Eavesdropping: The Forgotten Public Nuisance in the Age of Alexa

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Always-listening devices have sparked new concerns about privacy while evading regulation, but a potential solution has existed for hundreds of years: public nuisance.

Public nuisance has been stretched to serve as a basis of liability for some of the most prominent cases of modern mass-tort litigation, such as suits against opioid and tobacco manufacturers for creating products that endanger public health. While targeting conduct that arguably interferes with a right common to the public, this use of public nuisance extends far beyond the original understanding of the doctrine. Public nuisance has not been applied, however, to another prominent contemporary issue: privacy violations by always-listening devices. Plaintiffs have sued Google, Amazon, and Apple for their smart devices that listen and record snippets of conversations. But not one of these cases cites public-nuisance law as a basis for liability, even though the underlying wrong—eavesdropping—was one of the categories of conduct that fell within the earliest definitions of public nuisance.

This Article explores the history of eavesdropping as a public nuisance at common law and throughout U.S. history. It explains the public nature of the wrong underlying eavesdropping and why actions that invade individuals' privacy should be understood as wrongs against the public at large. It then applies public-nuisance law to always-listening devices, arguing that public nuisance could serve as a basis for addressing privacy issues arising from modern technology or as a common-law analogue to make intangible privacy harms justiciable in federal court.

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INTRODUCTION

Consumer technology promises convenience, security, and connectivity in our daily lives. Instead, some popular new technologies cause discomfort and apprehension. A prime example is the household device that continuously eavesdrops on some of our most intimate moments.[1] Even as concerns about the pervasiveness of always-listening devices have grown, regulation has not kept apace. Lawyers have tried using states' privacy laws to sue the companies that make and control such devices with little success.[2] As this Article explores through original historical research, however, there remains a surprising legal tool to police this technology: public nuisance.

William Blackstone included eavesdropping among the core categories of public nuisance—historically understood as a criminal action against those who interfered with a right shared by the public.[3] In recent years, scholars have stretched the law of public nuisance to do new work that Blackstone could not have anticipated.[4] Still, plaintiffs have yet to use it against eavesdropping, one of public nuisance's earliest focal points.

In fourteenth-century England, an eavesdropper could stand under the "eaves-drop," the edges of roofs where rain dropped off the side and onto the ground, and listen to conversations taking place inside a home.[5] Today, always-listening devices such as the Amazon Echo, Google Home, and even Apple iPhone can record people's private conversations within their homes (and elsewhere) without their knowledge. These recordings are often accessible to humans who work

1. *See, e.g.*, Kate O'Flaherty, *Amazon Staff Are Listening to Alexa Conversations—Here's What to Do*, FORBES (Apr. 12, 2019, 11:54 AM), https://www.forbes.com/sites/kateoflahertyuk/2019/04/12/amazon-staff-are-listening-to-alexa-conversations-heres-what-to-do/ [https://perma.cc/EYB9-69QU]; Jay Stanley, *The Privacy Threat from Always-On Microphones like the Amazon Echo*, ACLU (Jan. 13, 2017), https://www.aclu.org/blog/privacy-technology/privacy-threat-always-microphones-amazon-echo [https://perma.cc/U987-UZKX].

2. Leo Kelion, *Amazon Sued over Alexa Child Recordings in US*, BBC NEWS (June 13, 2019), https://www.bbc.com/news/technology-48623914 [https://perma.cc/6JZB-G6K8].

3. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PRIVATE WRONGS 144–48 (Thomas P. Gallanis ed., Oxford Univ. Press 2016) (1768).

4. *See, e.g.*, Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 YALE L.J. 702, 705–07 (2023) (noting the usage of public-nuisance law in the ongoing opioid crisis).

5. JOHN L. LOCKE, EAVESDROPPING: AN INTIMATE HISTORY 128 (2010); DAVID J. SEIPP, THE RIGHT TO PRIVACY IN AMERICAN HISTORY 4 (1981). Water dripping off the eaves of one house onto a neighbor's, leading to rot, could also be litigated as a nuisance. *See* Penruddocke v. Clerke (1598) 5 Coke 101, 77 Eng. Rep. 210 (KB), *reprinted in* 4 REPORTS FROM THE NOTEBOOKS OF EDWARD COKE, 1596–1598, at 136 (John Baker ed., Selden Society 2023).

at—or hack into[6]—the technology companies behind these devices, but even when they are not, the devices' "listening" and storing of information generate the same harms: public insecurity and the chilling of social interactions.

The hallmark of public nuisance is an interference with a right common to members of the public.[7] Although eavesdropping might appear to merely violate a private right, Blackstone and his successors rightly conceptualized eavesdropping as a public wrong.[8] Eavesdropping was long ago held out as a paradigmatic public nuisance because an eavesdropper threatens a community and the rights common to all community members.[9] While the technology may be different, the underlying wrong of eavesdropping remains the same as in Blackstone's day, which suggests the possibility of a Blackstonian remedy for the new threats posed by always-listening technology.

This Article identifies a common-law analogue to modern privacy torts in public-nuisance law, which could provide a new basis for standing and liability in addressing harms posed by always-listening technology. Such an approach is particularly salient in a post-*TransUnion* landscape,[10] and this Article aims to provide a basis for further work on the novel uses of public nuisance in privacy and technology law, as well as property, tort, and criminal law.

Part I of this Article explores the development of public nuisance generally. Public nuisance began as a criminal action to prosecute activities that threatened the public[11] and, as it modernized, occupied a space between a crime and a tort.[12] Today, public nuisance maintains some of its original coverage, but it has also expanded to include conduct outside of its initial reach.[13] Part II of this Article traces the historical development of eavesdropping and explains why public-nuisance

6. *See* O'Flaherty, *supra* note 1; Allison S. Bohm, Edward J. George, Bennett Cyphers & Shirley Lu, *Privacy and Liberty in an Always-On, Always-Listening World*, 19 COLUM. SCI. & TECH. L. REV. 1, 10 (2017) (noting that "[d]ata breaches are already a serious problem for even the largest, wealthiest companies").

7. *E.g.*, CAL. CIV. CODE § 3480 (West 2023) ("A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.").

8. *See infra* note 91 and accompanying text.

9. *See infra* Section II.A.

10. In June 2021, the Supreme Court in *TransUnion LLC v. Ramirez* said that federal laws must have "a close historical or common-law analogue" in order to create a basis for standing in federal court. 141 S. Ct. 2190, 2204 (2021); *see also* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 280–86 (2021).

11. Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J.L. ECON. & POL'Y 347, 357–58 (2022); 3 BLACKSTONE, *supra* note 3, at 113.

12. *See infra* Section I.B.

13. *Infra* Section I.D.

actions for eavesdropping eventually faded from the legal landscape. Eavesdropping was regularly prosecuted in fourteenth- and fifteenth-century England in response to two concerns:[14] that eavesdroppers gossiping about what they heard would disturb the public peace[15] and that people would be chilled in their actions and conversations.[16] Though eavesdropping made its way into American law and early scholarship, eavesdropping actions in the United States were rare,[17] and by the turn of the twentieth century, public-nuisance actions for eavesdropping had all but disappeared.[18] Surprisingly, they have not returned,[19] even amidst mounting concerns about always-listening technology.

Part III examines how the act of eavesdropping fits into public-nuisance law, paying particular attention to the public nature of the wrong. The historical record demonstrates that eavesdropping was most commonly understood as a public harm when eavesdroppers repeated overheard conversations to others, causing discord in communities, polluting the social environment, and chilling interpersonal interaction.[20] Even when the eavesdropper never publicizes overheard information, the harm is still public in nature because the fear that confidential communications will be overheard or repeated itself generates insecurity and chills interaction.

Finally, Part IV proposes to revive public nuisance as a cause of action against those responsible for eavesdropping technology today. Always-listening devices record private conversations, often without consent, but companies operating such devices remain remarkably unregulated. Public-nuisance law could serve as a basis of liability for this new form of eavesdropping, given the prevalence of these devices, the risk of release of their recordings, and the harmful effects they pose for society at large.

Writing about the earliest recording technology, Justice Brennan forewarned that it would add a "wholly new dimension to eavesdropping," making it "truly more obnoxious to a free society."[21] Decades later, some fear that always-listening devices have fulfilled

14. *See* MARJORIE KENISTON MCCINTOSH, CONTROLLING MISBEHAVIOR IN ENGLAND, 1370–1600, at 65 (1998) (noting the justifications for prosecuting eavesdropping included preventing "social harm" from "violating privacy or disturbing peaceful relations between neighbors").

15. *See* SEIPP, *supra* note 5, at 2.

16. *See id*. at 3.

17. *See* 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 1122, at 630 (Little, Brown & Co. 6th rev. ed. 1877) (1865).

18. *See infra* notes 163–167 and accompanying text.

19. *See infra* Section II.B.

20. *Infra* Section II.A.

21. Lopez v. United States, 373 U.S. 427, 466 (1963) (Brennan, J., dissenting).

Justice Brennan's prediction. Yet an existing body of law has stood ready to address these harms all along. Eavesdropping as a public nuisance could once again be a tool to protect both individuals' privacy interests and the public's well-being, whether as a common-law analogue for standing or as a basis for liability in its own right.

I. PUBLIC NUISANCE BACKGROUND

A. Historical Definition of Public Nuisance

Public nuisance has always been a challenging legal concept to define.[22] It has never been clear whether public nuisance is a crime, a tort, or a combination of both.[23] Joel Prentiss Bishop wrote that the English language does not "suppl[y] the words to express the idea exactly, comprehensively, in a single sentence."[24]

The concept of public nuisance can be traced back to twelfth- or thirteenth-century England.[25] Early legal writers first discussed public nuisance as a criminal action against those who blocked a public way, which sheriffs could then prosecute in local criminal courts.[26] The concept of public nuisance grew as the law of private nuisance developed.[27] Scholars initially called private nuisances committed on public lands (and thus against a community at large) "common nuisances," with "common" at the time meaning "of the community."[28] As the word "common" overtime transformed to mean "ordinary," these actions became known as "public nuisances" instead.[29] The power to bring a public-nuisance action at that time came not from tort law but from the government's police powers because a public or common nuisance was understood to "inconvenience[ ] the public in the exercise of rights common to all Her Majesty's subjects."[30]

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22. Note, *Statutory Declarations of Public Nuisance*, 18 COLUM. L. REV. 346, 349 (1918) (describing "difficulties in the definition of 'public nuisance' ").

23. *See* Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. TORT L., Sept. 2011, at 1, 54 (explaining that the *Restatement (Second) of Torts* created confusion by remaking public nuisance as a common-law tort).

24. 1 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW uPON A NEW SYSTEM OF LEGAL EXPOSITION § 1072, at 644 n.4 (T.H. Flood & Co. 8th ed. 1892) (1865); *see also* Note, *Statutory Declarations of Public Nuisance*, *supra* note 22, at 349.

25. *See* Kendrick, *supra* note 4, at 713.

26. Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After* Boomer, 54 ALB. L. REV. 359, 361–62 (1990).

27. *See* 3 BLACKSTONE, *supra* note 3, at 144. Private nuisances are defined as interferences with private lands, tenements, or hereditaments. *Id.*

28. J.R. Spencer, *Public Nuisance—A Critical Examination*, 48 CAMBRIDGE L.J. 55, 58 (1989).

29. *Id.*

30. JAMES FITZGERALD STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 105 (London, MacMillan & Co. 2d ed. 1890); *see also* Abrams & Washington, *supra* note 26, at 362.

Public nuisance developed to encompass a variety of colorful crimes against the community, including the following:

> [D]igging up a wall of a church, helping a "homicidal maniac" to escape . . . keeping a tiger in a pen next to a highway, leaving a mutilated corpse on a doorstep, selling rotten meat, embezzling public funds, keeping a treasure trove, and subdividing houses which "become hurtful to the place by overpestering it with poor."[31]

Unlike modern-day crimes, which are codified by statute, public nuisance was categorically flexible.

Blackstone discussed public nuisances in his *Commentaries on the Laws of England*,[32] the seminal treatise on English common law and later a leading legal authority for the American colonies. In Book Three, *Of Private Wrongs*, Blackstone explained that nuisances, which he defined as anything that causes hurt, inconvenience, or damage, were of two kinds. The first, private nuisances, included "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another," which are now called torts.[33] The second, public or common nuisances, "affect the public, and are an annoyance to *all* the king's subjects; for which reason we must refer them to the class of public wrongs, or crimes and misdemesnors."[34] Blackstone distinguished common nuisances from private nuisances, noting that common nuisances were only indictable and not privately actionable.[35]

Blackstone and the English courts conceptualized private and public nuisance as mutually exclusive. Initially, wrongs committed against one plaintiff were handled exclusively by the civil courts of common law, while wrongs that affected an entire community were handled exclusively by local criminal courts.[36] Private nuisance was understood as a civil matter, and public nuisance was understood as a criminal matter. The concept of public nuisance as a tort first emerged in the sixteenth century, when civil courts of common law began allowing an individual who suffered "special damage" from a wrong that affected a community at large to bring an action in civil court, rather than criminal court.[37]

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31. Abrams & Washington, *supra* note 26, at 362 (internal quotation marks omitted) (quoting Spencer, *supra* note 28, at 55).

32. *See generally* 3 BLACKSTONE, *supra* note 3, at 144–48.

33. *Id.* at 144.

34. *Id.*

35. *Id.* at 146.

36. Abrams & Washington, *supra* note 26, at 362–63 (citing Spencer, *supra* note 28, at 59).

37. *Id.* (quoting Spencer, *supra* note 28, at 59).

B. Public Nuisance Today

Public nuisance is now included in the *Restatement of Torts*, though it actually occupies a space somewhere between a crime and a tort.[38] Public nuisance has elements of a tort: it carries strict liability and is actionable by a private individual.[39] But public nuisance also retains elements of a crime: it is typically brought by public authorities, and its purpose is to punish or enjoin a wrong that harms the public at large.[40]

The *Restatement (Second) of Torts* defines public nuisance as "an unreasonable interference with a right common to the general public."[41] According to the *Restatement*, an interference with a public right is unreasonable under the following circumstances:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
>
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
>
> (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.[42]

The *Restatement* defines "public right" as a right "common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured."[43]

State statutes today have similar definitions of public nuisances. For example, the California Civil Code defines public nuisance as a nuisance "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[44] Other states have statutes enumerating particular

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38. RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979); Merrill, *supra* note 23, at 5.

39. *See* RESTATEMENT (SECOND) OF TORTS § 821B case citations by jurisdiction (AM. L. INST. 1979) (surveying different states' public-nuisance laws, some of which apply strict liability rules).

40. Merrill, *supra* note 23, at 5.

41. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

42. *Id.* § 821B(2).

43. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1979).

44. CAL. CIV. CODE § 3480 (West 2023). California defines a nuisance generally (inclusive of private nuisance) as "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." *Id.* § 3479.

activities as public nuisances, including the use of buildings for prostitution and gambling.[45]

Public nuisances interfere with the rights of members of the public to enjoy public spaces by subjecting individuals to uncomfortable, indecent, or dangerous behavior.[46] The subject matter of public-nuisance actions include wrongs committed by people (e.g., gambling), physical property whose existence can be considered harmful (e.g., a brothel), and certain conditions that can be considered injurious to the public (e.g., noxious smells).[47]

C. Elements of Public-Nuisance Claims

Governmental entities play the largest role in bringing public-nuisance actions.[48] Public-nuisance actions were initially brought only by local officials or on the Crown's behalf.[49] Today, public nuisances are "overwhelmingly prosecuted by public authorities."[50] To bring a public-nuisance action, the government must show that the action invades "a right common to the general public."[51] The type of conduct alleged, according to the *Restatement (Second) of Torts*, must be an "unreasonable interference."[52] In weighing whether the conduct is unreasonable, courts consider the significance of the interference, whether the action is banned by statute, the duration of the harm, and the defendant's knowledge that its conduct affects the ongoing harm.[53] In addition to showing that the conduct alleged is an unreasonable interference, to establish the elements of public nuisance the government must also prove that the cause of the harm is under the

45. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-343 (West 2021); MASS. GEN. LAWS ANN. ch. 139, § 4 (West 2023).

46. For example, storage of explosives, places of gambling, and brothels are public nuisances because they cause people discomfort, whether because of perceived indecency or perceived danger, in their everyday lives.

47. *See* Note, *Statutory Declarations of Public Nuisance*, *supra* note 22, at 349.

48. *See* Merrill, *supra* note 23, at 15 ("[T]he vast majority of public nuisance actions are brought by public authorities.").

49. *See id.* at 12; *see also* Spencer, *supra* note 28, at 66–72.

50. Merrill, *supra* note 23, at 12.

51. RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. L. INST. 1979).

52. *Id.*

53. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 564–65 (2006); *see also* 58 AM. JUR. 2D *Nuisances* § 31, Westlaw (database updated Oct. 2023) ("[I]n some jurisdictions, where the definition of public nuisance is based on the scope of the injury rather than on the type or nature of the injury, a public nuisance exists whenever there is an injury to a number of persons or a public interest.").

defendant's control and that the defendant proximately caused the harm.[54]

Private individuals acting on behalf of the government can also bring a tort action to abate a public nuisance. Private individuals have had the power to bring independent public-nuisance actions since the sixteenth century.[55] According to the *Restatement (Second)*, only individuals who suffer special harms may seek abatement of the nuisance or damages.[56] A special harm is present if the public nuisance also constitutes a private nuisance to the individual (i.e., it substantially and unreasonably interferes with the individual's use and enjoyment of her land)[57] or if the public nuisance harms the individual in a way that is distinct from the harm caused to the general public.[58]

In either case, private actions for public nuisance consist of two main elements. First, the individual must have suffered a particularized injury.[59] Typically the injury must be different in kind from the injury shared by the public.[60] Second, the plaintiff must show that the conduct meets all the elements above: that it is an "unreasonable interference" with "a right common to the general public" that is proximately caused by the defendant and is under the defendant's control.[61]

D. Development of Public Nuisance

Lawyers have, sometimes successfully, applied public-nuisance law "far outside its traditional boundaries" in some of the most prominent cases of modern mass-tort litigation.[62] Early instances of this expanded application of public-nuisance law typically involved efforts to bring about environmental reform.[63] Lawyers brought suits across

54. Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over? Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 OKLA. L. REV. 629, 633–34 (2010).

55. Schwartz & Goldberg, *supra* note 53, at 570.

56. RESTATEMENT (SECOND) OF TORTS § 821C(1) cmt. b (AM. L. INST. 1979); RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (AM. L. INST. 1979).

57. *Nuisance*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nuisance (last visited Dec. 11, 2023) [https://perma.cc/D594-CULS].

58. RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 30.6, at 745 & n.116 (2d ed. 2016) ("When the public nuisance actually substantially interferes with the integrity of the land itself or causes personal injury to its occupants, it would almost always qualify as a private nuisance and also demonstrate special harm different in kind from that suffered by the public generally.").

59. DOBBS ET AL., *supra* note 58, § 30.6, at 746.

60. *See* Schwartz & Goldberg, *supra* note 53, at 544.

61. *Id*. at 562–64 (emphasis omitted); Schwartz et al., *supra* note 54, at 633–34.

62. Schwartz & Goldberg, *supra* note 53, at 541.

63. Kendrick, *supra* note 4, at 721.

the country against companies allegedly causing air and water pollution.[64] Around that same time, drafters of the *Restatement (Second) of Torts* pushed to relax and expand the public-nuisance doctrine.[65] A decade later, school districts and municipalities sued asbestos manufacturers, alleging that asbestos was a public nuisance.[66] Courts rejected this argument because Plaintiffs could not establish Defendant control of the nuisance.[67] Again, a decade later, public nuisance appeared in actions against tobacco manufacturers.[68] While the court rejected the public-nuisance claim, this litigation resulted in a massive settlement against the tobacco manufacturers.[69]

In the decades since the tobacco settlements, plaintiffs and municipalities have brought public-nuisance claims in an ever-growing list of areas with mixed success.[70] Some of these new applications included actions against manufacturers of lead paint and guns.[71] Additionally, employees filed these lawsuits throughout the COVID-19 pandemic, alleging that workplaces that resumed in-person activity and therefore risked increased transmission were public nuisances.[72] While the majority of these new applications of public-nuisance doctrine have failed,[73] there have been some wins.[74] Notably, public nuisance has been

64. Schwartz et al., *supra* note 54, at 636–37; *see, e.g.*, Ohio v. Wyandotte Chems. Corp., 401 U.S. 493, 494–95 (1971); Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

65. Schwartz et al., *supra* note 54, at 636–37; Kendrick *supra* note 4, at 722.

66. Schwartz et al., *supra* note 54, at 638.

67. *See* Albert C. Lin, *Dodging Public Nuisance*, 11 U.C. IRVINE L. REV. 489, 495 (2020) (citing City of Manchester v. Nat'l Gypsum Co., 637 F. Supp. 646, 656 (D.R.I. 1986)).

68. Schwartz et al., *supra* note 54, at 638; Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance?*, 77 TEMP. L. REV. 825, 833–34 (2004).

69. Ausness, *supra* note 68, at 833–37.

70. *See* Kendrick, *supra* note 4, at 725 (listing handguns, lead paint, carbon-dioxide emissions, water pollution, and predatory lending as recent areas public nuisance actions have targeted).

71. *Id*. at 725, 727.

72. Christopher M. Hunchunk, *Employees Claim COVID-19 Risks Make Workplaces a Public Nuisance*, JONES DAY (Feb. 2021), https://www.jonesday.com/en/insights/2021/02/employees-claim-covid19-risks-make-workplaces-a-public-nuisance [https://perma.cc/KUD3-P58N].

73. *See, e.g.*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1148 (Ill. 2004) (gun manufacturer); State v. Lead Indus. Ass'n, 951 A.2d 428, 458 (R.I. 2008) (lead paint manufacturer); Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1233 (W.D. Mo. 2020) (COVID-19 related suit); *see also* Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 564–65 (2001); Schwartz et al., *supra* note 54, at 639 n.60 (citing City of Bloomington v. Westinghouse Elec. Corp, 891 F.2d 611, 613 (7th Cir. 1990)); Lin, *supra* note 67, at 496–97; Kendrick, *supra* note 4, at 725.

74. *See, e.g.*, City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1143 (Ohio 2002) (gun manufacturer); Young v. Bryco Arms, 765 N.E.2d 1, 19 (Ill. App. Ct. 2001), *rev'd*, 213 Ill.2d 433 (Ill. 2004) (gun manufacturer); White v. Smith & Wesson Corp., 97 F. Supp. 2d 816, 819 (N.D. Ohio 2000) (gun manufacturer); People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 514 (Ct. App. 2017) (lead paint manufacturer).

successfully used as the basis of liability in some recent opioid litigation. Though this success has not been universal,[75] courts considering this opioid litigation have regularly concluded that the complaints do make out a case for public nuisance.[76] The distinctions between the cases that succeed and fail are not clearly evident, though the success of a case often turns on whether the plaintiff can establish that the public nuisance was within the defendant's control.[77] Even while expanding far outside the bounds of Blackstone's imagination, public-nuisance theory has not appeared in eavesdropping cases for more than a century.

II. EAVESDROPPING'S FORGOTTEN STATUS AS A PUBLIC NUISANCE

The concept of eavesdropping as a public nuisance can be traced back to Blackstone's *Commentaries of the Laws of England*.[78] In his chapter on crimes, Blackstone included eavesdropping as the seventh entry on a list of public nuisances, alongside "publicly quarrelsome behavior."[79] Though the other entries in his list seem more in line with the paradigmatic examples of public nuisance today—obstructing a public way, operating a disorderly establishment such as a brothel, and setting off certain explosives—the inclusion of eavesdropping was not an accident.[80] Blackstone treated public nuisances and private nuisances as entirely distinct, and eavesdropping is completely absent from his discussion of private nuisances.[81] Eavesdropping was considered a specific, and model, iteration of the crime of public nuisance.[82]

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75. *See* Kendrick, *supra* note 4, at 734 (first citing People v. Purdue Pharma L.P., No. 30-2014-00725287-CU-BT-CXC, 2021 WL 7186146, at *4 (Cal. Super. Ct. Dec. 14, 2021); and then citing City of Huntington v. AmerisourceBergen Drug Corp., No. 17-01362, 2022 WL 2399876, at *60 (S.D. W. Va. July 4, 2022)).

76. Kendrick, *supra* note 4, at 731–35 (discussing the varying success of public-nuisance opioid claims); *see also* City of San Francisco v. Purdue Pharma L.P., 491 F. Supp. 3d 610, 695 (N.D. Cal. 2020) (denying motion to dismiss public-nuisance claim); *In re* Nat'l Prescription Opiate Litig., 406 F. Supp. 3d 672, 673 (N.D. Ohio 2019) (same); Commonwealth v. Purdue Pharma, L.P., No. 1884CV01808BLS2, 2019 WL 5495866, at *1 (Mass. Super. Ct. Sept. 17, 2019) (same).

77. *See, e.g.*, County of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A] nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality."); Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 541 (3d Cir. 2001).

78. SEIPP, *supra* note 5, at 4.

79. Merrill, *supra* note 11, at 357–58 (citation omitted).

80. *Id*.

81. *See id*. at 357–58, 364 (distinguishing between private nuisance and "publicly quarrelsome behavior").

82. *Id*. at 357–58.

Centuries before Blackstone, the term eavesdropping first appeared in English court records. The earliest record is from 1390 in Norwich, England.[83] A man named John Merygo "was arrested for being 'a common night-rover,' 'wont to listen by night under his neighbour's eaves.' "[84] In 1425, a man in Harrow, England named John Rexheth was arrested as a "common evesdroppere, listening at night and snooping into the secrets of his neighbors."[85] Eavesdroppers at that time were associated with two other distasteful characters: the male "common nightwalker" and the female "scold."[86] Both the nightwalker and the scold were seen as troublemakers who threatened public peace by staying out too late (the nightwalker) or instigating public disputes (the scold).[87] Matthew Bacon similarly understood eavesdroppers as a threat to public peace, listing them alongside other disrupters of the peace like robbers and common drunkards in his *New Abridgement of the Law*.[88] Well before Blackstone, eavesdropping was understood as a public problem, and a widespread one. For nearly two centuries, eavesdropping was one of the most frequently reported crimes in English communities.[89]

A. The English Conception of Eavesdropping as a Public Nuisance at Common Law

Blackstone placed eavesdropping within his list of indictable common nuisances, writing:

> Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nusance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties for the good behaviour.[90]

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83. JAMES PARKER & JOEL STERN, *Eavesdropping*, *in* EAVESDROPPING: A READER 8, 8–9 (James Parker & Joel Stern ed., 2019).

84. *Id.*

85. *Id.* at 8 (internal quotation marks omitted) (citation omitted).

86. *Id.* at 28; GILES JACOB, A NEW LAW DICTIONARY, at dxli (Lawbook Exch., Ltd. 2004) (1729) (listing eavesdroppers along with common scolds as forms common nuisances); *see* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 106 (London, S. Sweet 8th ed. 1824) (1716) (listing eavesdroppers with those that "go abroad in the night"). Though scolds were almost exclusively women, husband and wife couples could also be classified as scolds.

87. PARKER & STERN, *supra* note 84, at 26–27 (noting that common scolds' "false tales sowed discord . . . controversy, rumors and dissension") (internal quotations omitted).

88. 4 MATTHEW BACON, NEW ABRIDGMENT OF THE LAW 758 (Dublin, Luke White 6th rev. ed. 1793) (1759) (listing eavesdroppers alongside robbers and common drunkards).

89. *See* PARKER & STERN, *supra* note 84, at 8–9.

90. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS 111 (Ruth Paley ed., Oxford Univ. Press 2016) (1769).

Blackstone describes eavesdropping as a public nuisance that "annoy[s] the whole community in general, and not merely some particular person; and therefore [is] indictable only, and not actionable; as it would be unreasonable to multiply suits . . . for what damnifies him in common only with the rest of his fellow subjects."[91] This definition indicates that Blackstone considered the categories of private and public nuisance to be mutually exclusive. If a wrong is defined as a public nuisance, it cannot also be a private nuisance because it would be "unreasonable" to subject one party to hundreds of individual suits for the same wrong. Justice Baldwin had previously made the same point in a 1535 case, stating, "if one person shall have an action for this, by the same reason every person shall have an action, and so he will be punished a hundred times on the same case."[92]

Blackstone's explanation that public nuisances are indictable, not privately actionable, because they would otherwise give rise to a litany of private suits, implies that an act of eavesdropping would allow anyone in the relevant community—not just the individuals whose conversation was overheard—to bring suit.[93] In other words, for Blackstone, eavesdropping was not a private wrong or tort; he did not regard it to be a violation of the overheard party's property rights.[94] What, then, in Blackstone's view, is the right common to the public that is invaded by an act of eavesdropping?

Blackstone defined eavesdropping as "listen[ing] under walls or windows, or the eaves of a house, to hearken after discourse,"[95] and also noted that eavesdropping included "thereupon . . . fram[ing] slanderous and mischievous tales."[96] The first element of his definition points to eavesdropping occurring on a person's property, and thus potentially involves the private wrong of trespass. At the same time, however, eavesdropping's elements also seemed require intent to listen to private conversations,[97] and the second element of "fram[ing] slanderous and mischievous tales" seems to explain the characteristic harm that follows.[98] It is easy to see the effect this harm could have on the public: spreading private information, especially embarrassing or scandalous

91. *Id.* at 109–10.

92. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 796 (2003) (quoting Anonymous, YB Mich, 27 Hen. 8, fol. 27 pl. 10 (1535)).

93. *See* 4 BLACKSTONE, *supra* note 90, at 109–11.

94. *See id.* Blackstone presumably thought that an eavesdropper who entered onto private property without permission would be subject to liability for the tort of trespass to land—the wrong in that case would be the entry, not the surreptitious listening.

95. *Id.* at 111.

96. *Id.*

97. *Id.* ("to hearken after discourse").

98. *Id.*

information, risks provoking conflicts ranging from spats to violent brawls. Eavesdroppers who frame and repeat mischievous tales engage in conduct much like the other publicly quarrelsome behavior that Blackstone lists alongside eavesdropping, all of which disrupt the peace and order of communities as a whole.[99] Accordingly, though some language in Blackstone's definition echoes of a privately held property right, the harm at the core of eavesdropping is fundamentally public.

Further, by referring to eavesdroppers as "*such* as listen under walls or windows,"[100] Blackstone may be referring to a person who is in the habit of eavesdropping. Someone who engages in eavesdropping repeatedly is much like a common scold, a public nuisance listed directly after eavesdroppers in Blackstone's treatise.[101] A person would be less likely to be labeled a "scold" after just one quarrel. Rather, a common scold likely had a pattern of engaging in quarrels.[102] For example, married couples who publicly argued too often could be jointly convicted as common scolds.[103] The habitual nature of eavesdroppers and common scolds further illustrates the public nature of the harm: where this disruptive behavior became repetitive, it posed more of a problem for the community at large rather than just a single individual.

Blackstone's definition of eavesdropping as a public nuisance is consistent with earlier English criminal records. Eavesdropping was quite a common crime in early England, accounting for around eight percent of "social crimes."[104] In fourteenth- and fifteenth-century England, criminal eavesdropping involved a trespass onto another person's residence and, as Blackstone described, telling others what was heard after the fact.[105] Individuals were charged as "listeners at windows and sowers of discord between their neighbors" and "common

99. *See* Gifford, *supra* note 92, at 796 (describing the distinction between public and private nuisance).

100. 4 BLACKSTONE, *supra* note 90, at 111 (emphasis added).

101. *Id*.

102. *In 1634, Massachusetts Discovers the Cure for the Common Scold*, NEW ENG. HIST. SOC'Y, https://www.newenglandhistoricalsociety.com/in-1634-massachusetts-discovers-the-cure-for-the-common-scold (last visited Dec. 11, 2023) [https://perma.cc/4ULV-N7UH].

103. *Id*.

104. LOCKE, *supra* note 5, at 129 (citing MARJORIE KENISTON MCINTOSH, CONTROLLING MISBEHAVIOR IN ENGLAND, 1370–1600 (1998)). Social crimes "represent[ ] a conscious challenge to a prevailing social order and its values." *Social Crime*, OXFORD REFERENCE, https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100515481# (last visited Dec. 11, 2023) [https://perma.cc/ZC9S-UEY5]. Examples of social crimes "include forms of popular action and popular customs in early-modern England (including poaching, wood theft, food riots, and smuggling), which were criminalized by the ruling class, but were not regarded as blameworthy, either by those committing them, or by the communities from which they came." *Id*.

105. LOCKE, *supra* note 5, at 128–29; 4 BLACKSTONE, *supra* note 90, at 111.

listener[s] at night who follow[ ] the said listening by increasing disputes."[106]

Discord and disputes caused by spreading gossip or overheard information are problems common to the public—not just to the immediate eavesdropping victim—and thus fit squarely within Blackstone's concept of public nuisance as the violation of a right common to the public. The right in this case, it seems, is a right to interact with members of the community on certain terms. Just as a person who blocks a public road obstructs free movement by members of the effected community, an eavesdropper's gathering of private information and telling of tales inhibits free, comfortable social interaction. And even beyond that, eavesdropping also disrupts the public peace, undermining the right of the community as a whole to interact in a stable, undisturbed environment.

The repetition of the overheard information, however, was not necessary to constitute an eavesdropping offense. For example, individuals in fifteenth- and sixteenth-century England were charged based on listening alone, for offenses including "listening at night and snooping into the secrets of his neighbors" and sitting under a neighbor's window while "hear[ing] all things being said there."[107] Neither of these court records include any mention of repeating the overheard information.[108] In *The Country Justice*, a prominent legal handbook used by English Justices of the Peace, there was no requirement that overheard information be repeated to establish an eavesdropping claim; it merely identified eavesdroppers as breakers of the peace alongside loiterers, drunkards, and nightwalkers.[109] The association of eavesdroppers with these other characters illustrates that eavesdropping was understood as a threat to public well-being.[110] All of these wrongs were punished with sureties for good behavior, which were "ordained chiefly for the preservation of the [p]eace."[111]

Much like loiterers and nightwalkers, perhaps the very existence of eavesdroppers (even when they did not repeat what they heard) threatened the public peace by generating insecurity. A known eavesdropper might understandably cause residents to fear that conversations held in the privacy of their own homes would be spread throughout town, or simply to fear that their private interactions would

106. MCINTOSH, *supra* note 104, at 66 (1998) (internal quotation marks omitted).

107. *See* LOCKE, *supra* note 5, at 129 (internal quotation marks omitted).

108. *Id.*

109. MICHAEL DALTON, THE COUNTRY JUSTICE 292–93 (London, John Walthoe 1715) (1618).

110. *See id.* (condemning eavesdropping alongside other petty social wrongs).

111. *Id.* at 290. A surety of good behavior, which was essentially a bond, could be demanded from anyone justifiably suspected of committing a crime. *See id.*

be overheard by an unwelcome listener. If loiterers, who did nothing more than stand around, threatened the public peace, it is because they interfered with people's sense of security within their communities and created discomfort in their use of public spaces.[112] The existence of an eavesdropper who only listened outside windows and never repeated the overheard information could have been thought to breach the public peace in much the same way. It could generate insecurity and instill a fear of surveillance, in turn chilling overall social interaction and thereby harming the public as a whole.

Early English laws criminalizing eavesdropping reflected two concerns. The first was that if eavesdroppers talked, villages would become chaotic and "difficult to govern."[113] The second was that if the public knew that eavesdroppers were at large, people might not feel safe to engage in intimate conversations, even within their own homes.[114] The first concern, envisioned by Blackstone, is clearly a public problem. The second concern, while on its face a private problem, becomes a public matter in the aggregate, because if all individuals in a society feel insecure in their private conversations, it chills an entire society's trust and communication. As an eighteenth-century English decision held, " '[E]very man has a right to keep his own sentiments' and 'a right to judge whether he will make them public, or commit them only to the sight of his friends.' "[115] Eavesdropping, whether the overheard information was spread or not, violated that common right.

B. The American Conception of Eavesdropping as a Public Nuisance

Throughout American history, eavesdropping and similar conduct have been prosecuted under various specific causes of action, including peeping, trespass, and voyeurism, as well as more general causes of action, including violation of privacy, intrusion upon seclusion, and disorderly conduct.[116] Eavesdropping actions have existed in U.S. courts since the Founding Era, and though

112. Always-listening devices pose a threat to society in much the same way. The prevalence of these devices causes people to feel insecure moving about in society out of fear they are constantly being listened to or recorded.

113. LOCKE, *supra* note 5, at 130.

114. *Id.* This concern is applicable to always-listening devices that sit in a private home.

115. David J. Seipp, *English Judicial Recognition of a Right to Privacy*, 3 OXFORD J. LEGAL STUD. 325, 338 (1983) (citing Millar v. Taylor (1769) 4 Burr. 2303, 2379, 98 Eng. Rep. 201, 242 (KB) (Yates, J., dissenting)).

116. *See* Peter P. Swire, *Peeping*, 24 BERKELEY TECH. L.J. 1167, 1176 (2009); SANDRA NORMAN-EADY, CONN. GEN. ASSEMBLY, RE: VOYEURISM, 98-R-1034 (2003), https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1034.htm [https://perma.cc/CBE8-C4B3]; *see also* Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964).

eavesdropping actions largely disappeared in the twentieth century, eavesdropping remained a concern for courts and scholars, especially as modern technology developed.

1. Early American Eavesdropping Law and its Limits

Early U.S. laws and treatises incorporated Blackstone's understanding of eavesdropping as a public nuisance. All but one state[117] adopted English common law as the general law of the state (except where a statute provided otherwise).[118] As public nuisance was a common-law crime, it carried over into early U.S. laws. Typically, the Attorney General brought criminal prosecutions to abate public nuisances, but American colonies—and later the states—allowed actions brought by private citizens against eavesdroppers, usually through indictments.[119] In the nineteenth century, the policy behind eavesdropping actions was partly that "no man has a right . . . to pry into your secrecy in your own house."[120]

As criminal law was codified in statutes, every state enacted broad legislation that outlawed "anything that would have been a public nuisance at common law."[121] Eavesdropping as a common nuisance was thus likely included as part of the general laws of the states. As just one example, *Smith's Laws*, a volume of Pennsylvania laws enacted from 1700 through 1829, included and defined eavesdropping much like it is found in Blackstone's treatise.[122] Some colonies and states enacted statutes that specifically classified eavesdropping as a crime (rather than simply incorporating it into the general crime of public nuisance). For example, by 1702, colonial Connecticut had established laws that

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117. Louisiana. *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 804–05 (1951).

118. SEIPP, *supra* note 5, at 4.

119. *See* DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 89 (1972); *see*, *e.g.*, WIS. STAT. ANN. § 823.01 (West 2023) ("Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same.").

120. David J. Seipp, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1896 (1981) (alteration in original) (first citing Commonwealth v. Lovett, 6 Pa. L.J. 226, 226 (Ct. Quarter Sess. 1831); then citing State v. Pennington, 40 Tenn. (3 Head) 299, 300 (1859) (upholding indictment for eavesdropping after the Defendant listened in on secret grand jury proceedings); and then citing State v. Williams, 2 Tenn. (2 Overt.) 108, 108 (Super. Ct. L. & Eq. 1808) (rejecting Defendants argument that eavesdropping was not a legitimate cause of action, holding that "[a]n indictment will lie for eavesdropping")); *see also* 2 FRANCIS WHARTON, WHARTON'S CRIMINAL LAW § 1718, at 2003 (J.C. Ruppenthal ed., 12th ed. 1932) (stating eavesdropping was considered an indictable offense at common law).

121. William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

122. *See The Offence of Eaves-Dropping*, 3 U.S. L. INTELLIGENCER & REV. 203, 205 (1831) (discussing *Smith's Laws*).

criminalized habitually disturbing the peace of the King of England's subjects. Individuals who "Eves drop mens Houses" were included under the law, and Connecticut later incorporated the law into its state legal codes.[123] Even in this new law, Connecticut adopted Blackstone's theory that eavesdropping was a common nuisance that disturbed the public peace.[124]

Eavesdropping was subsequently included in various U.S. criminal-law treatises. William Oldnall Russell's leading criminal-law treatise, *Russell on Crime* (also known as *A Treatise on Crimes and Misdemeanors*), had an entire chapter specifically dedicated to "eavesdroppers, common scolds, and night-walkers."[125] Joel Prentiss Bishop's prominent criminal-law treatise, *Commentaries on the Criminal Law*, described eavesdropping as "indictable at the common law, not only in England but in our States" and consisting of the "nuisance of hanging about the dwelling-house of another, hearing tattle, and repeating it to the disturbance of the neighborhood," though repeating the overheard information was not, in fact, an element of the crime in all the cases to which he cites.[126]

Although eavesdropping appeared in most or all states' criminal codes, there appear to have been relatively few actual prosecutions. Bishop describes prosecutions for eavesdropping as so rare as to preclude precise definition of the crime beyond the fact that it "consists, not in peeping or looking, which is not indictable, but in [listening]."[127] Citing just five cases, Bishop concludes: "It is impossible to discuss this offence further, with special profit; because we have not the necessary decisions. It never occupied much space in the law, and has nearly faded from the legal horizon."[128] According to David Flaherty, eavesdroppers "were not often prosecuted, since the matter could be handled in a more practical and perhaps more satisfying manner by the person who discovered the culprit."[129] As in England, victims of eavesdropping could likely seek redress through private actions for trespass instead. On

123. ACTS AND LAWS OF HIS MAJESTIES COLONY OF CONNECTICUT IN NEW ENGLAND 91 (Hartford, Case, Lockwood & Brainard Co. 5th ed. 1702) ("Peace-Breakers"); *see also* ACTS AND LAWS OF THE STATE OF CONNECTICUT, IN AMERICA 185, 189 (New London, Timothy Green 1784) (containing a similar eavesdropping ban as during Connecticut's colonial period).

124. *See supra* Section II.A.

125. J.A. Coutts, *Press Behavior and the Criminal Law*, 22 J. CRIM. L. 145, 148 (1958) (internal quotation marks omitted) (quoting WILLIAM OLDNALL RUSSELL, RUSSELL ON CRIME (1819)).

126. 1 BISHOP, *supra* note 17, § 1122, at 630.

127. *Id*.

128. *Id*. § 1124, at 630. For a discussion of the five cases Bishop cited, see *supra* notes 121–125 and accompanying text.

129. FLAHERTY, *supra* note 119, at 89; SEIPP, *supra* note 5, at 3.

occasion, however, an eavesdropper who was not immediately apprehended would be prosecuted and adjudged a common nuisance.[130]

In addition to their rarity, various flaws in eavesdropping actions often led to their dismissal.[131] Some courts and laws defined the crime such that it was not completed until the eavesdropper not only overheard information but repeated it to others.[132] Other courts required that, if the information was not repeated, the eavesdropping be habitual. For example, a North Carolina court held in *State v. Davis* that an indictment failed because it did not allege that the eavesdropping was "habitual" or "repeated in the hearing of divers persons."[133] Citing Bishop's *Criminal Law*, the court suggested "it may be desirable, and is, perhaps, legally necessary, to prove at least three instances of offending, from which, and from the more general evidence, the jury will infer the habit of eavesdropping, wherein probably is the gist of the offense."[134] Cases requiring habituality in eavesdropping claims and the regular inclusion of eavesdropping alongside the common scold cast the eavesdropper as a person who tends to listen regularly to many homes, rather than a one-time, targeted listener. This habituality was presumably thought to increase the risk of numerous private conversations being made public, thus interfering with ordinary social interaction.[135] The habitual listener may have been seen as a public problem, and therefore indictable, because of the greater threat they posed not just to one home but to an entire neighborhood or community.

Courts sometimes also required that eavesdroppers not be residents or invited guests of the victimized household, echoing fourteenth- and fifteenth-century English court records requiring trespass as an element of the eavesdropping offense.[136] In *Commonwealth v. Lovett*, Pennsylvania's third-ever eavesdropping indictment,[137] the homeowner provided evidence that he authorized the

130. SEIPP, *supra* note 5, at 4.

131. *See* Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 706 (1990); Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 185 (2002) (citing State v. Davis, 51 S.E. 897, 897 (N.C. 1905) (affirming dismissal of an eavesdropping indictment for failure to allege that the eavesdropping had been habitual)).

132. Commonwealth v. Lovett, 6 Pa. L.J. 226, 227 (Ct. Quarter Sess. 1831).

133. *Davis*, 51 S.E. at 897.

134. *Id.*

135. By definition, always-listening devices would fall into the category of "habitual" listeners.

136. LOCKE, *supra* note 5, at 128 (discussing the early English requirement of trespass as an element of the offense).

137. *The Offence of Eaves-Dropping*, *supra* note 122, at 203.

Defendant to access his home in order to spy on his wife.[138] The judge instructed the jury that it should acquit the Defendant if the homeowner did give the Defendant permission to eavesdrop, even if the Defendant afterwards repeated tattle.[139] Similarly, in a Massachusetts case, when a witness argued that a Deponent was an eavesdropper, the alleged eavesdropper raised a successful defense that "he reported nothing but what he had heard in his own house."[140]

This trespassing requirement also prevented some actions against domestic servants. Many aspects of servants' roles required them to eavesdrop. Servants worked and lived in their employers' households and were expected to listen outside closed interior doors in case their employer summoned them, which naturally led to overhearing private conversations.[141] In an attempt to protect the privacy of households, a manual titled *The Complete Servant* instructed domestic workers to "[a]void tale-bearing, for that is a vice of a pernicious nature, and generally turns out to the disadvantage of those who practise it."[142] Still, servants were regularly called to serve as witnesses in disputes between spouses and were encouraged to present eavesdropped conversations as testimony.[143] In a 1776 dispute, John Potter Harris sued his wife for adultery, and three servants were called as witnesses.[144] All three testified that they "listened at the key-hole" of a door to the wife's affair, and the court subsequently found the wife guilty.[145] Such eavesdropping was not punished in many cases,[146] which reinforces the idea that when people invited into the home eavesdrop, it may not be actionable. There are, however, some examples of punishment for eavesdropping by servants. In 1637, a servant in Massachusetts was "whipped . . . 'for eavesdropping, [being] a common liar and running away,' " though the records did not indicate whether the servant eavesdropped at the household in which he worked, outdoors, or at another household.[147]

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138. *Id.* at 207.

139. *Id.*

140. FLAHERTY, *supra* note 119, at 89 (internal quotation marks omitted) (quoting Essex Rec., I, 7, III, 90 (1663)).

141. LOCKE, *supra* note 5, at 164. (noting that servants "saw and heard things that normally occur, and did occur, behind closed doors").

142. *Id.* at 175 (internal quotation marks omitted) (quoting SAMUEL ADAMS & SARAH ADAMS, THE COMPLETE SERVANT: BEING A PRACTICAL GUIDE TO THE PECULIAR DUTIES AND BUSINESS OF ALL DESCRIPTIONS OF SERVANTS 20 (1825)).

143. *Id.* at 164–65.

144. *Id.* at 165–68.

145. *Id.*

146. *See, e.g.*, *id.* at 167–68, 186.

147. FLAHERTY, *supra* note 119, at 89.

2. The Theory of Wrongdoing in U.S. Eavesdropping Laws and Cases

However limited the use of eavesdropping actions may be, the recorded case law does provide insights into the theory of wrongdoing underlying eavesdropping and the suitability of eavesdropping's categorization as a common nuisance. While there were fewer eavesdropping prosecutions in the United States than in England, anxieties about the public disorder that eavesdropping could generate were just as present.[148] Aiming to shield private, domestic conversations from eavesdropping, U.S. legislatures outlawed "hanging about a dwelling house of another, hearing tattle, and repeating it to the disturbance of the neighborhood."[149] One court noted that "eavesdropping could cause a 'great terror and disturbance of the family, to the annoyance and inconvenience of the inhabitants of [the] house.' "[150] These justifications reflect the same underlying goals present at common law: protecting public peace and safeguarding the ability to engage in ordinary social interactions in both public and private. Over time, however, lawyers and judges began conceptualizing eavesdropping as a private invasion of privacy rather than a public wrong, and eavesdropping as a public nuisance disappeared from the legal landscape.

In an 1808 Tennessee case, an accused eavesdropper argued that English common law should not be recognized in the United States because it was unsuited to particularly American principles of government, but the judge upheld the eavesdropping indictment, finding that the common law outlawing eavesdropping was suited to "the situation of any society whatever."[151] After that case, a handful of successful eavesdropping indictments throughout the United States discussed both the public and private elements of the wrong of eavesdropping.

In an 1886 Pennsylvania case, Louisa Ehrline was indicted as a common eavesdropper who listened at houses and repeated what she heard "against the peace and dignity of the commonwealth of Pennsylvania."[152] A few years earlier, a Pennsylvania Court heard

148. LOCKE, *supra* note 5, at 128–30.

149. Hafetz, *supra* note 131, at 184 (internal quotation marks omitted) (quoting State v. Pennington, 40 Tenn. (3 Head) 299, 300 (1859)).

150. *Id.* at 184–85 (alteration in original) (quoting State v. Davis, 51 S.E. 897, 897 (N.C. 1905)).

151. State v. Williams, 2 Tenn. (2 Overt.) 108, 108 (Super. Ct. L. & Eq. 1808); Seipp, *supra* note 5, at 5. A later eavesdropping suit was also successful in Tennessee in 1859. *Pennington*, 40 Tenn. at 299.

152. LOCKE, *supra* note 5, at 130 (emphasis omitted) (quoting LEGAL NEWS, July 30, 1887, at 241).

Commonwealth v. Lovett,[153] which provides perhaps the most extensive discussion of any early case on eavesdropping as a public nuisance. In this case, the Defendant was accused of eavesdropping through the windows of a house at night and telling "slanderous" accounts of what he overheard.[154] The Prosecution focused on the gravity of the offense of eavesdropping, describing it as "calculated to strike at the very root of society," as it threatens the freedom of conversation and sense of security in one's private home.[155]

The judge agreed with the Prosecution's concerns, stating that eavesdropping was a "serious" offense.[156] To that end, the judge expressed two distinct concerns. The first was a privacy concern that "a man's house is his castle" and should be free from prying strangers.[157] The second concern was a fear that if eavesdropped information was repeated, it could cause the societal "destruction of the family" generally.[158] The judge wrote, "there are very few families where even the truth would not be very unpleasant to be told all over the country."[159]

The court expressed concern with both the tattle aspect of eavesdropping and the invasion of privacy itself. Though the court ultimately required at least the *intent* to frame slanderous tales, the court portrayed the act of listening in alone as so indecent that it threatened to undermine the family as a social institution. The court's language expressed a concern that eavesdropping, whether or not overheard information is repeated, threatened destruction of family values, sense of security, and morals—all of which were values concerning the public at large. Eavesdroppers were therefore threats to public peace and well-being. The court's language, however, also reflected a strong concern about the private wrong of eavesdropping intruding on a family's private space. Ultimately, the court recognized eavesdropping as an actionable offense in Pennsylvania but found the

153. 6 Pa. L.J. 226 (Ct. Quarter Sess. 1831). The Pennsylvania law at the time—like Blackstone's description of English law—described eavesdroppers as "persons who listen under the walls, or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales; and they are said to be a common nuisance, and indictable and punishable by fine, and to find surety for good behaviour." *The Offence of Eaves-Dropping*, *supra* note 122, at 203.

154. *The Offence of Eaves-Dropping*, *supra* note 122, at 203 (emphasis omitted).

155. *Id.* at 204–05.

156. *Id.* at 206.

157. *Id.*

158. *Id.*

159. *Id.*; *see also* SEIPP, *supra* note 5, at 4.

Defendant not guilty because a married man had specifically hired him to spy on his wife.[160]

The *Lovett* court's concern that eavesdropping harmed private family life appeared to be the more prevalent concern in American society. Americans began to understand eavesdropping as a private wrong, and it eventually faded from serving as an indictable public-nuisance action.

3. U.S. Eavesdropping Case Law in the Twentieth Century

Decades after *Lovett*, the California Supreme Court seemingly became the last court to write at length about eavesdropping as a public nuisance. The court referenced eavesdropping in passing, listing it as an example of public nuisance along with being a common scold.[161] The court went on to urge that courts construe the field of public nuisance more narrowly, so as not to infringe on the legislature's role.[162]

Eavesdropping as an indictable offense eventually did disappear, especially as common-law criminal proceedings became obsolete.[163] By the 1960s, few legal scholars supported categorizing eavesdropping as a crime.[164] The Criminal Law Act of 1967 officially abolished eavesdropping as a criminal offense in the United Kingdom.[165] William Prosser identified only one particular type of

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160. *The Offence of Eaves-Dropping*, *supra* note 122, at 207; *see also* Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 95 n.60 (2008) (summarizing the outcome of *Lovett*).

161. People v. Lim, 118 P.2d 472, 475 (Cal. 1941). The court may have been incorrect in noting that public nuisances as a whole were rarely enjoined through the court in early English Chancery cases, writing:

> [I]t is clear that the jurisdiction of equity was very sparingly exercised on behalf of the sovereign to enjoin public nuisances. The attitude of the early English cases is expressed by Chancellor Kent in a leading case: "I know that the Court is in the practice of restraining private nuisances to property, and of quieting persons in the enjoyment of private right; but it is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less, preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy."

Id. at 474 (quoting Att'y Gen. v. Utica Ins. Co., 2 Johns 317, 380 (N.Y. 1817)). In the case of eavesdropping, the violation was of both the rights of property and general public policy. Perhaps due to this overlap, eavesdropping was commonly prosecuted in English courts.

162. *Id.* at 476; *see also* Rebecca Allen, People *ex rel.* Gallo v. Acuna*: (Ab)using California's Nuisance Law to Control Gangs*, 25 W. ST. U. L. REV. 257, 266 (1998) (discussing *Lim*). Eavesdropping has remained objectionable throughout many centuries, with concerns about eavesdropping reaching a new level in the modern digital age.

163. SEIPP, *supra* note 5, at 7.

164. *See, e.g.*, A.W. LeP. Darvall & D. McL. Emmerson, *Eavesdropping: Four Legal Aspects*, 3 MELB. U. L. REV. 364, 370 (1962) (arguing criminal law is "ill-prepared to provide appropriate action" for eavesdropping).

165. Criminal Law Act 1967, c. 58, § 13(1)(a) (UK).

eavesdropping as an offense falling within the definition of public nuisance:

> No better definition of a public nuisance has been suggested than that of an act or omission "which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." The term comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community, or the comfort or convenience of the general public. It includes . . . such unclassified offenses as eavesdropping on a jury, or being a common scold.[166]

When discussing eavesdropping on a jury, Prosser cited only to the nineteenth-century case *State v. Pennington*.[167] In doing so, he may have correctly concluded that as of the mid-twentieth century, eavesdropping on a jury was the only form of eavesdropping that was still criminalized through public-nuisance law in the United States.

A century earlier, Pennington had been charged with eavesdropping on a jury for discreetly standing outside the deliberation room and listening in.[168] The court referenced general eavesdropping as a nuisance, explaining, "[i]f it be an indictable offence to clandestinely hearken to the discourse of a private family, by which only a private injury would be done, much more must it be to obtain, by the same unlawful means, the secrets of the jury room."[169] The court exclusively referred to eavesdropping on a private family as a "private injury."[170] This discussion illustrates the shift away from conceptualizing eavesdropping as a public wrong, as Blackstone did, and toward viewing eavesdropping on private property as harming only private interests.

The court was clear, however, that eavesdropping on a jury specifically is a public wrong. The court wrote: "[I]t is necessary for the ends of justice, to keep their proceedings secret, so that information may not reach offenders of forthcoming charges against them, and thereby enable them to escape. All these evils, and more, would result from eaves-dropping."[171] The secrecy of jury proceedings is closely tied to the general exercise of rights common to the public. Eavesdropping disturbs these rights and, at least in the case of eavesdropping on a jury, is a clear public wrong. Eavesdropping on a jury also appears to be a per se wrong. In this context, repeating the overheard information, or engaging in the listening repeatedly, is not required for the offense to

166. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 566–68 (1941) (footnotes omitted).

167. *Id.* at 568 n.30.

168. State v. Pennington, 40 Tenn. (3 Head) 299, 300 (1859).

169. *Id.* at 301.

170. *Id.*

171. *Id.*

be indictable. Ultimately, Prosser's reliance on this case, which was nearly a century old at the time of his writing, suggests that though eavesdropping seemed to disappear from case law in the twentieth century, its relevance persisted, at least in some contexts.

Beyond Prosser's writing, Blackstone's conception of eavesdropping also reemerged in the twentieth century in response to a new threat: wiretapping technology.[172] For example, in 1959 the Pennsylvania Bar Association commissioned the book *The Eavesdroppers*, which discussed eavesdropping as envisioned by Blackstone and explained that wiretapping was a specific kind of eavesdropping.[173] Like eavesdroppers at common law, wiretappers were initially individual people,[174] but overtime, wiretapping became associated with the surveillance state and corporations.[175]

Even though such surveillance by corporations greatly expanded in the twentieth century, eavesdropping as a public nuisance has become a thing of the past. Instead of being scrutinized as public nuisances, electronic eavesdropping and wiretapping have faced Fourth Amendment challenges. In the seminal privacy case *Katz v. United States*, the Supreme Court held that obtaining evidence through electronic eavesdropping of a public telephone booth violated the Fourth Amendment and such evidence was therefore inadmissible in court.[176] Modern wiretapping statutes now prohibit most kinds of electronic eavesdropping.[177] As Fourth Amendment wiretapping cases gained prominence, actions against private people or entities for eavesdropping almost completely disappeared. There does not appear to be a single reported case against eavesdropping through the action of public nuisance since the mid-twentieth century.

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172. PARKER & STERN, *supra* note 83, at 27.

173. *Id*.; SAMUEL DASH, RICHARD F. SCHWARTZ & ROBERT E. KNOWLTON, THE EAVESDROPPERS 385 (1959).

174. PARKER & STERN, *supra* note 83, at 27.

175. *Id.* at 27–28*; see* April White, *A Brief History of Surveillance in America*, SMITHSONIAN MAG. (Apr. 2018), https://www.smithsonianmag.com/history/brief-history-surveillance-america-180968399/ [https://perma.cc/FVT8-PYW5].

176. Katz v. United States, 389 U.S. 347, 351 (1967); *see also* Edward F. Ryan, *The United States Electronic Eavesdrop Cases*, 19 U. TORONTO L.J. 68, 75 (1969) (discussing *Katz*); Note, *Tracking* Katz*: Beepers, Privacy, and the Fourth Amendment*, 86 YALE L.J. 1461, 1470 (1977) ("Starting from the proposition that 'the Fourth Amendment protects people, not places,' the Court focused its inquiry on the defendant's privacy rather than on the location of the bug." (quoting *Katz*, 389 U.S. at 351)).

177. Lindsey Barrett & Ilaria Liccardi, *Accidental Wiretaps: The Implications of False Positives by Always-Listening Devices for Privacy Law & Policy*, 74 OKLA. L. REV. 79, 111 (2022).

C. Eavesdropping and Related Wrongs

Since its inception, eavesdropping has been closely associated with other wrongs. *The Country Justice* listed eavesdroppers alongside nightwalkers, haunters, and common drunkards as wrongdoers who disturbed the public peace.[178] Eavesdroppers have often been grouped with other nosy characters, including common scolds and Peeping Toms.[179] The public wrong of eavesdropping is also closely related to private-law torts, including libel, defamation, invasion of privacy, and intrusion upon seclusion. Eavesdropping's relationship to these other wrongs provides further insight into the public nature of the harm underlying eavesdropping.

1. Common Scold

Nearly all historical descriptions of eavesdroppers, including Blackstone's, list them alongside common scolds.[180] Despite this, eavesdroppers and common scolds were distinct categories of wrongdoers. According to Blackstone, common scolds were defined as individuals who disturbed public peace by regularly quarreling with neighbors and, like eavesdroppers, were considered common nuisances.[181] But common scolds were almost exclusively women.[182] Eavesdroppers, by contrast, were often men.[183] From the end of the fourteenth century through the sixteenth century, around eighty percent of the courts that heard eavesdropping cases only heard cases involving male defendants.[184]

Like eavesdroppers, common scolds were indictable. A New Jersey Court wrote: "In an indictment for being a common scold, it is not necessary to set out the specific facts which show the accused to be

178. DALTON, *supra* note 109, at 292–93.

179. PARKER & STERN, *supra* note 83, at 27; FLAHERTY, *supra* note 119, at 89.

180. In Book IV, Chapter 13, Blackstone lists common scolds directly below eavesdroppers in his list of common nuisances. 4 BLACKSTONE, *supra* note 90, at 111.

181. *Id.* at 109, 111; *see also Scold*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Someone who regularly breaks the peace by scolding people, increasing discord, and generally being a *public nuisance* to the neighborhood." (emphasis added)).

182. *See* 1 BISHOP, *supra* note 17, § 1101, at 622 ("The offence is generally [regarded] as being confined to the female sex, though perhaps this has not been directly adjudged." (footnote omitted)); *The Offence of Eaves-Dropping*, *supra* note 122, at 203 ("I need only refer to the case of a prosecution in Philadelphia of a woman for a common scold . . . ."). Sometimes married couples quarrelling in public could be considered a common scold.

183. *See, e.g.*, MCINTOSH, *supra* note 104, at 65, 66 graph 3.3; LOCKE, *supra* note 5, at 129, 133; *see also* Ann Marie Rasmussen, *Gendered Knowledge and Eavesdropping in the Late-Medieval Minnerede*, 77 SPECULUM 1168, 1168 (2002) ("[A]ll employ as a framing device an eavesdropping male narrator . . . .").

184. MCINTOSH, *supra* note 104, at 65, 66 graph 3.3; LOCKE, *supra* note 5, at 133.

a common scold. It is sufficient to charge that she is a common scold, to the common nuisance of the public."[185] Fear of the reputational effects of scolding on the victim, alone, was sufficient to charge an offender with scolding.[186]

Scolding received tougher punishments than eavesdropping, despite the overlap between the two crimes. Eavesdroppers were typically punished with a small fine.[187] Punishments for commons scolds included fines and imprisonment; more severe punishments included "dunking," which involved repeatedly and publicly dunking the guilty party into a body of water until "all signs of hateful speech were extinguished," as well as the "scold's bridle," a tool which held down the guilty party's tongue to prevent them from speaking.[188]

The differences in punishments between the crimes offers some insight into the harms associated with each offense. One likely explanation for the differences in punishments between eavesdropping and scolding is that the crimes were gendered.[189] The punishments for the female common scolds were written by men. Another possible explanation for the differences in punishment between common scolds and eavesdroppers is that the wrongs behind the actions, while related, were distinct. While being a common scold necessarily involved telling tales to the public in a disruptive manner, eavesdropping, as evidenced by some court records, sometimes involved inappropriate listening alone.[190] As a result, it could have been perceived as a less serious offense. Perhaps eavesdropping did not as often lead to public disputes but rather disrupted the public peace in subtler ways that, while still offenses against the public at large, did not merit as severe or public of a punishment.

2. Peeping Tom

Despite being excluded from Blackstone's discussion of common nuisances, "Peeping Tom statutes are said . . . to have derived from the common law crimes of common nuisance and eavesdropping."[191] For

185. Baker v. State, 20 A. 858, 858 (N.J. 1890).

186. *See* LOCKE, *supra* note 5, at 135, 137.

187. *Id.* at 140; 4 BLACKSTONE, *supra* note 90, at 111.

188. LOCKE, *supra* note 5, at 140–42; NEW ENG. HIST. SOC'Y, *supra* note 102.

189. *See* 4 BLACKSTONE, *supra* note 90, at 111 ("[A] *common scold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender) is a public nusance to her neighbourhood.").

190. *See* LOCKE, *supra* note 5, at 129–30 (giving examples of cases where the accusation against the defendant consisted only of the act of listening while emphasizing that the real concern was that the eavesdroppers might talk).

191. H. Morley Swingle & Kevin M. Zoellner, *Criminalizing Invasion of Privacy: Taking a Big Stick to Peeping Toms*, 52 J. MO. BAR 345, 345 n.8 (1996) (citing *In re* Banks, 244 S.E.2d 386 (1978)).

example, "John Severns of Salisbury entered a complaint against two young men in 1680, 'for hovering about his house, peeping in at the window,' " an action that sounds very similar to those taken against individuals for hanging about houses and listening in.[192] Many states today have statutes against peeping.[193] For example, a Georgia statute prohibits being a Peeping Tom and defines it as "a person who peeps through windows or doors, or other like places, on or about the premises of another for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature which invade the privacy of such persons."[194]

Just as eavesdropping can be defined as listening alone or listening and disseminating tales, peeping can be divided into two distinct actions: "the gaze" and "the gossip."[195] The gaze, defined as "just looking," was punishable at common law;[196] for many state statutes, this is the sole requirement to constitute the offense of peeping.[197] The "gossip" element of peeping operates much like the eavesdropping's "tattle." Both require going a step beyond merely planning to spread the gossip to someone or many people, instead requiring that the transmission take place.[198] Additionally, like the tattle of eavesdropping, the gossip can cause more harm, and more obviously public harm, than the gaze alone.[199] The victim's reputation may be damaged, and the "evil tongue" of gossip may be spread into a community.[200]

One important distinction between eavesdropping and peeping is which sense—hearing or eyesight—is used to breach privacy. In its jury instructions, the court in *Commonwealth v. Lovett* emphasized the importance of the use of hearing to a finding of eavesdropping.[201] The judge stated that listening is a necessary element for any eavesdropping offense, "no matter how false the tales he afterwards circulated."[202] In fact, the Defendant in *Lovett* cited *Commonwealth v. Richmond*, which

192. FLAHERTY, *supra* note 119, at 89; *see* 8 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY, MASSACHUSETTS, 1680–1683, at 12, 23 (1921) (recording Severns' complaint).

193. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 491–92, 492 n.49 (2006).

194. *Id.*; GA. CODE ANN. § 16-11-61 (2023).

195. Swire, *supra* note 116, at 1173.

196. *Id.* at 1174–76.

197. *E.g.*, GA. CODE ANN. § 16-11-61 (2023); S.C. CODE ANN. § 16-17-470(A) (2023); LA. STAT. ANN. § 14:284 (2023); N.C. GEN. STAT. § 14-202 (2023); VA. CODE ANN. § 18.2-130 (2023).

198. Swire, *supra* note 116, at 1176; 1 BISHOP, *supra* note 17, § 1122, at 630.

199. *See* Swire, *supra* note 116, at 1176 (noting that the gossip can cause concrete and reputational harm).

200. *Id.* at 1176–77 (citing EDITH SAMUEL, YOUR JEWISH LEXICON 86–87 (1982)).

201. 6 Pa. L.J. 226, 227–28 (Ct. Quarter Sess. 1831).

202. *The Offence of Eaves-Dropping, supra* note 122, at 206.

held that peeping or just looking was not indictable: "It must be by *listening* or hearkening after discourse, that the offence of Eaves-Dropping is committed; and a man is allowed to *peep* wherever he pleases . . . without being indictable."[203] This distinction could be related to the fact that only eavesdropping, and not peeping, was considered a public nuisance indictable at common law.[204] The consequences that could result from peeping may be less severe and less public than eavesdropping. It could be that someone who sees and does not hear is more distant from the victim and, in turn, less likely to gain private information.

Despite these subtle distinctions, the harms underlying the offenses of peeping and eavesdropping are similar. Both offenses involve an invasion of privacy and the threat of making public something intended to be kept private. The Michigan Supreme Court in *City of Grand Rapids v. Williams* explained the gravity of the invasive offense of peeping.[205] The case involved a Defendant walking along a sidewalk, approaching the window of a residence where the lights were on and several women were "dressed decorously," and watching inside for two minutes.[206] The court concluded that it could hardly imagine conduct more "indecent" than "a stranger . . . peeking into the windows of an occupied, lighted residence . . . especially at the hours of night when people usually retire."[207]

The wrong here seems to be the same as the one articulated in the eavesdropping case *Lovett*. The invasion of privacy does involve making public (at least to one other individual) something that should be kept private for the sake of the safety and liberty of individuals in their homes. The similarities of the resulting harms do not end there. In *State v. Harris*, the Supreme Court of South Carolina held that "Peeping Tom" was "a crime of moral turpitude."[208] The existence of a Peeping Tom in a community, much like the existence of an eavesdropper, could threaten the public peace, infect a community with

203. *Id.* at 204.

204. *See* Lance E. Rothenberg, Comment, *Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127, 1141 (2000) (citing Bill Prewett, *Act 62: The Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388, 388 (1951)) (noting that window peeping was not a crime at common law).

205. 70 N.W. 547, 548 (Mich. 1897).

206. *Id.*

207. *Id.*

208. 358 S.E.2d 713, 714 (S.C. 1987).

immoral conduct, and invade individuals' ability to live life as they otherwise would.[209]

3. Defamation, Libel, and Slander

Eavesdropping is also associated with the private wrong of defamation, which consists of the tort and crime of libel and the tort of slander.[210] Like eavesdropping, defamation aims to protect against reputational injury.[211] Defamation differs from eavesdropping in that defamation requires the issuance of false statements.[212] Defamatory statements are false and "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[213] The harm underlying the wrong of defamation is most closely aligned with the harm that results from the repetition of eavesdropped information to others. Some scholars have noted that victims of gossip could seek redress through defamation law.[214] The tattle that can ensue from eavesdropping results in similar gossip, though the gossip in the case of eavesdropping is broader because it need not be false.[215]

Eavesdropping and defamation were sometimes interwoven in early U.S. case law. The judge in the eavesdropping case *Lovett* referenced slander, stating:

> A husband may slander his wife, yet she cannot maintain an action for the slander. . . . [T]here is no way that I know of for her to obtain redress at common law against her husband. And if he has given this man authority to watch his wife, I do not know how he can be prosecuted.[216]

The judge determined that because a wife could not sue her husband for slander, she also could not sue an eavesdropper hired by her

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209. In at least one specific circumstance, a woman who caused many people to peep was considered a possible public nuisance. In 1834, the daughter of a candy shop owner was "so wondrous fair that her presence in the shop caused three or four hundred people to assemble every day in the street before the window to look at her." William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 423 (1960). "[H]er father was forced to send her out of town, and counsel was led to inquire whether she might not be indicted as a public nuisance." *Id.* The public nature of the wrong in that instance was clear: the sheer volume of Peeping Toms caused a disturbance of the public peace. In the more typical, individual Peeping Tom case, the invasion of privacy and threat of repetition of what had been seen is a public concern of the same nature as eavesdropping.

210. 11 PERSONAL INJURY—ACTIONS, DEFENSES, DAMAGES § 46.01, LexisNexis (database updated October 2023).

211. Solove, *supra* note 193, at 549.

212. RESTATEMENT (SECOND) OF TORTS § 558(a) (AM. L. INST. 1977).

213. *Id.* § 559; *see also* Solove, *supra* note 193, at 549.

214. *E.g.*, SEIPP, *supra* note 5, at 6.

215. *See* Commonwealth v. Lovett, 6 Pa. L.J. 226, 226 (Ct. Quarter Sess. 1831) ("It might perhaps cause the destruction of the family, even if the stories told were true.").

216. *Id.* at 227.

husband to eavesdrop.[217] Additionally, there are examples of accusations of eavesdropping and peeping that actually resulted in defamation claims against the accuser. In 1679, a man successfully brought a slander and defamation action after he was accused of peeping by a neighbor.[218] So, there was evidently a risk that raising a peeping or perhaps eavesdropping claim could result in a countersuit for defamation.

The harms underlying defamation and eavesdropping overlap significantly, especially where eavesdropping involves tattle. There is a public dimension to the private injury of defamation because the resulting harm affects how one interacts with other people. Defamation, libel, and slander injure victims because they alter public perceptions of individuals, which affects individuals' reputations and in turn how they can participate in public spaces.[219] Defamation and related wrongs not only affect the immediate victim but also the society that, in turn, makes clouded judgments of that individual.[220] The effects of defamation are felt most closely by the immediate victim, but the wrong affects all of society as it risks disruption of social relations. Eavesdropping presents a similar issue to individuals and communities at large. When information obtained through eavesdropping is shared, people may perceive victims of eavesdropping differently, and victims' abilities to move about in public as they otherwise would have is hindered. In fact, regardless of whether the information is shared, the very threat of eavesdropping can be enough to discourage individuals from moving about, publicly or privately, in ways that they are entitled to.

4. Invasion of Privacy

From the fourteenth century through the nineteenth century, the application of public nuisance to eavesdroppers in at least some instances may have been a way for courts to recognize an entitlement to privacy before any official right to privacy existed. For instance, laws outlawing eavesdropping may have been used to protect privacy in cases where there was no physical trespass onto private property or

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217. *Id.*

218. New Haven Cnty., Cnty. Ct. Recs. vol. I, at 114 (June 11, 1679) (Recs. Jud. Dep't, Archival Rec. Grp. #003) (on file with Conn. State. Libr. & State Archives).

219. Solove, *supra* note 193, at 551 ("Throughout most of western history, one's reputation and character have been viewed as indispensable to self-identity and the ability to engage in public life. . . . [O]ne's reputation is the product of the judgment of other people in society. Reputation is a currency through which we interact with each other.").

220. *See id.* (stating that defamation "interferes with our relationships to that individual, and it inhibits our ability to assess the character of those that we deal with").

where the harm extended beyond trespass alone.[221] Eavesdropping may have been conceived as a wrong to the public, but it was a tool that individuals could use to protect their interest in keeping something private.

An independent right to privacy was not recognized until 1890, when it was first introduced by Samuel Warren and Louis Brandeis.[222] Warren and Brandeis explained that the principle underlying privacy—that individuals "shall have full protection in person and in property"—is as old as the common law and grew in part from the law of nuisance.[223] Warren and Brandeis conceptualized privacy rights as rights that existed "against the world."[224] William Prosser divided the wrongs that invade this privacy right into four separate tort actions: intrusion (later called intrusion upon seclusion), public disclosure of private facts, false light in the public eye, and appropriation,[225] which were later adopted by *Restatement (Second) of Torts* and many states.[226]

More recently, Percy Winfield defined "infringement of privacy" as "unauthorized interference with a person's seclusion of himself or of his property from the public."[227] Such an unauthorized interference with a person's individual space can occur when someone is close enough to hear them.[228] According to Ruth Gavison, invasions of privacy include the "collection" and "dissemination of information about individuals," "peeping," and "*eavesdropping*."[229] Before the tort of invasion of privacy existed, eavesdropping public-nuisance actions were a way to vindicate the gaps not filled by other related causes of action. Defamation, as described above, only protected against the dissemination of false tales and did not capture the invasion of privacy that eavesdropping involved. Trespass claims could vindicate the victim's property interest but not the public harm of the spread of

221. *See* Hafetz, *supra* note 131, at 184.

222. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890); *see also* Maria Pope, *Technology Arms Peeping Toms with a New and Dangerous Arsenal: A Compelling Need for States to Adopt New Legislation*, 17 JOHN MARSHALL J. COMPUT. & INFO. L. 1167, 1171 n.33 (1999) (noting that the Warren and Brandeis article has been consistently referred to as one of the most influential privacy articles).

223. Warren & Brandeis, *supra* note 222, at 193.

224. *Id.* at 213.

225. Prosser, *supra* note 209, at 389; RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977) (titled "Intrusion upon Seclusion").

226. Pope, *supra* note 222, at 1171–72; RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (AM. L. INST. 1977).

227. Percy H. Winfield, *Privacy*, 47 LAW Q. REV. 23, 24 (1931) (emphasis omitted).

228. *See* Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 433 (1980) ("Individuals lose privacy when others gain physical access to them," which occurs when someone is "close enough to touch or observe" the individual "through normal use of his senses.").

229. *Id.* at 436 (emphasis added).

captured information or the risk thereof. Invasion of privacy could encompass all of these harms.

Courts' eventual recognition of an individual right to privacy may have driven eavesdropping's transformation from a public into a private wrong, as the creation of an individual right to privacy meant there were fewer instances where eavesdropping was needed to vindicate claims that did not involve property rights or falsity. The rise of mass society also may be an explanation for eavesdropping's move from a public crime to a private tort. As the relative size of communities grew, it became much harder for any one eavesdropper to sow discord in a small, tightly knit community. Despite these societal shifts, the prevalence of always-listening devices today has once again brought to light concerns about the ability to keep private conversations from outside ears.

Public nuisance reaches harms that peeping, defamation, libel, slander, and modern privacy torts alone do not.[230] Eavesdropping as a public nuisance captures the wrong of overhearing information, regardless of whether the information is repeated. While privacy torts may provide an action for the immediate individual whose privacy was invaded, the harm of eavesdropping is much broader. Unlike privacy torts, public nuisance protects the broader society that is injured as a result of eavesdropping. The widespread use of always-listening devices has led to a resurgent public insecurity about being listened to at all times, which in turn could chill social interactions at large. Just as in pre-eighteenth-century England and America, eavesdropping may again be a public problem.

III. EAVESDROPPING'S FIT WITHIN PUBLIC NUISANCE

A. The Public Nature of the Wrong of Eavesdropping

A nuisance can be properly characterized as public when it affects the "health, comfort, safety, property, sense of decency or morals of the citizens at large."[231] By including eavesdropping in his list of

230. As an example, physicality has often become an essential element of private property suits, so a public-nuisance action could reach issues such as light projections on buildings that private nuisance could not. *See generally* Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1214 (2020) (arguing that tort law can address light pollution and projects by extending "harm to encompass offending activity without economic or physical consequences that would be experienced as harmful by . . . ordinary citizens"). Additionally, public nuisance may be a necessary vehicle to abate moral nuisances that private law cannot protect against. *See generally* John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265 (2001) (arguing that nuisance law should encompass moral nuisances).

231. *Public Nuisance*, BALLENTINE'S LAW DICTIONARY (3d ed. 1969).

public nuisances, Blackstone indicated that eavesdropping was distinct from private nuisances and wrongs against individuals alone. Blackstone and early case law show that eavesdropping was understood as a public problem because it risked disorder in society, particularly when it involved the spread of overheard information. The same logic applies to allow eavesdropping to fit within public-nuisance law today. The public spread of private information risks harm to society by causing embarrassing or undesirable information to pollute a community, and in turn constitutes a public nuisance. This is the traditional model of the public harm of eavesdropping: when information is repeated, or at risk of being repeated, it harms not just the direct eavesdropping victim but also the broader community.

There is also an alternative model of the public harm of eavesdropping, though its public effect is more subtle. Eavesdropping, regardless of whether overheard information is spread, causes people to feel insecure in their surroundings and chills social interactions. While on its face eavesdropping seems to be an invasion of privacy that harms one individual rather than the public at large, discussions of the rationale behind privacy make clear that the harm caused by this invasion of privacy is injurious to the broader public. Eavesdropping is particularly threatening to the public because it is surreptitious by nature. It is likely the case that victims have no idea exactly when or by whom they are being overheard. When there is a risk of eavesdropping in a community, all behavior may be chilled for fear of privacy being invaded and conversations being overheard by another, even if the information is never spread beyond the eavesdropper. Such a fear burdens an entire community by undermining its members' ability to live and interact in both private and public spaces.

1. Traditional Model: The Public Threat of Spreading Private Information[232]

Blackstone expressed a particular concern about the repeating of eavesdropped information, which early treatises referred to as the "tattle."[233] It is easy to see the private harm that tattle has on the

232. This model is applicable to always-listening devices in some circumstances, most likely where employees of companies operating these devices are able to listen to recordings or read transcriptions of recordings. *See* Alex Hern, *Apple Contractors 'Regularly Hear Confidential Details' on Siri Recordings*, GUARDIAN (July 26, 2019, 12:34 AM), https://www.theguardian.com/technology/2019/jul/26/apple-contractors-regularly-hear-confidential-details-on-siri-recordings [https://perma.cc/VL97-L5A2] (reporting that Apple contractors hear private recordings of customers while engaging in quality control services for the company's Siri software); *infra* Section III.B.

233. 1 BISHOP, *supra* note 17, § 1122, at 630.

eavesdropping victim. In addition to the initial privacy (and generally property) invasion, further harm results to the victim when information—true or false—is repeated to others. The reputation of the eavesdropping victim may be damaged, causing, for instance, loss of a job or social isolation.[234] Warren and Brandeis describe this harm to the individual, stating:

> The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may properly prefer to keep private, made public against their will.[235]

Tattle's harm is public because it extends beyond just the individual victim into the public sphere. Peter Swire, in his essay on peeping, wrote about how Rabbis viewed gossip as a particularly atrocious crime that was on par with murder, in part because it harmed not only the victim but also the gossiper and the listener.[236] Swire noted that the potential harm has been recognized as even greater today because gossip can now be shared broadly and instantaneously.[237] The Rabbis' views illustrate that spreading gossip, even true gossip, is considered by some both immoral and indecent.

Notably, public-nuisance law is regularly applied to control a different act perceived as immoral and indecent: obscenity.[238] A California court held that the showcasing of obscene pictures is subject to regulation under California's public-nuisance laws.[239] Obscenity is covered by public-nuisance law because it is a moral nuisance.[240] Exhibiting obscene, or immoral, materials so that they are on display to the community ensures that the public shares the resulting harm in common. Gossip is similarly "immoral" and threatening to the decency of a community.[241] Eavesdropped information that is repeated and that, in turn, infiltrates and infects an entire community could be actionable under a similar theory.

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234. Swire, *supra* note 116, at 1176.

235. Warren & Brandeis, *supra* note 222, at 214–15.

236. Swire, *supra* note 116, at 1177 (citing SAMUEL, *supra* note 200, at 86–87 (1982)).

237. *Id.*

238. *See* Steven T. Catlett, Note, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616, 1616 (1984) ("The regulation of obscenity with nuisance doctrines entails declaring obscene materials, or obscenity in general, to be a nuisance and then abating it through use of a permanent injunction.").

239. Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 ISJLP 317, 328 (2010) (citing People *ex rel.* Busch v. Projection Room Theater, 550 P.2d 600, 606 (Cal. 1976)).

240. *Id.* at 337. *See generally* Nagle, *supra* note 230 (describing moral nuisances).

241. *See* Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 566 (2002).

Additionally, "immoral" conduct can constitute a nuisance where it is invasive or intrusive, though the invasion need not be physical.[242] According to Gavison: "Noxious smells and other nuisances are described as problems of privacy because of an analogy with intrusion. Outside forces that enter private zones seem similar to invasions of privacy."[243] Where public-nuisance doctrine applies to noxious smells and other intrusions, it seems like a natural extension to apply it to such eavesdroppers who invade private zones.

The harm of tattle on the individual whose privacy was invaded is obvious, but the harm also extends to the tattler and listeners of the tattle as well. The person who initially spreads the gossip and the people who hear it are also harmed, not just morally, but because their social relationships and judgments are impaired.[244] The person who receives overheard private information now makes certain judgments about the subject based on information that was never intended to be publicly accessible. The spread of such gossip acts much like the release of misinformation that "pollutes" our media and social environments.[245] When people hear information that is not intended to be made public, their perceptions of others, and in turn their relationships, could be affected.[246] While the effect of such gossip may be felt most directly by the victim, it affects all of society because it undermines trust and risks disrupting social relations.[247]

The public spread of information also threatens the public peace by risking disorder in society, just as early case law and Blackstone envisioned. While publicly quarrelsome behavior and related wrongdoers, such as common scolds, may not be as much of a concern as they were in fifteenth-century England, the logic behind Blackstone's categorization of eavesdropping in *Commentaries on the Laws of England* as a common nuisance remains.[248] Eavesdropping appears within the chapter "Of Offenses Against the Public Health, and the Public Police or Economy."[249] The *Restatement* defines public nuisances

242. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 998–99 (2004).

243. Gavison, *supra* note 228, at 439.

244. *See* Solove, *supra* note 193, at 533 ("Knowing bits and pieces of gossip about a person will often not paint a more complete portrait; it can lead to misimpressions and condemnation without full understanding.").

245. *See* Whitney Phillips, *The Toxins We Carry*, COLUM. JOURNALISM REV. (Dec. 2, 2019), https://www.cjr.org/special_report/truth-pollution-disinformation.php [https://perma.cc/H8NS-PZW5] (comparing disinformation to pollution).

246. Solove, *supra* note 193, at 551.

247. *See id.*

248. 4 BLACKSTONE, *supra* note 90, at 111.

249. *Id.* at 106, 111.

as an activity that "significant[ly] interfere[s] with the public health, the public safety, the public peace, the public comfort or the public convenience."[250] Because it threatens social relations, the tattle that follows eavesdropping disturbs the public peace. Much like the classic public-nuisance example of releasing harmful toxins, eavesdropping, when it results in the release of private information that was never meant to be publicized, can pollute the public environment. The tattle that follows eavesdropping can foster embarrassment, mistrust, and judgment, infecting society and making social interaction more difficult for all people within a community.

2. Alternative Model: The Public Threat of Eavesdropping Itself[251]

While arguing a case before a jury, John Adams proclaimed:

> An Englishman[']s dwelling House is his Castle. The Law has erected a Fortification round it . . . every member of society has entered into a solemn Covenant with every other that he shall enjoy in his own dwelling House as compleat a security, safety and Peace and Tranquility as if it was surrounded with Walls of Brass, with Ramparts and Palisadoes and defended with a Garrison and Artillery. . . . Every English[man] values himself exceedingly, he takes a Pride and he glories justly in that strong Protection, that sweet Security, that delightful Tranquility which the Laws have thus secured to him in his own House, especially in the Night.[252]

As Adams and early American case law suggested,[253] eavesdropping can also be a public problem even beyond the risk of spreading private information.[254] By generating insecurity and, in turn, chilling social interactions, the act of listening itself harms public welfare. Eavesdropping is invasive and disrupts people's enjoyment of private and public spaces. It then becomes a public problem, in part because it harms individuals' abilities to live life in private on such a large scale. Moreover, the existence of eavesdropping or even the fear of eavesdropping itself impairs one's freedoms of speech and action and

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250. RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

251. This model is most applicable to always-listening devices, which are ubiquitous and, by their nature, could be considered to be habitually listening in on conversations. The existence of these devices generates insecurity and could chill speech in society, whether or not the devices actually record certain conversations.

252. FLAHERTY, *supra* note 119, at 88 (alterations in original) (quoting 1 LEGAL PAPERS OF JOHN ADAMS 137–38 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

253. *See id.*; *supra* Part I.

254. Scholars have noted that privacy should be acknowledged as a collective and public problem. *See* Barrett & Liccardi, *supra* note 177, at 126 ("Privacy decisions aren't made in a vacuum, and they have collective consequences that a focus on individual decision-making often ignores."); Gavison, *supra* note 228, at 428 ("A loss of privacy occurs as others obtain information about an individual, pay attention to him, or gain access to him."). Other scholars have defined privacy based on what public information about an individual is available. *See* Gavison, *supra* note 228, at 429 n.25 (collecting sources).

affects the public at large, even where information is never shared beyond the eaves of a home. The undetectable and habitual nature of eavesdropping makes it an even greater threat to the public because when people do not know if or when they are being watched or listened to, they can fear that they never have any security. If there is a risk that an eavesdropper is at large in a community—or, as is the case for always-listening devices, placed inside one out of every four homes in America[255]—speech and action can be chilled on a broad scale.[256]

a. Generation of Insecurity

Eavesdropping poses a threat to the public peace, safety, and comfort, even where overheard conversations are not repeated, because eavesdropping generates insecurity in a community.[257] People may be less concerned that any given private conversation was spied on, but this cultural insecurity may cause individuals to feel that none of their conversations are entirely private. In turn, a community can become a less safe, peaceful, and desirable place to live.

Other paradigmatic public nuisances are understood as public problems because they similarly generate insecurity in a community. The storage of explosives is a classic example of a public nuisance, though, unlike eavesdropping, it was not included in Blackstone's list.[258] Storing explosives is a public nuisance not when or because the explosives go off, but because there is a risk that they could, thereby generating fear in the community. Storing explosives is considered especially problematic when the explosives are stored in heavily populated areas because there is a risk that more people could be

255. Brooke Auxier, *5 Things to Know About Americans and Their Smart Speakers*, PEW RSCH. CTR. (Nov. 21, 2019), https://www.pewresearch.org/short-reads/2019/11/21/5-things-to-know-about-americans-and-their-smart-speakers/ [https://perma.cc/F8M6-QSR6] (discussing the prevalence of always-listening devices); *see also* Barrett & Liccardi, *supra* note 177, at 84.

256. The Supreme Court has expressed deep concern with the idea of the "chilling effect" in the First Amendment context. In *Meese v. Keene*, Justice Stevens wrote that the potential harm to the Defendant went beyond a "subjective chill" and resulted in a "cognizable injury." 481 U.S. 465, 473 (1987). For more discussion of the chilling effect, see Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 539–40 (1951); and Michael N. Dolich, *Alleging a First Amendment "Chilling Effect" to Create a Plaintiff's Standing: A Practical Approach*, 43 DRAKE L. REV. 175, 176 (1994).

257. *See* RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979).

258. *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (AM. L. INST. 1979) ("[P]ublic nuisances included interference with . . . the public safety, as in the case of the storage of explosives in the midst of a city . . . ."). Blackstone did include the making and selling of fireworks. 4 BLACKSTONE, *supra* note 90, at 111 ("The making and selling of fireworks and squibs, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance . . . and therefore is . . . punishable by fine." (emphasis omitted)).

harmed.[259] Eavesdropping could operate in much the same way. If an eavesdropper is thought to be a threat in a community, people could fear that there is a risk they will be spied on. Both explosives and eavesdropping threaten the public peace because their very presence makes people feel less secure in their communities—regardless of whether the explosion, or the "tattle," actually occurs.

Initially, eavesdropping was correctly conceptualized as more of a public harm than other types of privacy invasions because of its surreptitious and often habitual nature.[260] While most public nuisances, such as excessive noise and foul odors, are noticeable and conspicuous, eavesdropping can easily go undetected. Eavesdropping is often accomplished through sneaking.[261] Further, eavesdropping "feeds on activity that is inherently *intimate*, and is so because the actors are unaware of the receiver, therefore feel free to be 'themselves.' "[262] Because eavesdropping involves the theft and potential release of intimate information, it is a particularly terrifying privacy invasion that can generate fear in community members that they are being watched or listened to at any given time without their knowledge.[263]

Eavesdropping is also properly conceptualized as a public harm because it is often a habitual act. Especially where information was not repeated, early U.S. case law emphasized the heightened risk of habitual eavesdropping.[264] This emphasis points to the public nature of eavesdropping's harm; if eavesdropping were solely a private harm, rather than a threat to the trust and communication of an entire community, the fact of repetition would be irrelevant, because a single offense against a single individual would be sufficient. This early American understanding of an eavesdropper as a habitual actor was not limited to case law—it was also present in cultural depictions. A nineteenth-century novel titled *The Eavesdropper* illustrates the habitual nature of eavesdropping with the narrator stating, "I felt . . . that eavesdropping was not an honorable practice . . . ; but when one has taken to it . . . it is somehow very difficult to give up."[265]

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259. *See* Matthew Russo, Note, *Productive Public Nuisance: How Private Individuals Can Use Public Nuisance to Achieve Environmental Objectives*, 2018 U. ILL. L. REV. 1969, 1979 ("Storing explosives in heavily populated areas or shooting fireworks in public streets interferes with the public safety.").

260. *See* LOCKE, *supra* note 5, at 3–4.

261. *See id.* at 48–49.

262. *Id.* at 3.

263. *See id.* at 3, 5.

264. *See, e.g.*, State v. Davis, 51 S.E. 897, 897 (N.C. 1905) ("The indictment before us is defective, in that it fails to charge that the conduct described was habitual . . . .").

265. SEIPP, *supra* note 5, at 4 (alterations in original) (quoting JAMES PAYN, THE EAVESDROPPER: AN UNPARALLELED EXPERIENCE 97 (New York, 1888)).

When eavesdropping happens more than once, a community may grow to understand that an eavesdropper is at large in a neighborhood, leading all residents to fear that their private information may be heard and repeated. Eavesdroppers make a neighborhood less pleasant to live in because their presence is a constant threat to the entire community's sense of privacy.

Public nuisance may also be a necessary tool to prevent future eavesdropping from harming a community. Because eavesdropping is conducted in secret and does not result in any noticeable injury or stolen physical property, the majority of eavesdropping victims may never realize that they have been wronged.[266] As a result, people may never know they have been victims of eavesdropping and thus might not sue.[267] Once one individual learns of the eavesdropping, a public-nuisance suit may be necessary to abate the wrongdoing, vindicate multiple, otherwise-unknowing victims' rights, and protect the broader community.

Notably, Blackstone included eavesdropping and other public nuisances in his chapter on public health.[268] Today, eavesdropping can be understood as involving a threat to public health, in particular public mental health, because of the stress and insecurity that it generates. Eavesdropping's constant threat of invaded privacy makes it difficult for people to live free from anxiety. When people are being surveilled or feel they are at risk of being surveilled, they face increased anxiety and mental distress.[269] Privacy is necessary to allow individuals to maintain free, healthy lives,[270] and "privacy may therefore both indicate the existence of and contribute to a more pluralistic, tolerant society."[271]

b. Chilled Social Interaction

When eavesdropping generates this insecurity, it can also have a particularly chilling effect on speech and actions, which in turn harms public life. The undetectable nature of eavesdropping creates the risk that any person might be harmed by eavesdropping in the future. This risk, according to Daniel Solove, makes privacy harms "akin . . . to

266. *See* Rothenberg, *supra* note 204, at 1149 (stating that video voyeurism is clandestine by nature).

267. *Id.*

268. *See supra* note 249 and accompanying text.

269. Solove, *supra* note 193, at 493 ("[P]eople expect to be looked at when they ride the bus or subway, but persistent gawking can create feelings of anxiety and discomfort.").

270. Gavison, *supra* note 228, at 455 ("We desire a society in which individuals can grow, maintain their mental health and autonomy, create and maintain human relations, and lead meaningful lives.").

271. *Id.*

environmental harms or pollution," in part because these activities threaten future harm.[272] Like environmental harms or pollution, the harm of eavesdropping does not end with one instance of eavesdropping: it creates a risk, or a fear of a risk, of future harm, and that fear alone upsets typical social interaction.[273] Even where a particular individual is not directly harmed by the privacy invasion, the threat of the invasion itself changes the person's behavior.[274]

There can be a harmful chilling effect when people know they are being listened to but are not sure when or where.[275] Eavesdropping, because of its secretive nature, poses this threat. The chilling effect caused by risk of constant surveillance is exemplified by the Panopticon, a design for a prison put forward by philosopher Jeremy Bentham.[276] In Bentham's prison, a central tower for guards to observe inmates was surrounded by a lower ring of prison cells, which allowed guards to see all cells at all times but prevented the prisoners from being able to see the guards.[277] The guiding principle behind the Panopticon was that the prisoners would police themselves because they were aware that they could be watched at any time, but they were not sure precisely when. Solove concluded that this Panopticon demonstrated that "awareness of the possibility of surveillance can be just as inhibitory as actual surveillance."[278] Awareness of the possibility of surveillance can also be inhibitory because, as in the case of eavesdropping, the threat of this privacy invasion looms large over a whole community. Where people are aware there is one eavesdropper in the area, they may all feel forced to adjust much of their behavior. Because nearly every person engages in problematic or immoral conduct at some point,[279] fear of surveillance could freeze human action in a way that is entirely unnatural and unproductive.

Where there is a constant threat to privacy, there is a burden on the social relationships and freedoms that are dependent on privacy's guarantees. Such an ongoing, ubiquitous threat instills fear and has a

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272. Solove, *supra* note 193, at 488.

273. *Cf. id.* (noting the potential harms that eavesdropping can lead to and the chilling effect of surveillance).

274. *Id.*

275. *Id.* at 495.

276. *Id.*; *see also* Maša Galič, Tjerk Timan & Bert-Jaap Koops, *Bentham, Deleuze and Beyond: An Overview of Surveillance Theories from the Panopticon to Participation*, 30 PHIL. & TECH. 9 (2017).

277. *The Panopticon*, UNIV. COLL. LONDON, https://www.ucl.ac.uk/bentham-project/about-jeremy-bentham/panopticon (last visited Dec. 11, 2023) [https://perma.cc/HAF2-HQ4P]; Galič et al., *supra* note 276, at 12.

278. Solove, *supra* note 193, at 495.

279. *Id.* at 495–96 ("If watched long enough, a person might be caught in some form of illegal or immoral activity, and this information could then be used to discredit or blackmail her.").

chilling effect on society, which harms the very values that the public-nuisance doctrine is intended to protect, including the maintenance of public peace and morality. Brothels, well-recognized public nuisances,[280] are similarly considered a threat to the public peace or morality, not only because what goes on inside them is considered by some immoral but also because their existence makes a neighborhood a less appealing place to live.[281] Brothels and gambling sites are considered public nuisances because the existence of these spaces alone subjects members of the public conducting their everyday lives to certain activities widely considered undesirable or unacceptable.[282] Similarly, the presence of eavesdroppers in a community prevents many people within the community from the full use and enjoyment of their private properties and prevents their uninhibited engagement in public spaces, and thus should likewise be actionable under public-nuisance theory.

Privacy invasions such as eavesdropping can also hurt the economy, as Blackstone noted,[283] and the public convenience by threatening the free exchange of ideas. Judge Richard Posner suggests that eavesdropping would stifle competition if businesses could hear and exploit competitors' strategies and secrets.[284] Moreover, privacy allows individuals to comfortably form and express ideas rendering it, in Judge Posner's view, essential to capitalism.[285] Especially in the digital age, "[d]iscouraging innocent people from mentioning anything that might lead a computer search to earmark the communication for examination by an intelligence officer would inhibit the free exchange of ideas on matters of public as well as private importance."[286] Eavesdropping poses a threat to the free exchange of ideas that are deemed necessary to our capitalist society.

Similarly, eavesdropping poses a threat to democracy. Privacy is necessary for a democracy to function because it allows individuals to vote, protest, and otherwise participate in the political process in ways

280. *See* Nagle, *supra* note 230, at 277.

281. *See id.* at 278–79 (noting that houses of prostitution "caused the value of the adjacent property to decline.").

282. *See id.* at 278 (noting that prostitution houses "caused those living in neighboring properties to be uncomfortable"). Notably, eavesdroppers were listed alongside "those, who are publickly scandalous," "Keepers of lewd Women in their own Houses," and "Haunters of Bawdy-houses." WILLIAM HAWKINS, A SUMMARY OF THE CROWN LAW 153 (London, T. Waller 1770).

283. *See* 4 BLACKSTONE, *supra* note 90, at 109, 111 (including eavesdropping in a list of "offences against the . . . oeconomical regimen of the state").

284. Richard A. Posner, *Privacy, Surveillance, and Law*, 75 U. CHI. L. REV. 245, 246 (2008) ("Competition would be impaired if business firms could eavesdrop on competitors' planning sessions or otherwise appropriate their trade secrets with impunity.").

285. *See id.*

286. *Id.* at 246–47.

that express their true beliefs free from certain societal pressures.[287] Without guarantees of privacy, people may refrain from expressing criticism.[288] Candid expressions of ideas are essential to our conception of a peaceful democracy. Eavesdropping inhibits free speech, and free speech is necessary to support the free exchange of ideas that promote democracy and a tolerant society.[289] Judge Posner writes: "When people are speaking freely, they say things that eavesdropping strangers are likely to misconstrue. When they speak guardedly because they are afraid that a stranger is listening in, the clarity and candor of their communication to the intended recipients are impaired."[290] Privacy "functions to promote liberty of action, removing the unpleasant consequences of certain actions and thus increasing the liberty to perform them."[291] Some public nuisances, like roadblocks, hamper the ability of citizens to physically move about freely, while other public nuisances, such as excessive noise, make existing in the world less pleasant.[292] Where eavesdropping burdens members of the public in their ability to exist in or move about the world, it should be actionable as a public nuisance.

Regardless of whether overheard information is spread, the fact that the information is no longer solely within the victim's control is itself a threat to the public. Once information is overheard, it immediately escapes control of the person who intended to keep it private. The information leaving the privacy of a home's interior is enough to make an individual feel chilled in society and relationships, affecting the public as a result. Especially when an eavesdropper is at large, a significant number of individuals may feel threatened, which could alter public relations on a larger scale. Early case law, then, was correct to conceptualize eavesdropping as a public harm: regardless of whether the stolen information is later circulated, the privacy invasion

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287. Gavison, *supra* note 228, at 455:

> Privacy is . . . essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy. Part of the justification for majority rule and the right to vote is the assumption that individuals should participate in political decisions by forming judgments and expressing preferences.

288. Solove, *supra* note 193, at 488.

289. *Cf.* Gavison, *supra* note 228, at 455 (noting the importance of privacy to "a more pluralistic, tolerant society").

290. Posner, *supra* note 284, at 246.

291. Gavison, *supra* note 228, at 448.

292. *See* Merrill, *supra* note 23, at 9–10 (explaining how public nuisance interferes with "rights common to the entire community").

itself harms the community because it significantly threatens the public health, safety, and peace.[293]

B. Possible Avenues for a Public-Nuisance Eavesdropping Action

Having established the public nature of eavesdropping's wrongs, this Part turns to the three different avenues for bringing a public-nuisance eavesdropping action. First, a public entity could bring an action for an injunction. This is the most likely route for an eavesdropping suit because public-nuisance actions are most often brought by public entities.[294] The public is itself the victim of a public nuisance, so a governmental entity could bring suit on its behalf.[295] A public authority would have basis to bring an action either because enough people are harmed such that the public entity itself is entitled to a public-nuisance claim or because the harm itself is so damaging to the public at large.[296] Examples of suits brought by public officials include the relatively successful tobacco and opioid litigations, where government officials sued on the public's behalf against these products' manufacturers and distributors.[297] Similarly, in 2017, California municipalities successfully brought a public-nuisance suit against paint manufacturers for encouraging the use of lead paint despite knowledge of its health risks, thereby harming the general public.[298]

Second, an individual who suffers a particularized injury from conduct that also is a private nuisance to numerous other individuals can bring a public-nuisance eavesdropping action. Conduct can be deemed a public nuisance simply because it is a private nuisance to a

293. According to Gavison, privacy serves several values, including: "a healthy, liberal, democratic, and pluralistic society; individual autonomy; [and] mental health." *Id.* at 442. These values are almost identical to those protected through the public-nuisance doctrine. *See* N.A. Moreham, *Beyond Information: Physical Privacy in English Law*, 73 CAMBRIDGE L.J. 350, 373–74 (2014). Solove cites scholars to argue that privacy is a collective right that contributes to the public good. Solove, *supra* note 193, at 487–89 (first citing Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 709 (1987); then citing Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 959 (1989); and then citing 11 JOHN DEWEY, *Liberalism and Civil Liberties*, *in* JOHN DEWEY: THE LATER WORKS, 1925–1953, at 372, 373 (Jo Ann Boydston ed., S. Ill. Univ. Press 1987) (1936)).

294. Kendrick, *supra* note 4, at 715.

295. *See* Mark A. Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453, 453, 455 (1974).

296. *Cf. id.* at 455 (stating that public entities may bring such actions under their police powers).

297. *See* Kendrick, *supra* note 4, at 707, 731–36 (discussing various opioid and tobacco suits).

298. *See id.* at 725 & n.118 (citing People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 568–71 (Ct. App. 2017)).

large number of individuals.[299] Disturbing the peace of a sufficient number of individuals, for example, may in turn disturb the public's peace, such that the conduct is considered a public nuisance in its own right.[300] In fact, some courts require that conduct affect a sufficiently large number of individuals in order to constitute a public nuisance.[301] This case seems harder to imagine in the prototypical, historical example of an individual eavesdropping next to a home. It becomes easier to imagine in the case of modern technology, as discussed below.[302]

Finally, an individual could suffer a particularized injury from conduct that itself has the character of a public nuisance. Certain injuries arising from public nuisances give rise to private rights of action. The *Restatement (Second) of Torts* requires that to establish standing, private plaintiffs must show that they suffered a special injury, a harm different in kind from the harm suffered by the public generally.[303] Courts have found that even indirect harm can result in a special injury sufficient to support public nuisance. In *Stop & Shop Cos. v. Fisher*, where the Defendant caused obstruction of a public bridge, the court allowed a business's public-nuisance claim to proceed against the Defendant due to its special injury of having suffered loss of business from customers unable to cross the bridge.[304]

Eavesdropping could similarly cause a special injury from conduct that itself has the character of a public nuisance and create a private right of action for public nuisance. In instances where one individual intentionally comes within earshot of others' private conversations in order to eavesdrop, there is no question that there is a particularized harm to an individual. This is because the individuals whose conversations have been overheard, unlike other members of the

299. *See, e.g.*, People v. Rubenfeld, 172 N.E. 485, 486 (N.Y. 1930) (Cardozo, C.J.) ("Public also is the nuisance committed 'in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution." (citations omitted)).

300. *See id.* (describing the creation of a public nuisance when "so many are touched by the offense and in ways so indiscriminate and general that the multiplied annoyance may not unreasonably be classified as a wrong to the community").

301. 1 JAMES H. BACKMAN & DAVID A. THOMAS, A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS-EASEMENTS § 8A.02 (2023); David A. Thomas, *Whither the Public Forum Doctrine: Has This Creature of the Courts Outlived Its Usefulness?*, 44 REAL PROP. TR. & EST. L.J. 637, 704 (2010).

302. *See infra* Part IV.

303. RESTATEMENT (SECOND) OF TORTS § 821C (AM. L. INST. 1979); *see also* Russo, *supra* note 259, at 1995.

304. 444 N.E.2d 368, 369 (Mass. 1983); *see also* David R. Hodas, *Private Actions for Public Nuisance: Common Law Citizen Suits for Relief from Environmental Harm*, 16 ECOLOGY L.Q. 883, 895–96 (1989) (discussing *Fisher*).

general public, have suffered an invasion of privacy (and possibly a trespass as well). As this Article has discussed, the harm is also public in nature because of the consequences it can have on a broader community.[305] In the quintessential ear-to-door case of eavesdropping, the remaining elements of a public-nuisance claim are also fulfilled because the harm is an "unreasonable interference," which is often even prohibited by statute,[306] and the defendant both causes the harm and exercises control of their own senses or a listening device.[307] Some of these elements, including defendant control, become a bit murkier with eavesdropping technology, but it is clear that multiple avenues exist for exploring an eavesdropping action.[308]

IV. EAVESDROPPING AND ALWAYS-LISTENING TECHNOLOGY

When discussing electronically enabled eavesdropping in a 1995 case, the New York Court of Appeals noted, "[c]ondemned as a nuisance at common law and long recognized as highly intrusive, eavesdropping has grown more simple and yet infinitely more complex in the modern communication age."[309] Blackstone never could have anticipated the increased public threat of eavesdropping brought by modern technology. But his understanding of eavesdropping as public nuisance can help tackle contemporary problems associated with the technology.

The Supreme Court has for decades been concerned about the risk that modern eavesdropping technology poses. In 1963, Justice Brennan wrote in a dissent joined by Justices Douglas and Goldberg that

> [e]avesdropping was indictable at common law and most of us would still agree that it is an unsavory practice. The limitations of human hearing, however, diminish its potentiality for harm. Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society.[310]

In 1967, the Court opined that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices."[311] Then,

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305. *See supra* Subsection III.A.2.

306. *Cf.* Hodas, *supra* note 304, at 885–86 (noting the inclusion of "conduct 'proscribed by a statute' " in "unreasonable interference").

307. *See supra* Section I.C.

308. *See infra* Part IV.

309. People v. Capolongo, 647 N.E.2d 1286, 1289 (N.Y. 1995) (citations omitted) (discussing New York's wiretapping and electronic eavesdropping statutes).

310. Lopez v. United States, 373 U.S. 427, 466 (1963) (Brennan, J., dissenting). *But see id.* at 436–39 (majority opinion) (holding that use of an electronic eavesdropping did not violate the Defendant's privacy because it only recorded what the Defendant had voluntarily communicated).

311. Berger v. New York, 388 U.S. 41, 63 (1967) (holding that a New York law authorizing electronic eavesdropping violated the Fourth Amendment).

in 1971, Justice Douglas wrote: "[M]ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters."[312]

These decisions were issued decades before the invention of always-listening devices and other smart technologies that pose a far greater, and still increasing, threat to individual privacy and society at large. Though state and federal laws have evolved to restrict wiretapping and certain electronic recording, many new technologies that present analogous privacy concerns remain virtually unregulated.[313] Always-listening devices, such as Amazon Alexa, Google Home, and smartphones that employ "Siri" or similar technology, are just one example of pervasive technology with the power to eavesdrop on private conversations.[314]

These always-listening devices are voice activated and operate by continuously listening for a "wake word" such as "Alexa" or "Hey."[315] In order to listen for the wake word, the devices record their environments and evaluate those recordings for commands.[316] Technology companies operating these devices record and store conversations, and recordings are then used to improve the accuracy of

312. United States v. White, 401 U.S. 745, 764–65 (1971) (Douglas, J., dissenting). *But see id.* at 748–54 (majority opinion) (holding that recording conversations using concealed radio transmitters is not an unreasonable search in violation of the Fourth Amendment).

313. Bohm et al., *supra* note 6, at 13–14, 19.

314. *See id.* at 1, 3–4 (describing the various devices as "powerful surveillance tools"). Smart security devices such as Ring cameras and Google Nests raise similar eavesdropping concerns, especially when placed inside the home, as the devices record both video and audio. *See* Yael Grauer, *Video Doorbell Cameras Record Audio, Too*, CONSUMER REPS., https://www.consumerreports.org/home-garden/home-security-cameras/video-doorbell-cameras-record-audio-too-a4636115889/ (last updated May 18, 2022) [https://perma.cc/RHX4-43VX]. Unlike smart speakers and voice assistants, the devices do not constantly listen for a wake word but rather are activated by a motion sensor. *See id.*; Matt Burgess, *All the Data Amazon's Ring Cameras Collect About You*, WIRED (Aug. 5, 2022, 7:00 AM), https://www.wired.com/story/ring-doorbell-camera-amazon-privacy/ [https://perma.cc/ANS2-YPEM].

315. Bohm et al., supra note 6,at 9 n.23; Josh Hendrickson, *How Alexa Listens for Wake Words*, HOW-TO GEEK (July 15, 2019), https://www.howtogeek.com/427686/how-alexa-listens-for-wake-words/ [https://perma.cc/49Z4-UV6T].

316. Bohm et al., *supra* note 6, at 9 n.23; Hendrickson, *supra* note 315; Barrett & Liccardi, *supra* note 177, at 87:

> Amazon's Alexa perpetually records its surroundings and analyzes those recordings for its programmed wake word ("Alexa," "Computer," or something else). When it detects the wake word, it sends that recording to the Amazon cloud, at which point the cloud saves the recording, interprets what was recorded, and directs the Alexa device to execute the command it detected . . . .

the technology.[317] Revelations as of 2019 showed that all major producers of always-listening devices employ human reviewers to listen to the recordings and grade device performance.[318] Apple and Google have acknowledged that some of their employees can listen to recordings of what users say to their devices, including Google Home and Siri.[319] Apple contractors tasked with evaluating device performance have reported hearing sensitive information, including business deals, criminal activities, conversations between patients and doctors, and sexual encounters.[320] Employees reviewing the device performance shared recordings they considered "amusing" with other employees over chat.[321] Two Amazon workers shared what they thought might be a recording of a sexual assault over chat to "reliev[e] stress."[322] According to a recent Department of Justice complaint, "between August 2018 and September 2019, Amazon Alexa users' voice recordings were accessible to 30,000 of its employees—approximately 15,000 of whom lacked any business need for such access."[323]

Employees of the companies that produce always-listening devices are not the only ones that have found ways to eavesdrop using these devices. For example, some Amazon devices have a feature called "Drop In," which permits one user to automatically connect to another user's device without the receiver actively accepting the connection.[324] Although consent is required to enable this feature, consent may not always be voluntary, especially because not all individuals using the

317. *See, e.g.*, Lisa Eadicicco, *A New Lawsuit Accuses Apple of Violating User's Privacy by Allegedly Allowing Siri to Record Without Consent*, BUS. INSIDER (Aug. 8, 2019, 9:05 AM), https://www.businessinsider.com/apple-class-action-lawsuit-over-siri-recordings-privacy-violations-2019-8 [https://perma.cc/E5Y3-HFEJ].

318. *Id.*; Alex Hern, *Apple Apologises for Allowing Workers to Listen to Siri Recordings*, GUARDIAN (Aug. 29, 2019, 5:59 AM), https://www.theguardian.com/technology/2019/aug/29/apple-apologises-listen-siri-recordings [https://perma.cc/EH8J-M3B8].

319. Hern, *supra* note 318; Kari Paul, *Google Workers Can Listen to What People Say to Its AI Home Devices*, GUARDIAN (July 11, 2019, 4:41 PM), https://www.theguardian.com/technology/2019/jul/11/google-home-assistant-listen-recordings-users-privacy [https://perma.cc/YXW4-NMVL].

320. Barrett & Liccardi, *supra* note 177, at 85 n.20, 88 (citing Hern, *supra* note 232).

321. *Id.* at 89; Matt Day, Giles Turner & Natalia Drozdiak, *Thousands of Amazon Workers Listen to Alexa Users' Conversations*, TIME (Apr. 11, 2019, 2:04 PM), https://time.com/5568815/amazon-workers-listen-to-alexa/ [https://perma.cc/FQ5E-AXUF].

322. David Phelan, *Amazon Admits Listening to Alexa Conversations: Why It Matters*, FORBES (Apr. 12, 2019, 5:00 PM), https://www.forbes.com/sites/davidphelan/2019/04/12/amazon-confirms-staff-listen-to-alexa-conversations-heres-all-you-need-to-know/ [https://perma.cc/S4B8-VL6Y].

323. Complaint for Permanent Injunction, Civil Penalties & Other Relief at 8, United States v. Amazon.com, Inc., No. 2:23-cv-00811 (W.D. Wash. May 31, 2023).

324. Barrett & Liccardi, *supra* note 177, at 85; *Alexa Communications and Your Privacy*, AMAZON, https://www.amazon.com/b/?node=23993193011 (last visited Dec. 11, 2023) [https://perma.cc/ZQU3-47ST].

device necessarily give consent to the feature's use.[325] For example, a child may be present when the Drop-In feature is used by others in the household; this child did not enable the feature or otherwise consent to being listened in on. Moreover, critics have raised concerns that the feature could empower abusive partners or parents to constantly monitor their partners or children.[326] Beyond the Drop-In feature, internet-connected listening devices are also susceptible to cybersecurity attacks, and any stored information could be at risk of a privacy intrusion by hackers.[327]

These always-listening devices typically sit in the home and record information that previously could have only been captured through a person's physical presence in or next to the home. In the context of the Fourth Amendment, the Court found that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where . . . the technology in question is not in general public use."[328] Notably, this holding only affects the government, not corporations. Corporations manufacturing and operating these always-listening devices remain for the most part unregulated and unchallenged.[329] Still, always-listening devices "violate people's privacy on a massive scale that regulators have, so far, failed to meaningfully constrain."[330] As one article states, "Alexa has been eavesdropping on you this whole time."[331] Currently, this kind of eavesdropping is not substantially regulated by statute, but it could be abated through public-nuisance actions.

A. Application to Public Nuisance

Much like the eavesdroppers of early U.S. cases, always-listening devices intrude on the intimacy of the home by listening to private conversations. This, in turn, generates insecurity and chills

325. Brian Heater, *Amazon Disputes Claims That Echo Show's Drop-In Feature Is a Security Risk*, TECHCRUNCH (June 28, 2017, 8:37 AM), https://techcrunch.com/2017/06/28/amazon-disputes-claims-that-echo-shows-drop-in-feature-is-a-security-risk/ [https://perma.cc/26B4-CV9Z].

326. Barrett & Liccardi, *supra* note 177, at 85; *see also* Heater, *supra* note 325 (describing the Drop-In feature).

327. Barrett & Liccardi, *supra* note 177, at 87.

328. Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

329. Bohm et al., *supra* note 6, at 13.

330. Barrett & Liccardi, *supra* note 177, at 125.

331. Geoffrey A. Fowler, *Alexa Has Been Eavesdropping on You This Whole Time*, WASH. POST (May 6, 2019, 9:00 AM), https://www.washingtonpost.com/technology/2019/05/06/alexa-has-been-eavesdropping-you-this-whole-time [https://perma.cc/A57K-R7AD].

social interaction, resulting in a public harm to society. The act and harm done by the eavesdropping are much the same today as they were six hundred years ago, only the eavesdropping today is far easier to achieve and more common.

Perhaps, as Bishop writes, eavesdropping "never occupied much space in the law" because, in most cases, it was necessarily tied to trespass and, thus, frequently not required as an independent cause of action.[332] Historically, many documented U.S. cases that utilized eavesdropping as a nuisance could not have otherwise involved a trespass claim because the eavesdropper in question was invited onto the property to spy,[333] listened in on a jury in a public space,[334] or was watching from a public sidewalk.[335] While eavesdropping claims could vindicate privacy rights in instances where no property action was available,[336] where property actions *were* available, eavesdropping claims were rarely used. Moreover, until the advent of modern technology, it was nearly impossible to eavesdrop without physical trespass. In the modern technological age, however, eavesdropping can easily occur without trespass, creating a category of privacy violations that cannot be vindicated by trespass actions. Accordingly, the once-obsolete eavesdropping action may now have legs in its original form: as an indictable public nuisance.[337] Always-listening devices are a paradigmatic case for reviving eavesdropping as a public nuisance as these devices are welcomed into homes, meaning a trespass claim is unavailable. And though these devices are welcomed into homes, their intrusion on various private conversations certainly is not.

Eavesdropping as a public nuisance could provide the cause of action for a class action or municipality suit against companies operating always-listening devices. Eavesdropping by these devices fulfills the same requisite elements as earlier public-nuisance claims,

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332. 1 BISHOP, *supra* note 17, § 1124, at 630; *see* LOCKE, *supra* note 5, at 128 (observing that in England, eavesdropping "involved trespassing" in addition to listening); Donald A. Dripps, *Eavesdropping, the Fourth Amendment, and the Common Law (of Eavesdropping)*, 32 WM. & MARY BILL RTS. J. (forthcoming 2024) (listing reasons why eavesdropping actions may have been rare, including that "most eavesdropping would have gone undetected" and that police may have instead arrested eavesdroppers for "offenses such as loitering or disorderly conduct").

333. *See, e.g.*, Commonwealth v. Lovett, 6 Pa. L.J. 226, 227 (Ct. Quarter Sess. 1831) ("Some evidence has been offered to show that the owner of the house, the husband, gave this man authority to watch his wife.").

334. *See, e.g.*, State v. Pennington, 40 Tenn. (3 Head) 299, 300 (1859) ("[H]e stealthily, that is, secretly, or clandestinely approached near to the room occupied by the grand jury . . . for the 'unlawful purpose of listening to and overhearing what was then and there said and done.' ").

335. *See, e.g.*, City of Grand Rapids v. Williams, 70 N.W. 547, 548 (Mich. 1897) (distinguishing, in jury instructions, the legality of looking through a window from the sidewalk and looking through a window after stepping off the sidewalk).

336. *See supra* Subsection II.C.4.

337. *See* Dripps, *supra* note 332.

perhaps even more easily.[338] In fact, scholars have acknowledged that public nuisance could be a possible tool for regulation of the internet, likening the deprivation of internet access to a classic public nuisance: the blocking of a public highway.[339] Similarly, eavesdropping by modern technologies fits neatly onto the conception of public nuisance that had been around for centuries. Much like the community's feared, ubiquitous eavesdropper, Alexa, Google Home, and similar devices generate public insecurity and possibly inhibit freedom of social interaction. The insecurity these devices generate is evident on any news platform, where recent headlines include "Apple Siri Eavesdropping Puts Millions of Users at Risk,"[340] "The Privacy Threat from Always-On Microphones Like the Amazon Echo,"[341] and " 'Alexa, Are You Invading My Privacy?'—The Dark Side of Our Voice Assistants."[342] On the basis of public insecurity alone, a governmental entity or a private individual acting on behalf of the government could bring an injunction to abate sale of these devices or to require Amazon, Google, and other companies to build more secure software. These devices are thought to cause a public harm, and, provided that the other elements of public nuisance are satisfied, public-nuisance eavesdropping actions against these technology companies are appropriate.

First, it is possible to imagine an individual suffering a particularized harm as a result of these devices. A guest enters a home with an Amazon Echo and is unknowingly recorded without consent, or a Google Home accidentally wakes up to the word "they" instead of "hey" and proceeds to record intimate details of a private conversation. The victims' privacy has been invaded, and they could suffer reputational and social harm if the recorded information was ever released. Moreover, the victims' speech and actions in their own home and in public could be chilled regardless of whether the recording is ever publicized. Even if the individuals did not know they were being

338. *See supra* Sections I.C, III.B; *supra* notes 304–308 and accompanying discussion.

339. *See* Henry H. Perritt, Jr., *Towards a Hybrid Regulatory Scheme for the Internet*, 2001 U. CHI. LEGAL F. 215, 282 ("[T]he internet—or at least certain routes through it—is equivalent to a public highway. If someone . . . blocks access to the internet by targeting specific individuals or entities, those individuals or entities should be able to show the qualitatively different harm necessary to recover for public nuisance.").

340. Kate O'Flaherty, *Apple Siri Eavesdropping Puts Millions of Users at Risk*, FORBES (July 28, 2019, 8:26 AM), https://www.forbes.com/sites/kateoflahertyuk/2019/07/28/apple-siri-eavesdropping-puts-millions-of-users-at-risk/ [https://perma.cc/WLL4-DM8S].

341. Stanley, *supra* note 1.

342. Dorian Lynskey, *'Alexa, Are You Invading My Privacy?'—The Dark Side of Our Voice Assistants*, GUARDIAN (Oct. 9, 2019, 1:00 AM), https://www.theguardian.com/technology/2019/oct/09/alexa-are-you-invading-my-privacy-the-dark-side-of-our-voice-assistants [https://perma.cc/C7FA-BS8D].

recorded, the existence of these devices could cause them to feel insecure in their surroundings and modify their behavior as a result. There is a possible concern that the harm any individual suffers, including insecurity in their surroundings and inhibition of social interactions, would be shared in common with the general public and thus not satisfy the particularized harm element of a public-nuisance suit.[343] Even without any particularized harm, however, a public entity could bring suit as long as it can prove the device invades "a right common to the general public."[344]

Once the particularized harm element has been satisfied, a plaintiff must show that the harm is public. In some ways, the application of the public-nuisance doctrine to eavesdropping by always-listening devices is the easiest application yet. So many people have these devices that the devices comprise a public nuisance simply by constituting a private nuisance to sufficiently numerous individuals.[345] A Pew Research Center study found that one-quarter of U.S. adults say they have an always-listening device in their home,[346] and an NPR and Edison Research study found that over one-third of U.S. adults own a smart speaker and sixty-two percent of U.S. adults use a voice assistant on any device, including smartphones.[347] Over half of the users of voice assistants on smartphones constantly leave them enabled.[348] Usage of smart speaker devices even increased during the pandemic.[349]

One individual may have a more particularized harm because a private conversation was repeated[350] or the recorded conversation was particularly sensitive, while countless others with the same devices could have eavesdropping claims as well. Because the sheer volume of

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343. *See* Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950, 958 (R.I. 1994) ("To meet the 'special damage' requirement, the individual 'must have suffered harm of a kind different from that suffered by other members of the public *exercising the right common to the general public that was the subject of interference*.' " (quoting RESTATEMENT (SECOND) OF TORTS § 821C(1) (AM. L. INST. 1979))).

344. *Id.*

345. *See supra* Section III.B (explaining a basis for which public officials could bring a public-nuisance suit).

346. Auxier, *supra* note 255.

347. NPR & EDISON RSCH., THE SMART AUDIO REPORT 5, 16 (2022), https://www.nationalpublicmedia.com/uploads/2022/06/The-Smart-Audio-Report-Spring-2022.pdf [https://perma.cc/5W53-TRFJ].

348. NPR & EDISON RSCH., THE SMART AUDIO REPORT 15 (2020), https://www.nationalpublicmedia.com/uploads/2020/04/The-Smart-Audio-Report_Spring-2020.pdf [https://perma.cc/BSN6-2CD3].

349. *Id.* at 50–51.

350. A conversation being repeated would be akin to tattle, the repeating of eavesdropped information, which was an element of Blackstone's conception of criminal eavesdropping. *See supra* Section II.A (discussing whether repeating the overheard information is a necessary element of eavesdropping).

these claims would be so extensive, a highly particularized harm becomes a public matter.

In addition to these devices harming numerous individuals, the character of always-listening technology's harm is adequately significant to the public to constitute a public nuisance. The risk of spreading overheard information and the resulting chilling effect pose a threat to the public.[351] Though the element of repeating information would not be necessary to a nuisance claim,[352] perhaps a human employee who is testing the accuracy of these devices listens to the recording and repeats its contents.[353] Or perhaps a hacker breaches the data of a company collecting and storing these private conversations. Moreover, law enforcement could subpoena recordings from these devices, increasing the reach of the surveillance state—an issue many already fear.[354] There are many privacy suits alleging such harms, though not through nuisance or public-nuisance doctrines.[355] As Blackstone and early case law show,[356] this potential spread of overheard information could result in public discord and other social consequences.[357]

Even if the information is never repeated or listened to by a human, these devices' recordings could still constitute a public nuisance. As these devices are always listening, there is potential for a constant fear of surveillance. The insecurity that these devices generate

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351. Widespread eavesdropping harms society by indirectly chilling the exercise of rights such as freedom of speech and action. *See* Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227, 232 (2021) ("[I]n addition to subjecting us to unreasonable risks of harm, criminality also chills the exercise of our rights and forces us to take expensive precautions.").

352. *See supra* Subsections II.B.2, II.B.3 (discussing instances in which repeating information was not necessary to the nuisance claim).

353. *See* Nicole Nguyen, *A Team at Amazon Is Listening to Recordings Captured by Alexa*, BUZZFEED NEWS (Apr. 10, 2019, 7:15 PM), https://www.buzzfeednews.com/article/nicolenguyen/amazon-employees-listening-to-alexa-echo-recordings [https://perma.cc/44WF-Q588].

354. Barrett & Liccardi, *supra* note 177, at 86; *see* Dumitrina Galantonu, *The Big Brother Fear: Four Perspectives on Surveillance*, 33 AM. INTEL. J. 59, 59 (2016).

355. *See, e.g.*, Eric Hal Schwartz, *Judge Dismisses Most of Lawsuit Claiming Google Assistant Violated Privacy*, VOICEBOT.AI (May 8, 2020, 9:00 AM), https://voicebot.ai/2020/05/08/judge-dismisses-most-of-lawsuit-claiming-google-assistant-violated-privacy [https://perma.cc/UNT7-GCHQ]; Todd Spangler, *Amazon Agrees to Pay $25 Million Fine to Settle Allegations Alexa Voice Assistant Violated Children's Privacy Law*, VARIETY (July 20, 2023, 2:40 PM), https://variety.com/2023/digital/news/amazon-fine-alexa-settlement-doj-ftc-childrens-privacy-law-violation-1235675702/ [https://perma.cc/B79R-WAAB]; Rachel Lerman, *Lawsuits Say Siri and Google Are Listening, Even when They're Not Supposed to*, WASH. POST (Sept. 2, 2021, 8:50 PM), https://www.washingtonpost.com/technology/2021/09/02/apple-siri-lawsuit-privacy/ [https://perma.cc/M8UZ-UJFZ].

356. *See supra* Section II.A (discussing concerns that learning and sharing private information would breed disputes and social disorder).

357. *See supra* Part III (arguing that eavesdropping harms individuals and the public by spreading private information and causing insecurity that chills speech).

on such a large scale could alone constitute a public nuisance.[358] Further, this fear could inhibit speech and action, chilling social interaction and harming society as a result. Just as a habitual eavesdropper could have threatened a community in fourteenth-century England, a habitually eavesdropping device owned by many could threaten the security and well-being of anyone in its proximity.

The other elements of public nuisance—defendant control, unreasonable conduct, proximate causation—are more contested here than in the traditional ear-to-door eavesdropping case. First, questions arise over whether the devices are in fact within Amazon or Google's control once they are purchased and used by consumers. But because the recorded conversations are stored and used by these technology companies, it is likely that this element could be satisfied. Second, as to the reasonableness of conduct, the Court in *Kyllo* noted that thermal imaging devices, which are analogous to always-listening technology, may be so pervasive that their use is not unreasonable.[359] On the other hand, however, another factor used to determine unreasonableness is the conduct's "continuing nature"—something definitionally true of always-listening devices' eavesdropping activities.[360] Finally, without proximate causation, suits against companies operating these devices could falter, as have some public-nuisance claims against manufacturers of guns, drugs, and other potentially harmful products.[361] The connection between the always-listening device operator and the relevant harm is less attenuated than that between a gun or drug manufacturer. There are no intermediaries here: Amazon is the entity recording and listening to conversations when its Echo device is in a person's home. Given that courts found the proximate cause element to be satisfied in public-nuisance cases against third-

358. For more about eavesdropping's potential to cause insecurity, see *supra* Subsection III.A.2.a.

359. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that thermal imaging a house is a "presumptively unreasonable" search because, inter alia, the device "is not in general public use").

360. RESTATEMENT (SECOND) OF TORTS § 821B(2)(c) (AM. L. INST. 1979).

361. *See, e.g.*, County of Johnson v. U.S. Gypsum Co., 580 F. Supp. 284, 294 (E.D. Tenn. 1984) ("[A] nuisance claim may only be alleged against one who is in control of the nuisance creating instrumentality."); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1138 (Ill. 2004) ("[T]he alleged public nuisance is not so foreseeable . . . that the[ ] conduct can be deemed a legal cause of a nuisance that is the result of the aggregate of the criminal acts of many individuals over whom they have no control."); Ashley County v. Pfizer, Inc., 552 F.3d 659, 671 (8th Cir. 2009) ("Arkansas law will not support a conclusion that the 'natural and probable consequences' of manufacturers selling cold medicine to independent retailers through highly regulated legal channels is that the cold medicine will create a methamphetamine epidemic resulting in increased government services." (citation omitted)).

party opioid manufacturers,[362] it seems likely that this element of a public-nuisance claim would be satisfied in the context of eavesdropping by always-listening devices.

Even if courts deemed always-listening technologies' eavesdropping a poor fit for public-nuisance doctrine, Prosser and Keaton's specific example of eavesdropping on juries could be actionable.[363] Eavesdropping on a jury is a per se public problem. As the court explained in *State v. Pennington*, the proceedings of juries are so important to the liberty of the citizenry that they must be kept secret or risk harming public safety.[364] If, for example, a juror took a smart phone into the jury room, Siri or Google assistants could easily be voice activated and hypothetically record these particularly sensitive conversations. As noted above, eavesdropping on a jury is a clear public wrong and could be separately actionable from the more prototypical cases of these devices listening to private conversations within a home.[365]

Courts have found that public-nuisance claims against opioid manufacturers could proceed in part because they determined public-nuisance law must be flexible so it can cover new factual situations.[366] The same argument could apply more strongly to eavesdropping by always-listening devices. Whereas opioid litigation involves an expansion of public-nuisance law, eavesdropping actions merely involve a return to public-nuisance law's roots. The use of public nuisance in opioid litigation is subject to traditionalist critiques that public nuisance was never intended to address opioids.[367] In contrast, public nuisance has been aimed at addressing eavesdropping since its inception—the only change is that the eavesdropping in question is now technologically enhanced.

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362. *See, e.g.*, City of San Francisco v. Purdue Pharma L.P., 491 F. Supp. 3d 610, 628–29 (N.D. Cal. 2020) (denying motion to dismiss public-nuisance claim); *In re* Nat'l Prescription Opiate Litig., 406 F. Supp. 3d 672, 673 (N.D. Ohio 2019) (denying Defendant's motion for summary judgment on public-nuisance claim); Commonwealth v. Purdue Pharma, L.P., 36 Mass. L. Rptr. 56, 56 (Super. Ct. 2019) (same).

363. *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643–45 (5th ed. 1984) (citing State v. Pennington, 40 Tenn. (3 Head) 299 (1859)) (listing "eavesdropping on a jury" as an example of an act constituting a public nuisance).

364. 40 Tenn. at 300–01.

365. *See, e.g.*, *id.*

366. *See, e.g.*, *In re* Opioid Litigation, No. 21-C-9000, 2022 WL 18028767, at *1–2 (W. Va. Cir. Ct. July 1, 2022); *see also* Catherine M. Sharkey, *Public Nuisance as Modern Business Tort: A New Unified Framework for Liability for Economic Harms*, 70 DEPAUL L. REV. 431, 434 (2020).

367. *See* Kendrick, *supra* note 4, at 738 ("[O]ne traditionalist objection is that public-nuisance liability should not extend to products like opioids, because (1) products were not public nuisances at common law and (2) they do not fit the common-law definition of public nuisance.").

B. Responses to Potential Defenses

Even though always-listening devices fit within a public-nuisance eavesdropping action, there are barriers to a successful suit. One potential complication to suits against companies operating these always-listening devices is that individuals arguably consent to being recorded by purchasing and using the device.[368] Consent to the listener's presence defeated some early eavesdropping claims against spies and servants.[369] Today, companies are required to receive consent from the device purchasers; however, this consent is often achieved through clickwrap agreements or by providing disclaimers in device packaging.[370] Arguably, this consent is insufficiently meaningful because the device marketing does not adequately inform consumers about the extent to which devices listen to and record conversations.[371] Additionally, these devices may record conversations beyond what a consumer does or can reasonably consent to. Situations often arise where devices are accidentally activated, devices record background conversations, or guests or minors activate the devices.[372] Guests

368. Devices being purchased and placed in homes may also be likened to people being invited into homes as guests or workers, who were not considered eavesdroppers. *See supra* notes 136–146 and accompanying text. However, devices can be distinguished from servants or guests because eavesdropping by these devices cannot be disincentivized as it is not subject to the same social or work norms as a human guest or worker. Additionally, the recording of private conversations is distinguishable from eavesdropping and repeating information. Hearing a direct recording of the conversation itself is arguably more invasive than hearing a secondhand account of what was overheard.

369 *See supra* Subsection II.B.1.

370. Bohm et al., *supra* note 6, at 16, 19. Court decisions on whether signing warranty disclaimers and other clickwrap agreements constitute meaningful consent have been mixed. *See generally* Rachel Cormier Anderson, *Enforcement of Contractual Terms in Clickwrap Agreements: Courts Refusing to Enforce Forum Selection and Binding Arbitration Clauses*, 3 SHIDLER J.L. COM. & TECH. 11 (2007) (summarizing cases addressing the enforceability of electronic agreements).

371. *See* Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 657 (2017) (noting that "full disclosure of technical and professional information to the layperson consumer is impossible" in the modern market). Always-listening devices provide varying levels of information regarding privacy settings on their primary sales pages. *Compare Echo*, AMAZON, https://www.amazon.com/dp/B07XKF75B8/ (last visited Dec. 11, 2023) [https://perma.cc/6B8Y-WGDW] (providing paragraph addressing privacy halfway down the product page, stating users "have control over [their] voice recordings and can view, hear, or delete them at any time"), *with Google Nest*, GOOGLE, https://store.google.com/category/nest_speakers (last visited Dec. 11, 2023) [https://perma.cc/J9JA-HTAN] (page selling product not mentioning devices recording users). Google provides additional information about Google Nest recordings on a separate webpage. *A Helpful Home Is a Private Home*, GOOGLE, https://safety.google/nest/ (last visited Dec. 11, 2023) [https://perma.cc/GE3C-KWGF] (noting only that "we will keep your . . . audio recordings" separate from their advertising enterprise).

372. Bohm et al., *supra* note 6, at 19; *see* Kate O'Flaherty, *Amazon, Apple, Google Eavesdropping: Should You Ditch Your Smart Speaker?*, FORBES (Feb. 26, 2020, 10:12 AM), https://www.forbes.com/sites/kateoflahertyuk/2020/02/26/new-amazon-apple-google-eavesdropping-threat-should-you-quit-your-smart-speaker/ [https://perma.cc/7SEC-WLS5] (explaining research that found that smart home devices often mistakenly hear "wake words").

visiting a home with an always-listening device may not even know that such a device is present and that they are potentially being listened to or recorded.

A 2019 class action against Amazon alleged that the company violated privacy laws in eight states when its Alexa device recorded and stored children's voices without their consent.[373] The Washington district court denied Amazon's motion to compel arbitration and the Ninth Circuit affirmed, holding that parents who purchased these products cannot consent to arbitration on their children's behalf.[374] Recently, the Federal Trade Commission and Department of Justice charged Amazon with violating children's privacy laws by indefinitely keeping children's voice recordings and transcripts of those recordings.[375] Scholars have also argued that these always-listening devices' practice of recording conversations violates wiretap and consumer protection laws at the state and federal levels.[376]

Currently, companies manufacturing these devices claim that the devices only connect to the cloud, thus initiating storage of a recording, when the device is activated by a "wake word"—but even taking this as true, it would be easy for these companies to collect and store even more recordings.[377] Additionally, there are situations where the devices were activated by a false positive word (for example, "they" instead of "hey"), leading the devices to record and store conversations where it should not.[378] Northeastern University researchers studying

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373. Jim Sams, *Federal Lawsuit Charges Amazon's Alexa Violates Children's Privacy*, CLAIMS J. (June 17, 2019), https://www.claimsjournal.com/news/national/2019/06/17/291497.htm [https://perma.cc/NA88-E4QY]; Class Action Complaint & Demand for Jury Trial at 1–2, Hall-O'Neil v. Amazon.com Inc., No. 2:19-cv-910 (W.D. Wash. June 11, 2019), *sub nom.* B.F. *ex rel.* Fields v. Amazon, 2020 WL 3542653 (June 30, 2020); *see also* Orin Kerr, Opinion, *The FCC's Broadband Privacy Regulations Are Gone. But Don't Forget About the Wiretap Act.*, WASH. POST (Apr. 6, 2017, 11:00 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/06/the-fccs-broadband-privacy-regulations-are-gone-but-dont-forget-about-the-wiretap-act/ [https://perma.cc/E3ZK-GALU] (discussing whether users of wireless networks could be bound by arbitration clauses in a wireless company's terms of service when they use an account that another party has set up); United States v. Lanoue, 71 F.3d 966, 981 (1st Cir. 1995) ("The surrounding circumstances must convincingly show that the party knew about and consented to the interception in spite of the lack of formal notice or deficient formal notice."), *abrogated in part on other grounds by* United States v. Watts, 519 U.S. 148 (1997).

374. *B.F.*, 2020 WL 3542653; B.F. v. Amazon.com Inc., 858 F. App'x 218, 221 (9th Cir. 2021); Lauren Berg, *Amazon Can't Arbitrate Kids' Alexa Privacy Battle*, LAW360 (Apr. 9, 2020, 10:42 PM), https://www.law360.com/articles/1262396/ [https://perma.cc/4CAW-BAVB].

375. On May 31, 2023, the FTC and DOJ jointly charged Amazon with violations of the Children's Online Privacy Protection Act ("COPPA"). Complaint at 1, United States v. Amazon.com, Inc., No. 2:23-cv-00811 (W.D. Wash. filed May 31, 2023).

376. *See generally* Barrett & Liccardi, *supra* note 177.

377. *See* Bohm et al., *supra* note 6, at 9.

378. *See generally* O'Flaherty, *supra* note 372 (reporting on various words and word combinations found to erroneously activate smart speaker devices).

these devices found that the devices were activated up to once per hour by a word that should not have woken the device.[379] There are enough situations where consent to listen and record is not received that a public-nuisance suit remains viable.

C. Eavesdropping as a Common-Law Analogue for Standing

Even if courts do not accept the described public-nuisance actions against companies operating always-listening devices, the conclusions within Parts II and III of this Article still pave the way for strengthening privacy law. Policymakers are interested in addressing the consumer-privacy issues that emerge alongside new technologies such as always-listening devices and artificial intelligence.[380] Lawmakers looking to create statutes addressing privacy harms face an increasing barrier: the justiciability of cases brought by private plaintiffs alleging privacy violations. In particular, federal (and many state) courts' requirement that plaintiffs demonstrate "concrete" harm impedes the enforcement of privacy law because of the supposed lack of concreteness of privacy invasions.[381]

In *Spokeo, Inc. v. Robins*, the Supreme Court determined that intangible injuries such as privacy harms are "concrete" when they "ha[ve] a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[382] In *TransUnion LLC v. Ramirez*, the Court further elaborated that to determine whether a harm is sufficiently concrete, courts should look to "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury."[383] The Court noted that this test

379. Daniel J. Dubois, Roman Kolcun, Anna Maria Mandalari, Muhammad Talha Paracha, David Choffnes & Hamed Haddadi, *When Speakers Are All Ears: Characterizing Misactivations of IoT Smart Speakers*, 4 PROC. ON PRIV. ENHANCING TECH. 255, 255 (2020); Allen St. John, *Yes, Your Smart Speaker Is Listening When It Shouldn't*, CONSUMER REPS. (July 9, 2020), https://www.consumerreports.org/smart-speakers/yes-your-smart-speaker-is-listening-when-it-should-not/ [https://perma.cc/Q25P-GY2V].

380. *See, e.g.*, Tonya Riley, *White House Hosts Roundtable on Harmful Data Broker Practices*, CYBERSCOOP (Aug. 15, 2023), https://cyberscoop.com/white-house-roundtable-data-brokers/ [https://perma.cc/LEU6-RJZU] (reporting on the Biden Administration's recent efforts to take a stronger stance on consumer privacy, including a White House roundtable to discuss the topic and CFPB proposals to heighten consumer protection).

381. *See* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 808 (2022) (noting that, historically, "[f]ailing to fulfill promises made in privacy policies and thus betraying people's expectations has not counted as a cognizable harm").

382. 578 U.S. 330, 341 (2016); *see also* Chemerinsky, *supra* note 10, at 278–80 (discussing the ruling and precedential effects of *Spokeo* on later cases); William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 198 (arguing that *Spokeo* may "have ominous implications for the law of privacy").

383. 141 S. Ct. 2190, 2204 (2021).

would "not require an exact duplicate in American history and tradition."[384]

TransUnion was a class action suit under the Fair Credit Reporting Act brought by 8,185 Plaintiffs against TransUnion, a credit reporting company, for falsely alerting third-party creditors that their names were on a terrorism watchlist.[385] A 5-4 majority held that only the Plaintiffs for whom a false label was actually provided to third parties had standing to sue in federal court (1,853 of the original 8,185 class members).[386] The Court wrote that because TransUnion disseminated its reports to third parties, those "class members therefore suffered a harm with a 'close relationship' to the harm associated with the tort of defamation."[387] The Court explained the analogy to defamation, writing, "Under longstanding American law, a person is injured when a defamatory statement 'that would subject him to hatred, contempt, or ridicule' is published to a third party," and thus concluded those 1,853 class members suffered a harm with a historical analogue giving rise to standing.[388] In contrast, the remaining Plaintiffs, whose label had not been publicized to third parties, did not have standing, because there was no historical analogue to the harm they suffered. The determining factor in whether Plaintiffs could bring suit in federal court was the similarity of their harms to ones cognizable at common law.

The problem the Plaintiffs faced in *TransUnion* demonstrates a larger trend of federal courts imposing "onerous harm requirements" for privacy suits.[389] Following *Spokeo*, lower courts have been sent on expeditions for common-law analogues to a variety of claims.[390] *TransUnion* could mean that, going forward, plaintiffs suffering privacy harms will need to find a common-law analogue in order to even have their case heard in federal court. Similarly, policymakers seeking to

384. *Id.*

385. *Id.* at 2200.

386. *Id.* at 2212–13.

387. *Id.* at 2209.

388. *Id.* at 2208–09.

389. Citron & Solove, *supra* note 381, at 798.

390. *See, e.g.*, Salcedo v. Hanna, 936 F.3d 1162, 1171 (11th Cir. 2019) (finding that receipt of an automated text message was not analogous to intrusion upon seclusion); Heglund v. Aitkin County, 871 F.3d 572, 577 (8th Cir. 2017) (evaluating Plaintiff's claim by evaluating whether the privacy interest violated "was a cognizable interest at common law"); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 463 (7th Cir. 2020) (finding that common law intrusion upon seclusion was analogous to receipt of unsolicited text messages); Perez v. McCreary, Veselka, Bragg & Allen, P.C., 45 F.4th 816, 822 (5th Cir. 2022) (noting that Plaintiff must "show that the type of harm he's suffered is similar in kind to a type of harm that the common law has recognized as actionable").

strengthen privacy protections will also worry about whether legislation they propose will have ties to common-law actions.[391]

Courts and plaintiffs have used common-law analogues to modern privacy harms such as defamation,[392] public disclosure,[393] intrusion upon seclusion,[394] and fraudulent misrepresentation.[395] This Article has presented a lesser-recognized—but perhaps even more useful—analogue in eavesdropping. As Part II illustrated, eavesdropping actions have existed in English law since at least 1390,[396] and eavesdropping was recognized as an actionable wrong at common law. Eavesdropping then passed into U.S. common law and statutes and provided a basis for lawsuits in U.S. courts.[397] Unlike defamation and public disclosure, eavesdropping does not require that information obtained be repeated to constitute a harm—the bar that some *TransUnion* Plaintiffs failed to meet.[398] Eavesdropping has been closely associated with many other privacy torts that exist to this day, including trespass, libel, intrusion upon seclusion, and violation of privacy.[399] Though properly conceptualized as a public wrong, eavesdropping is closely related to its private-law counterparts. Plaintiffs suing under statutes protecting privacy rights—and courts hearing those cases—can and should use eavesdropping as a historical basis for recognizing the injury.

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391. *See* Note, *Standing in the Way: The Courts' Escalating Interference in Federal Policymaking*, 136 HARV. L. REV. 1222, 1226 (2023) (discussing how the outcome of these cases indicates a "diminishment of Congress's ability to create enforceable statutory rights").

392. *See TransUnion*, 141 S. Ct. at 2209.

393. *See* Nabozny v. Optio Sols. LLC, 84 F.4th 731, 737 (7th Cir. 2023) (rejecting comparison of disclosure of information in violation of the Fair Debt Collection Practices Act to the common-law tort of public disclosure because the disclosure in the instant case was not "public").

394. *Gadelhak*, 950 F.3d at 458 (finding receipt of unsolicited text messages was analogous to the common-law tort of intrusion upon seclusion).

395. *Perez*, 45 F.4th at 820 (rejecting Plaintiff's primary argument that failure to disclose was analogous to fraudulent misrepresentation).

396. *See supra* Part II.

397. *See supra* Section II.B; *see, e.g.*, Commonwealth v. Lovett, 6 Pa. L.J. 226, 226 (Ct. Quarter Sess. 1831).

398. *See supra* Parts I, II. The Seventh Circuit recently found that a Plaintiff's attempt to analogize a violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, which allegedly harmed her by "invading her privacy," to a common-law privacy tort failed because the closest common-law analogue, public-disclosure, required publication as an essential element, which the Plaintiff did not establish. *See Nabozny*, 84 F.4th at 735. Eavesdropping could have served as a common-law analogue to the harm alleged and, as this article has demonstrated, would not have required publication or repetition as an essential element of the offense.

399. *See* Swire, *supra* note 116, at 1176 ("Peeping and eavesdropping have been punished under a variety of causes of action, including trespass, window peeking, secret peeping, eavesdropping, indecent viewing or photography, violation of privacy, voyeurism, and unlawful photographing."); NORMAN-EADY, *supra* note 116; *see also* Hamberger v. Eastman, 206 A.2d 239, 242 (N.H. 1964).

This Article shows that for hundreds of years, common-law courts have recognized "intangible" privacy harms under eavesdropping public-nuisance actions. This insight may allow contemporary courts to deem invasions of privacy and other intangible harms concrete under even the most restrictive interpretations of current standing jurisprudence.

CONCLUSION

Though Blackstone could never have foreseen "Alexa," "Hey, Google," and "Siri" technologies, the theory of public harm that he and later U.S. cases adopted applies to eavesdropping devices today. The once-defunct public nuisance of eavesdropping could be revived to hold producers of major technologies accountable for the risks they pose to individuals' privacy and, in turn, to the public well-being.

The Supreme Court noted well before the advent of always-listening devices that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices."[400] Centuries earlier, the Pennsylvania state court in *Lovett* feared that eavesdropping could "cause the destruction of the family, even if the stories told were true," holding that it is "important to all persons, that our families should be sacred from the intrusion of every person."[401] Eavesdropping, especially in light of technological advances today, unreasonably interferes with the public's right to security in public and private spaces and to uninhibited social interactions. Eavesdropping could again be actionable under public-nuisance law.

This Article has endeavored to explain why Blackstone and early American case law envisioned eavesdropping as a public nuisance and how their conception can be applied and even adapted today. The historical record demonstrates that, at its core, eavesdropping was understood as a public harm when overheard conversations were repeated and caused discord in communities. Early case law also shows that even when the eavesdropper never publicized overheard information, the eavesdropping could be indictable as a public nuisance, particularly when the conduct was habitual. The insecurity that eavesdropping causes interferes with the health, comfort, safety, property, sense of decency, and morality of the citizenry at large. The surreptitious and repeated nature of eavesdropping can burden the way an entire community interreacts publicly and privately for fear that confidential communications will be overheard or repeated. Modern

400. Berger v. New York, 388 U.S. 41, 63 (1967).

401. *Lovett*, 6 Pa. L.J. at 226.

technology is capable of listening in on anyone who encounters a device such as an Amazon Echo, Google Home, or potentially even an iPhone, which extends this risk even further. Eavesdroppers on the loose in fifteenth-century England or early America would have been considered a public nuisance because they posed a threat to a dozen houses and made one neighborhood—or at most, one town—a less attractive place to live. Ubiquitous always-listening technology poses a threat to millions.

The application of public-nuisance doctrine to modern eavesdropping technology seems far more plausible than other recent uses of public-nuisance actions. Courts have used public nuisance in novel ways to respond to other modern threats to public well-being.[402] The threat of eavesdropping is as old as the common law itself, and public-nuisance law should revive eavesdropping as a public nuisance in light of the serious risk eavesdropping poses to public welfare today.

More broadly, the potential application of public nuisance to modern-day technology shows the continued relevance of traditional common-law concepts. Centuries-old legal principles have more in common with modern issues than one might think. Specifically, Prosser's "new privacy torts"[403] and Justice Harlan's "reasonable expectation of privacy" test have existed in some form since Blackstone.[404] Additionally, eavesdropping as a public nuisance can be used as a close historical or common-law analogue to provide standing under *Spokeo* and *TransUnion* for related harms, particularly for modern privacy harms. Public nuisance can also be used directly as a basis for addressing modern-day issues. Contrary to what some scholars argue,[405] common law has been ready for the legal issues of the digital age all along. When it comes to eavesdropping, you can teach an old law new tricks.

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402. *See, e.g.*, *supra* note 362 and accompanying text.

403. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1806, 1821–24 (2010).

404. Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring); *see* 4 BLACKSTONE, *supra* note 90, at 106, 111.

405. *See, e.g.*, Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1918–21 (2010) ("New technologies and methods for collecting and disseminating information have changed how people can modulate their privacy, but courts appear stuck with notions of privacy more appropriate for the first half of the twentieth century.").