spam to consumers at nearly \$14 billion and estimating firm spending on antispam solutions at \$6.5 billion (citing Richi Jennings, *Cost of Spam is Flattening—Our 2009 Predictions*, MUSEUM EMAIL & DIGITAL COMM. (Jan. 28, 2009), <http://email-museum.com/2009/01/28/cost-of-spam-is-flattening-our-2009-predictions/> [<https://perma.cc/M6DP-JB7Q>])).

212. See *supra* Part I.C.2. Note that pregnant women could bring their cases to courts, but without the recognition of the right to attention, courts seem to struggle in addressing these concerns. See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (invalidating North Carolina’s mandatory ultrasound law as unconstitutional because it violated physicians’ free speech rights).

213. The right to attention can also be viewed as a negative right—the right to not be distracted/disturbed/bothered.

214. Note that this Article does not get into the bill’s details, which a legislature could flesh out given its resources. Rather, this Article advocates for a new idea that should be in the works.

215. This Article seeks to stimulate more scholarly discussion on the right to attention. More rights within this bundle of rights will be defined and refined as time goes on.

216. Note the similarity to “the right to be let alone” under the right to privacy’s bundle of rights. See *Warren & Brandeis*, *supra* note 15, at 195 (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (2d ed. 1888)). In his famous dissent in *Olmstead v. United States*, Justice Brandeis found the “right to be let alone” as “the most comprehensive of rights and the right most valued by civilized men.” 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

217. See Press Briefing by Ari Fleischer, Press Sec’y, White House Office of Commc’ns (May 8, 2001), available at 2001 WL 483484, at \*6 (“[T]he President . . . believes that consumers should be empowered and individuals should not be subject to numerous or unwanted spam messages. And that means working very carefully . . . to find the appropriate balance to protect people’s 1st Amendment rights, also protecting consumers and individuals’ rights to not be spammed when they do their work.”).

or uninvited,<sup>218</sup> the right to waive the understanding of an agreement, the right to give consent without being informed,<sup>219</sup> and the right not to be required to receive information against one's will.

The right to attention would primarily be a negative right rather than a positive right.<sup>220</sup> This means the government has no affirmative duty to ensure an individual's right to attention (i.e., not a positive right), but each individual has the right not to have his or her attention demanded or taken away freely without consequences (i.e., a negative right).

Furthermore, given that the right to attention is a personal right, it would attach to each individual and, thus, would not be transferable.<sup>221</sup> Also, the right to attention would only apply to persons and not corporations because entities like corporations do not have attention.<sup>222</sup>

The legislature should allow an individual to have a legal action against advertisement and spam companies for taking away his or her time and attention.<sup>223</sup> By asserting the injury of lost time and attention, a litigant could convert the lost time and attention to the other form of currency (i.e., money) via the remedy of monetary damages.<sup>224</sup> This takes care of the injury and remedy issues. Enactment of this proposal would give each individual the necessary standing to initiate a legal action against advertisement corporations, empowering them to stand up for themselves to take back what is rightfully theirs in the first place—their attention.

Recognizing the right to attention would also allow individuals to not be subject to needless, mandatory ultrasounds against their wills.<sup>225</sup> Recognizing the right to attention would help form contracts<sup>226</sup> or a more informed consent.<sup>227</sup> Without recognizing the right to attention, contract formation and informed consent are

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218. *See id.*

219. *See* Vadim S. Rotenberg, *To Inform or Not To Inform—A Decision with Psychobiological Implication*, 16 *MED. & L.* 49, 52 (1997) (“[T]he patient with a ‘fatal’ illness has the right not to be informed about his illness in order to be free from renunciation of search and helplessness.”).

220. *See supra* Part II.A.1.b. This is similar to the right to abortion, where a pregnant mother is entitled to have an abortion, but the government does not need to provide funds or access to such abortion (except when it is necessary to save the pregnant mother's life). *See Harris v. McRae*, 448 U.S. 297, 316 (1980).

221. In New York, for example, the right of publicity is a privacy claim that is personal to an individual, is non-transferable, and is extinguished upon the individual's death. *See Smith v. Long Island Jewish-Hillside Med. Ctr.*, 499 N.Y.S.2d 167, 168 (App. Div. 1986). This is similar to the right to privacy.

222. *Cf., e.g., Roberts v. Gulf Oil Corp.*, 195 Cal. Rptr. 393, 411 (Ct. App. 1983) (“[C]orporations have a lesser right to privacy than human beings and are not entitled to claim a right to privacy in terms of a fundamental right . . .”). Furthermore, corporations are fictional entities that do not have the five human senses, which is where the ability to pay attention comes from.

223. *See supra* Part I.C.1.

224. *See supra* Parts I.B.2 & I.B.3.

225. *See supra* Part I.C.2.

226. *See infra* Part II.C.2.

227. *See infra* Part II.C.1.

hollow and superfluous<sup>228</sup>: contracting parties have no meeting of the minds<sup>229</sup> and informed consent is giving consent without being informed.<sup>230</sup> In short, recognizing the right to attention would give the “little guys” more privacy and control over their lives and their daily decisions.

To infringe on an individual’s right to attention, the government would probably be subject to some level of intermediate-scrutiny review,<sup>231</sup> rather than rational-basis<sup>232</sup> or strict-scrutiny review.<sup>233</sup> It is too easy to satisfy rational basis, which would make the right to attention superfluous. Similarly, strict-scrutiny review for the right to attention (unlike, for example, the right to vote) is likely too high of a standard.

Note that a requirement to read a written contract is easier for an individual to ignore than a requirement to watch a video or to listen to audio. Thus, insistence on delivering information that is harder to ignore (e.g., by requiring watching a video or listening to audio) as a condition for, for example, buying an audio recording or consenting to in vitro fertilization (IVF)<sup>234</sup> should be more offensive than imposing an easier requirement (e.g., requiring reading a written contract). The contexts seem different: buying a recording is usually about copyright, whereas IVF has risks which may impact the mother or the child. Individuals can voluntarily waive their right to attention, but others intruding on their right to attention should not assume waiver of that right. Note that this only applies when individuals are forced to give up their right. A notice to individuals inquiring or requesting a waiver of their right to attention would be a start and should be enforceable. In other words, giving up the right to attention cannot be a condition (i.e., waiver of the right to attention cannot be forced), but individuals can voluntarily waive their right to attention. For example, either access to a contract or to an abortion can be conditioned on the waiver of the right to attention.

### 3. How? Where the Right to Attention Can Come From

One scholar examined 100 years of the right to privacy and concluded that scholars were “unable to agree on a one-size-fits-all definition of legal privacy

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228. See *infra* Part II.C.

229. See *infra* Part II.C.2.

230. See *infra* Part II.C.1.

231. The intermediate-scrutiny review discussed here follows the same intermediate scrutiny under the constitutional standard of review for an equal protection claim. That is, the government must prove that the regulation is substantially related to an important government interest. *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225 (1995).

232. Under the rational-basis standard of review for an equal protection claim, the regulation’s challenger must prove that the regulation is not rationally related to a legitimate state interest. *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

233. Under the strict-scrutiny standard of review for an equal protection claim, the government must prove that the regulation is necessary to achieve a compelling government interest. *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

234. For a discussion on IVF, see generally June Carbone & Naomi Cahn, *Embryo Fundamentalism*, 18 WM. & MARY BILL RTS. J. 1015 (2010); June Carbone, *Who Decides What Number of Children Is “Right”?*, 104 NW. U. L. REV. COLLOQUY 109 (2009).

because it actually consists of five distinct species”: (1) tort privacy, (2) Fourth Amendment privacy, (3) First Amendment privacy, (4) fundamental-decision privacy, and (5) state constitutional privacy.<sup>235</sup> Similarly, the right to attention can come from many different places as well: (1) the right to privacy under the U.S. Constitution, (2) statutes, (3) economic/property rights, or (4) human rights.

Upon reviewing the literature, the right to attention has appeared before in only one context: minors’ right to attention from their parents.<sup>236</sup> There is no reason why this should not be extended to be an individual’s right. The Supreme Court could start here—minors’ right to attention from their parents—and expand it to all individuals.

The right to attention can stem from other existing rights. For instance, constitutionally, the right to attention<sup>237</sup> can be interpreted as part of the “right to privacy[’s]”<sup>238</sup> “bundle of rights”<sup>239</sup> as guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments<sup>240</sup> and their penumbræ.<sup>241</sup> Specifically, the penumbræ and Ninth Amendment contain many unenumerated rights,<sup>242</sup> one of which could include the right to attention. Alternatively, rather than falling under the right to privacy’s umbrella of rights, the Supreme Court could read the right to attention from the Constitution’s First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments and their penumbræ. Constitutional law itself is a romantic subject.<sup>243</sup>

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235. Gormley, *supra* note 159, at 1335 (discussing 100 years of the right to privacy).

236. Note that the United Nations Children’s Fund (UNICEF) has advocated for “children hav[ing] the right to attention from both parents.” UNICEF, *Article 18*, YOUTUBE (Sept. 28, 2007), <https://www.youtube.com/watch?v=m3wTJ30FaCQ&list=PLtPoovv4KdsIxNzFBQoYJhRiz6nm1oZ2v&index=16> [<https://perma.cc/7Q8H-G42X>]. For a discussion on UNICEF, see generally *About UNICEF*, UNICEF, [http://www.unicef.org/about/who/index\\_introduction.html](http://www.unicef.org/about/who/index_introduction.html) (last updated May 12, 2015). Although the United Nations’ concept is different from the concept articulated in this Article, why shouldn’t the United States extend a similar-but-unqualified right to attention to each individual, including adults?

237. The right to attention is a right viewed from the information receiver’s perspective. This leads to some overlap between the right to attention and the right to privacy. If we draw a Venn diagram between the two rights’ bundle of rights, there are some overlaps and some differences. The right to attention is a framework, a perspective. Rather than trying to fit this nicely within our current body of law, this Article offers a fresh perspective to view law from the angle of “attention.” This was how the body of privacy law got started—looking at law from the perspective of “privacy.”

238. Warren & Brandeis, *supra* note 15. This was the first article that articulated the right to privacy.

239. *E.g.*, Steven Winters, Comment, *The New Privacy Interest: Electronic Mail in the Workplace*, 8 HIGH TECH. L.J. 197, 200 (1993) (describing the right to privacy as “a diverse and growing bundle of rights which derive from four principal sources: The United States Constitution, state constitutions, statutory sources, and the common law” (footnotes omitted)).

240. See cases cited *supra* note 16.

241. The penumbræ include the rights guaranteed by implication in the Constitution. See *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965); Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1092 (1997).

242. See U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” (emphasis added)).

243. Cf. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (“Our constitutional theory is in the grip of a romantic conception

What we knew about constitutional law twenty years ago is different from what we know today, which will again be different from what we know twenty years from now.

Statutorily, the right to attention can be interpreted as a negative right from, for example, the right to not be disturbed by others' loud noises<sup>244</sup> (for which one could call the police to file a noise<sup>245</sup> complaint against loud neighbors<sup>246</sup>) or by noise from a vehicle.<sup>247</sup>

Alternatively, the right to attention can be recognized as an economic or property right, falling under the Fourteenth Amendment's guaranty of "life, liberty, [and] property."<sup>248</sup> The right to attention can also be a tort right, for which there could be a damages remedy.<sup>249</sup> The right to attention could also be a human right.<sup>250</sup>

### *B. When the Right to Attention Does Not Arise*

The right to attention is not absolute—it should have boundaries. The right to attention generally would not arise if an individual were under an obligation<sup>251</sup> or were to gain a privilege.<sup>252</sup> Although it is hard to tell whether an individual is paying attention, his or her attention can be demanded through, for example, the administration of an exam.<sup>253</sup> Even so, the demanding party would still need a

of free expression, a belief that the 'marketplace of ideas' is freely accessible.'").

244. *See, e.g.*, HAW. REV. STAT. § 342F-30.5 (West 2008) ("[n]oise control" statute providing for creation of state community noise code).

245. Noise can be subject to time, place, and manner restrictions. *See* State v. Poe, 88 P.3d 704, 7113 (Idaho 2004) ("[R]easonable time, place, or manner restrictions on speech may be upheld if they are justified without reference to the content of the speech, and speech may be proscribed based upon a non-content element, such as noise." (citing R.A.V. v. St. Paul, 505 U.S. 377 (1992))).

246. Of course, some noise level, such as from a "licensed premises" under Washington D.C.'s laws, can be permitted depending on a property's zoning district. *See, e.g.*, D.C. CODE § 25-725 (LexisNexis Supp. 2015) ("[n]oise from licensed premises" statute). Also, loud noises from living or being near aircraft or trains are also permitted because people assume the risk when living near an airport or the railroad. *Cf.* 42 U.S.C. § 4916 (2012) (setting "[r]ailroad noise emission standards" that imply that noises near a railroad are permitted on some level and implying that those who choose to live near a railroad assume the risk of disturbance caused by noises).

247. *See* Noise Control Act of 1972, 42 U.S.C. §§ 4901–18 (2012) (commanding emission standards for manufacturers of noise emitters).

248. *See* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

249. *See generally* Warren & Brandeis, *supra* note 15, at 219 (describing the remedies for invasion of privacy as grounded in tort).

250. *See generally supra* Part II.A.1.c.

251. North Carolina's mandatory ultrasound requirement is not an obligation to pregnant women because the new law interferes with a pregnant woman's right to abort. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

252. The quid pro quo for demanding an individual's attention is receiving a privilege in exchange.

253. Assuming he or she wants to pass, of course. Without paying attention, one would not likely pass an exam.

legitimate interest to override an individual's right to attention and require his or her attention for a finite amount of time. For example,<sup>254</sup> to gain the driving privilege, an individual must pass both the written and driving exams, where he or she must pay extra careful attention either while taking the written exam or while driving during the driving exam. The government can justify its requirement of an individual's attention because driving a vehicle is like operating a dangerous or deadly weapon that can easily kill others.<sup>255</sup>

Clients, customers, and bosses can demand employees' attention according to contractual agreement. Under their contractual obligations, employees often must pay attention to clients, customers, and bosses during the work hours as part of the job's requirements. Technically, an employee can choose to not pay attention on the job, but failure to do so might result in being fired.

Also, the government can demand an individual's attention, and the individual can face consequences for not complying.<sup>256</sup> For instance, jury duty calls an individual to serve on a jury, presumably paying attention to the facts at trial to vote on a verdict. Failure to report for jury duty may result in a fine,<sup>257</sup> but a juror faces no consequence for not paying attention and falling asleep during trial.<sup>258</sup> Courts can summon an individual as a witness via their power to subpoena, and an individual can face court sanctions resulting in fines or jail time for failure to appear.<sup>259</sup> Failure to respond to a court's questions during a hearing can result in sanctions or being disciplined. Similarly, a police officer can arrest or detain an individual with sufficient probable cause.<sup>260</sup>

Another exception to the right to attention is that there is no right to attention in a human relationship.<sup>261</sup> Attention is the premise of each human relationship; humans naturally crave attention and want others' validation.<sup>262</sup> For instance, when a spouse

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254. The listed scenarios are not exhaustive. Rather, they serve as a starting place to think about similar instances.

255. *See, e.g.*, *United States v. Cunningham*, 597 F. Supp. 2d 155, 157 (D. Me. 2009) (“Maine law confirms that the act of driving a motor vehicle into another vehicle can constitute use of a dangerous weapon.” (citing *State v. York*, 899 A.2d 780, 781–82 (Me. 2006))).

256. This overlaps with other schemes in society: our duty as members of a society and our obligations to follow the law to belong to society.

257. *E.g.*, *Imperial – Ignoring Jury Duty May Result in Fines*, LSI (Aug. 19, 2015), <http://www.lsi.org/imperial-ignoring-jury-duty-may-result-in-fines/> [<https://perma.cc/TBR8-N6DV>].

258. *Cf.* *People v. Williams*, 355 P.3d 444, 470 (Cal. 2015) (holding that “sleeping during trial constitutes good cause for the dismissal of juror” and implicitly holding that jurors face no consequences—besides being dismissed—for falling asleep).

259. *E.g.*, *State v. Castle*, 637 N.E.2d 80, 82 (Ohio Ct. App. 1994) (affirming criminal contempt for failure to obey subpoenas requiring witness testimony).

260. *E.g.*, *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (per curiam) (“[T]he traditional rule [is] that arrests may constitutionally be made only on probable cause.” (quoting *Hayes v. Florida*, 470 U.S. 811, 816 (1985))).

261. The human relationship is a personal relationship rather than a commercial one like in the case of advertisement, spam, and scams. *See supra* Part I.C.1.

262. *See, e.g.*, Arthur Pearlstein, *Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR*, 12 PEPP. DISP. RESOL. L.J. 215, 250 (2012) (“[D]esire for attention or approval . . . [was] implanted . . . within our natures as a substitute for reason or



stops paying attention to the other partner, the relationship is likely doomed to fail.<sup>263</sup> Although a spouse might arguably have the right to attention from the other partner for dating or marrying that partner, this Article does not advocate for recognizing the right to attention in domestic disputes, which are personal and can be solved between the parties. Likewise, this Article does not discuss whether children have a right to attention from their parents.<sup>264</sup>

### C. Application to Other Contexts

Every exchange of information involves at least two parties, where one side communicates the information and the other side receives the information. Scholarship most often focuses on the communicator's perspective (e.g., how much information the communicator discloses) or on the information itself,<sup>265</sup> but surprisingly, scholarship does not focus much on the receiver's perspective.

This lack of discussion and dearth of scholarship from the information receiver's perspective is problematic because the receiver is often the "little guy"<sup>266</sup> in the conversation. For those who do not pay attention in reviewing contracts, contracting parties have no meeting of the minds,<sup>267</sup> and "informed consent" could mean giving consent without being informed.<sup>268</sup> Recognizing the right to attention would legitimize informed consent and contract formation by allowing individuals to waive their rights to attention.<sup>269</sup>

#### 1. Healthcare: Informed Consent

Attention is very important to the decision-making process and is especially crucial in the healthcare decision-making setting. In healthcare, there are usually two parties in each conversation<sup>270</sup>: physicians as the communicator and patients as the information receiver. If the receiver does not pay attention, the communication chain is broken. Interesting cases arise in the informed-consent regime.

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virtue." (quoting Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 33, 47 (2005)); *id.* ("[A]ttention addresses a fundamental human desire. . . . While many of us crave huge amounts of recognition, the lure is not merely fame or a place in history. It's also praise from the people around you for what you do." (alteration in original) (quoting Goldhaber, *supra* note 60)).

263. See, e.g., Leslie Petruk, *Divorce Signs: 6 Indications that Your Marriage Will End*, HUFFPOST: DIVORCE (Oct. 29, 2012, 12:31 PM), [http://www.huffingtonpost.com/2012/10/29/divorce-signs\\_n\\_2025734.html](http://www.huffingtonpost.com/2012/10/29/divorce-signs_n_2025734.html) [<https://perma.cc/R2DT-E593>] ("Just like other relationships, if your marriage doesn't receive the necessary time and attention, it will deteriorate.").

264. See *supra* note 236.

265. See *supra* note 27.

266. The "little guy" denotes one without authority and whose voice is not being heard.

267. See *infra* Part II.C.2.

268. See *infra* Part II.C.1.

269. See *infra* Parts II.C.1 & II.C.2.

270. The other parties are the hospital and the insurance company, but they are not relevant to the context at hand—the communication between a patient and his or her physician.

New York codified the existing common law informed-consent doctrine into the Medical Malpractice Act, defining the lack of “informed consent” as:

the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.<sup>271</sup>

In short, a physician owes a duty to inform or disclose when the physician takes an action in cases involving “‘non-emergency treatment, procedure or surgery’ or procedures that involve ‘invasion or disruption of the integrity of the body.’”<sup>272</sup>

In recent years, controversies regarding informed consent have been on the rise, with questions raised over whether and to what extent physicians must disclose health risks to patients<sup>273</sup> and whether and to what extent researchers must disclose their research findings to participants.<sup>274</sup> However, these informed-consent questions focused solely on the perspective of the physicians, the researchers, or their affiliated institutions, but not the patients. The underlying assumption is that patients pay attention and understand most, if not all, information from the physicians and the researchers.

Can a patient, either intentionally or inadvertently, just not listen, not understand, or not pay attention to the information coming from physicians or researchers? For example, the physicians or researchers could speak in medical or scientific language that the patient does not understand, and thus the patient might not pay attention to the disclosed information. Or a patient who does not speak English and requires a translator may not understand the physician’s words through the translator because the words’ meanings were lost in the translation. Or a patient could simply choose to not pay attention to the information disclosed.

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271. Paula Walter, *The Doctrine of Informed Consent: To Inform or Not To Inform?*, 71 ST. JOHN’S L. REV. 543, 549 (1997) (quoting N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1993)).

272. *Id.* at 551 (quoting N.Y. PUB. HEALTH LAW § 2805-d(2) (McKinney 1993)).

273. *See, e.g.*, Alexander Morgan Capron, *Informed Consent in Catastrophic Disease Research and Treatment*, 123 U. PA. L. REV. 340, 350–92 (1974); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure To Warn*, 65 N.Y.U. L. REV. 265, 271–326 (1990) (discussing physicians’ failure to warn); Valerie Gutmann Koch, *A Private Right of Action for Informed Consent in Research*, 45 SETON HALL L. REV. 173, 177–83 (2015) (discussing informed consent to treatment); Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 907–41 (1994); Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 232–56 (1985) (discussing physicians’ duty to inform).

274. *See, e.g.*, Capron, *supra* note 273, at 350–92; Koch, *supra* note 273, at 183–93 (discussing informed consent in research); Karine Morin, *The Standard of Disclosure in Human Subject Experimentation*, 19 J. LEGAL MED. 157, 165–96 (1998); Preston D. Mitchum, Note, *Gene Patents and Informed Consent: The Mythical “Reasonable Person” Standard*, 3 BIOTECHNOLOGY & PHARMACEUTICAL L. REV. 79, 79–86 (2010).

How about when a patient does not get the relevant information not by choice but rather due to a systemic problem? The critical question is what physicians should tell patients, and lawyers would often advise physicians to tell patients everything—every possible scenario, no matter how unlikely. However, “Many consent forms are 15 to 20 pages long. . . . [T]o simply read a document that is 20 pages long would mean a time spent of approximately 60 minutes.”<sup>275</sup> Consent forms that are lengthy and filled with legalese actually obscure rather than illuminate relevant information.<sup>276</sup> Instead of directing patients’ attention to the relevant information to inform patients, these forms do the opposite—distract the patients with unhelpful information.<sup>277</sup>

This is the negative consequence of telling patients everything. For example, a patient who needs a wisdom tooth removed might face an extremely rare chance of death,<sup>278</sup> but does the patient need to know that? Most people think not, because knowing would likely deter most patients, especially millennials who are (at least in terms of finances) more risk averse than previous generations,<sup>279</sup> from undergoing this typically safe treatment. Thus, patients would then have to deal with the consequences of not undergoing the procedure. Either way, the patients suffer.

Alternatively, patients also suffer when their physicians withhold information either intentionally or because the physicians are used to doing things a certain way.<sup>280</sup> Ultimately, what patients would want to know most is the information that would allow them to make better choices (e.g., this anesthesia is better than that one) and to know what their physician’s opinion is or which treatment their physician would recommend.

Once a patient, either intentionally or inadvertently, just does not listen, does not understand, or does not pay attention to the information coming from physicians or researchers, the question becomes whether a patient was informed in giving his or her “informed consent.” Evidently not, and the so-called informed consent becomes superfluous and hollow<sup>281</sup>—it is just consent without being informed. The objective behind informed consent is actually evidenced by the heavy emphasis on the word “informed” rather than “consent,”<sup>282</sup> though both terms are still important. Informed

275. Anvita Pandiya, *Readability and Comprehensibility of Informed Consent Forms for Clinical Trials*, 1 PERSP. CLINICAL RES. 98, 99 (2010).

276. *See id.*

277. *See id.*

278. *See, e.g., Maine Teenager Dies After Wisdom Teeth Removed*, CBS NEWS (Feb. 27, 2014, 4:55 PM), <http://www.cbsnews.com/news/maine-teenager-dies-after-wisdom-teeth-removed/> [<https://perma.cc/P89Y-ZDC4>] (“[D]eath from complications of oral surgery is so rare that its frequency cannot be accurately estimated.”).

279. *E.g., Steven Russolillo, Chart of the Day: Millennials Are Really Risk Averse*, WALL ST. J.: MONEYBEAT (May 29, 2014, 2:37 PM), <http://blogs.wsj.com/moneybeat/2014/05/29/chart-of-the-day-millennials-are-really-risk-averse/> [<https://perma.cc/DQQ6-86GC>].

280. *See* Mark A. Rothstein & Gil Siegal, *Health Information Technology and Physicians’ Duty To Notify Patients of New Medical Developments*, 12 HOUS. J. HEALTH L. & POL’Y 93, 133–34 (2012) (discussing physicians’ duty to notify and its practical concerns, including patients’ privacy and (in some cases) patients’ “lack of health literacy” interfering with their “ability to understand health information”).

281. This is very similar to the analysis of contract formation. *See infra* Part II.C.2.

282. *Cf.* Edward L. Raab, *The Parameters of Informed Consent*, 102 TRANSACTIONS AM. OPHTHALMOLOGICAL SOC’Y 225, 229 (2004) (discussing conceiving of informed consent “as

consent is a great idea,<sup>283</sup> but it will not work if patients are not paying attention.<sup>284</sup> Recognizing the right to attention would allow the patient to waive his or her respective right to attention. That is, the patient would effectively waive his or her right to an informed consent while still giving consent.<sup>285</sup>

Given that an individual's attention span is limited and easily lost after reading pages after pages of text, the hospital should summarize the consent form in one paragraph in bold, separately initialed or read to the patient. These are efforts to command attention and thus demonstrate that consent is informed. Informed consent forms are becoming meaningless rituals, but with the right delivery, they can effectively compel attention rather than burying salient points in ways that obscure them.

## 2. Adhesion Contract: Contract Formation

To form a contract, the offeror offers, followed by the offeree's acceptance.<sup>286</sup> There are two contracting parties. In the case of an adhesion contract, the offeror has the commanding power, whereas the offeree often must "take-it-or-leave-it."<sup>287</sup> The offeror (i.e., the communicator) often attempts to communicate the contract's terms to the offeree (i.e., the information receiver), and the offeree attempts to listen to understand what he or she is getting himself or herself into.<sup>288</sup> But what happens when the offeree, intentionally or inadvertently, does not pay attention in either listening or reading the adhesion contract's terms?

This scenario occurs quite often. For example, before individuals can live in an apartment, they must sign a rental agreement setting out the terms of the lease, regardless of whether they read the agreement. Before individuals can download a computer program (e.g., Apple's iTunes)<sup>289</sup> or join a website (e.g., Facebook)<sup>290</sup> or find out more information about their DNA (e.g., 23andMe),<sup>291</sup> they must click "I

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a process, not as a paper").

283. Interview with Bryan Liang, M.D., Ph.D., J.D. and Arthur W. Grayson Professor of Law & Medicine, Southern Illinois University Schools of Law and Medicine, AUDIOLOGYONLINE (May 9, 2000), <http://www.audiologyonline.com/interviews/interview-with-bryan-liang-m-1822> [<https://perma.cc/A7G5-RNA3>] ("[W]ritten informed consent is a good idea . . .").

284. See Pandiya, *supra* note 275, at 98.

285. See *supra* Part II.A.2.

286. See U.C.C. § 2-206 (2014). In forming a contract, there is also consideration and a meeting of the minds. See, e.g., Caroline N. Bruckel, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation*, 68 MINN. L. REV. 117, 118 (1983).

287. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983).

288. Cf. *id.* at 1177 (discussing the details of the deal timeline and how offeree dickers about the terms).

289. See Henry Sprott Long III, Note, *Reconsidering the "Balance" of the "Digital First Sale" Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine To Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183, 1191 (2008).

290. See Grimmelmann, *supra* note 106, at 1145 n.26.

291. See generally *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL

Accept” to an adhesion contract provided by the company,<sup>292</sup> regardless of whether they read the agreement.

Without reading the agreement, the party with little voice—the offeree in an adhesion contract—effectively waives his or her rights. The American culture has become fixated on contracts’ written signatures or initials to protect the interests of landlords, software companies, and the like without paying much attention<sup>293</sup> to the other contractual party—the offeree.

A lack of attention from the offeree’s side effectively destroys the contract (or at least its spirit) because there is no meeting of the minds of both parties.<sup>294</sup> Some might consider this agreement waiver (i.e., the offeree waiving his or her right to understand the contract’s terms but still wanting to go through with it) perhaps due to trust or simply not understanding the contract or believing that a lack of bargaining power makes reading the contract’s terms pointless. Regardless, what the offeree waived was the ability to understand the contract’s terms or, in other words, the offeree’s right to attention.<sup>295</sup> Without recognizing this right to attention, a contract, though it looks “good” on paper, is in fact hollow and superfluous because there is no meeting of the minds. Recognizing the right to attention would allow the offeree to waive his or her respective right to still form a contract.<sup>296</sup>

Like the suggested improvements for informed consent,<sup>297</sup> the offeror should likewise summarize the contract in one paragraph in bold, separately initialed or read to the offeree. These are efforts to command attention and thus demonstrate that the contracting parties had a meeting of the minds. Adhesion contracts are also becoming meaningless rituals, but with the right delivery, they can effectively compel attention rather than burying salient points in ways that obscure them.

#### *D. Counterarguments to Recognizing the Right to Attention*

##### 1. Narrowing the Communicator’s Freedom of Speech and Fitting the Right into Current Laws

The strongest counterargument is that recognizing the information receiver’s right to attention would oppose, and, in effect, narrow the communicator’s freedom of speech as guaranteed by the First Amendment, including his or her right to advertise.<sup>298</sup>

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2903752, at \*2–\*3 (N.D. Cal. June 25, 2014) (discussing 23andMe’s terms of service).

292. *E.g.*, Long, *supra* note 289, at 1191.

293. Pun intended.

294. Meeting of the minds is another requirement of contract formation; it is essentially the spirit behind contract formation. *See, e.g.*, Wilhelm Lubrication Co. v. Brattrud, 268 N.W. 634, 635 (Minn. 1936); Van Meeruwen v. Swanson, 141 N.W. 112, 113–14 (Minn. 1913); *cf.* Viker v. Lien, 109 N.W. 1135, 1135 (Minn. 1906) (“There is no merit to appellant’s claim that the parties never came to a full agreement.”).

295. *See generally supra* Part II.A.2.

296. *See id.*

297. *See supra* Part II.C.1.

298. *See generally* Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 92 (1999).

However, the focus here is on the receiver, not the communicator.<sup>299</sup> If the focus always stays on the communicator, the receiver would likewise always receive the shorter end of the stick. Just because the communicator has the freedom of speech, such freedom is not unlimited and is not without boundaries. In fact, the freedom of speech itself has boundaries and exceptions.<sup>300</sup> It is about time for the receiver to speak up for his or her respective rights,<sup>301</sup> especially the right to attention.<sup>302</sup> And it is time to recognize both the communicator's and the receiver's respective rights—rather than just viewing the issue from the communicator's perspective—and work together to achieve a fair and reasonable resolution.<sup>303</sup>

Furthermore, this Article is not advocating for more regulation or prohibition of the communicator's speech, but rather, for a recognition of the receiver's right to attention.<sup>304</sup> Perhaps an unintended effect of recognizing the receiver's right to attention could be narrowing the communicator's speech by a time, place, and manner restriction.<sup>305</sup>

Another unintended effect could be making some current law unnecessary, for example, the Federal Communications Commission's (FCC) Telephone Consumer Protection Act.<sup>306</sup> The current rule is that (1) callers must provide their names, their representative institution, and a contact phone number or address; (2) callers cannot call between 9:00 p.m. and 8:00 a.m.; and (3) callers must immediately comply with do-not-call requests.<sup>307</sup> However, the FCC's attempt has fallen short of solving the problem: it focuses on treatment rather than prevention or cure.<sup>308</sup> Putting a "Band-Aid on a bullet hole" does not solve the long-term distraction problem of advertisements, spam, and scams. For example, "we've gone from being exposed to about 500 ads a day back in the 1970's to as many as 5,000 a day [in 2006],"<sup>309</sup> and that number is still climbing. Imagine a future where almost everyone wears Google

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299. See *supra* Parts I.C & II.A.2.

300. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

301. See *supra* Part I.C.

302. See *supra* Part II.A.2.

303. Cf. Howard M. Erichson, Commentary, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1023 n.40 (2013) (noting that judging in nonclass settlement aims to come to "'a fair and reasonable resolution'" for the parties (quoting Transcript of Proceedings at 38, *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007))).

304. See *supra* Part II.A.2.

305. See generally William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 783 n.168 (1986).

306. See Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2012).

307. *Unwanted Telephone Marketing Calls*, FED. COMM. COMMISSION, <http://www.fcc.gov/guides/unwanted-telephone-marketing-calls> [<https://perma.cc/DYK8-49AA>] (last updated Nov. 7, 2015).

308. Cf. Sara Lykken, *We Really Need To Talk: Adapting FDA Processes to Rapid Change*, 68 FOOD & DRUG L.J. 357, 373 (2013) (discussing that treatment, prevention, and cure are all important).

309. Johnson, *supra* note 30.

Glass,<sup>310</sup> but ads pop up every three to five minutes. Americans badly need a more long-term solution—recognizing the right to attention could be a start.

However, our current laws are not perfect, and we should welcome innovative changes—changes that make sense—for example, North Carolina’s new mandatory ultrasound law is invalid.<sup>311</sup> The right to privacy faced a very similar challenge 125 years ago, until the Supreme Court recognized it as a common-law constitutional right. Likewise, it is time for a change for our attention, and changes in law have to start somewhere. Although most of the time the changes are small,<sup>312</sup> some bold changes should be made—especially in this information day and age.

Regardless, given the progression of technology making attention a more valuable asset,<sup>313</sup> it is time to even the playing field and grant the information receiver some respective rights of his or her own.

## 2. Assumption of Risk when Not Paying Attention

Others could argue that not paying attention is a choice rather than a right, and those choosing to not pay attention implicitly assume the risk of doing so.<sup>314</sup> This is especially relevant in the contract formation analysis, where the information receiver essentially assumes the risk by not paying attention to the contract’s terms.<sup>315</sup>

This assumption of risk argument would only work in scenarios where the information receiver intentionally disregards the communicated information. However, in the situations where the receiver accidentally did not receive the information for one reason or another, this assumption of risk argument is not applicable. Even in scenarios where the receiver intentionally disregards the communicated information, for example, when the mother “‘avert[ed] her eyes’” and “‘refus[ed] to hear’” about the mandatory ultrasound,<sup>316</sup> victim blaming should be avoided.<sup>317</sup>

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310. Essentially, Google Glass connects to the Internet, providing users access to the World Wide Web instantly. For a background discussion on Google Glass, see generally Kristin Bergman, *Cyborgs in the Courtroom: The Use of Google Glass Recordings in Litigation*, 20 RICH. J.L. & TECH. 11, 15–20 (2014).

311. See *supra* Part I.C.2.

312. For instance, Justice Ruth Bader Ginsburg, first as a lawyer then later as a jurist, made small but impactful legal changes over the years to women’s rights.

313. See *supra* Parts I.B & II.A.

314. For a discussion on implied assumption of risk, see generally Schuck, *supra* note 273, at 911–12.

315. See *supra* Part II.C.2.

316. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014) (quoting N.C. GEN. STAT. ANN. § 90-21.85(b) (West Supp. 2014)).

317. Cf. Josephine Ross, *Blaming the Victim: ‘Consent’ Within the Fourth Amendment and Rape Law*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 1, 10 (2010) (discussing victim blaming in rape cases).

### 3. Endorsing the Right To Be Ignorant

Some might argue that recognizing the right to attention is like granting or endorsing people with the right to be ignorant, which can be used as a way to insulate them from knowing important information. They fear that people would abuse their right to attention and block out the world. However, this criticism implicitly assumes being ignorant is necessarily “bad.”

One district court concluded that “[t]he ‘constitutional right to be ignorant’ or ‘the constitutional right to remain uneducated,’ . . . simply does not exist [for inmates]”<sup>318</sup> but also noted that inmates “cannot be forced to learn” either.<sup>319</sup> Admittedly, for strict liability law, there is no right to be ignorant<sup>320</sup>—individuals can be liable under strict liability even if they did not know of the law that they violated.<sup>321</sup> But outside of the strict liability regime, it is within an individual’s privacy of personal knowledge to choose to know or not to know. If we are concerned about need-to-know information, the government can convey this information to everyone by meeting the intermediate scrutiny review.<sup>322</sup>

This Article does not actually endorse the right to be ignorant. Rather, what this Article is trying to convey is that we have the right to our attention, and in the world of vast information, we should get to pick and choose which information we receive.<sup>323</sup> The kind of slippery slope argument<sup>324</sup> that focuses on one extreme end (i.e., knowing nothing) would unlikely become the reality because rather than falling at either extreme end, the reality tends to fall somewhere in the middle, the equilibrium between knowing everything and knowing nothing.

### CONCLUSION

The dearth of scholarship from the information receiver’s perspective is problematic because the information receiver is often the “little guy” in the conversation. We own and are entitled to our attention, yet advertisement companies and scam artists freely bombard us with their “products” daily, resulting in our own time and monetary loss. Without recognizing the right to attention, contract

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318. *Rutherford v. Hutto*, 377 F. Supp. 268, 272 (E.D. Ark. 1974).

319. *Id.* at 272.

320. *See, e.g., Press Publ’g Co. v. McDonald*, 63 F. 238, 241 (2d Cir. 1894) (noting that, in a libel case, courts have “‘no right to be ignorant of the meaning of current phrases which everybody else understands’” (quoting *Bailey v. Kalamazoo Publ’g Co.*, 40 Mich. 251, 256 (1879))); Marc B. Hernandez, Note, *Guilt Without Mens Rea: How Florida’s Elimination of Mens Rea for Drug Possession Is Constitutional*, 66 FLA. L. REV. 1697, 1712 (2014) (“[T]here is no ‘right to be ignorant of the nature of the property in one’s possession’” (quoting *State v. Adkins*, 96 So. 3d 412, 421 (Fla. 2012))). *But see* Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 492 (2012) (“Congress has a right to be ignorant . . .”).

321. *See* Robert Batey, *Mens Rea and Constitutional Law: A Report Card for the Florida Supreme Court in State v. Adkins*, 43 STETSON L. REV. 3, 7–8 (2013); Hernandez, *supra* note 320, at 1709.

322. *See supra* Part II.A.2 & note 231.

323. *See supra* Parts I.C.1 & II.A.

324. *See generally* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 368–70 (1985).



formation and informed consent (just to name a few) are hollow and superfluous: contracting parties have no meeting of the minds, and informed consent is giving consent without being informed. States could continue to freely mandate ultrasounds for pregnant women against their wills as though their attentions were not really theirs in the first place. Similarly, other problems in our daily lives that involve attention would likely continue to go unaddressed.

This Article proposes legislation to recognize the right to attention as a statutory right, or alternatively, suggests that the courts recognize the right to attention as a common law right based on the U.S. Constitution. Specifically, the right to attention's much larger, as-yet-poorly-defined bundle of rights includes, for example, the right to deny attention when demanded, the right to be left alone, the right to not be spammed and the right not to receive ads when such advertisement is unwanted or uninvited, the right to waive the understanding of an agreement, the right to give consent without being informed, and the right not to be required to receive information against one's will.

This Article is the first to identify the right to attention, including its much larger, as-yet-poorly-defined bundle of rights. What this Article discusses—marketing, mandatory ultrasounds, informed consent, and contract formation—is in no way comprehensive of the right to attention's practical implications. Like the right to privacy, the right to attention reaches far and wide. This Article invites further discussion to fully flesh out this novel body of law.