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NOTES

REGULATION OF UNSOLICITED TELEPHONE CALLS: AN ARGUMENT FOR A LIABILITY RULE

It is a common experience to find oneself talking on the telephone in either one's home or place of business to an unrequested and unwanted salesperson or contribution seeker. Yet despite the rising incidence¹ of these unsolicited telephone calls,² there is no effective legislation³ or regulation to prevent the intrusion. Solicitors are generally free to call any person, at any time and in any place⁴ to peddle their goods, services or causes.⁵ Since there is no effective way to screen calls beforehand,⁶ unsolicited calls result in great inconvenience

1. There are at least 7 million of these calls made each working day. *Foes of "Junk Calls" Go Into Action*, U.S. NEWS & WORLD REP., Mar. 27, 1978, at 67.

2. The term "unsolicited telephone call" does not have a precise, generally accepted definition. For purposes of this discussion, it should be understood as referring to a business call from an organization with which the recipient has had minimal, if any, prior dealings. Unless otherwise indicated, the term does not refer to unwelcome personal calls or misdialed calls.

Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1029 (1980).

3. Several states have limited the use of automatic dialing recorded message players. These are devices which dial numbers in sequence and play a recorded message. *See, e.g.*, CAL. PUB. UTIL. CODE §§ 2871-2875 (West Supp. 1984). No state, however, has as yet either limited or banned unsolicited telephone calls made by a human solicitor.

4. Most states, however, have laws against obscene and intentionally annoying calls. *See, e.g.*, CAL. PENAL CODE § 653m (West Supp. 1984). *See also* Note, *Unwanted Telephone Calls—A Legal Remedy*. 1967 UTAH L. REV. 379, 381-95. Also, many states recognize a civil cause of action for intentional infliction of emotional distress for certain disturbing calls. *See, e.g.*, *Schlussel v. Schlusser*, 141 Cal. App. 3d 194, 190 Cal. Rptr. 95 (1983).

5. *See* Comment, *Smile and Dial: Regulating Telephone Sales*, 32 FED. COM. L. J. 371 (1980) for a description of the various sorts of companies engaged in unsolicited telephone calls.

6. Answering machines presently offer only a crude solution, since an owner must wait to hear the recorded message before deciding whether to answer a call. Unlisted numbers are also inconvenient because people with whom the callee would like to speak would be unable to obtain the number. Of course, the future may bring more sophisticated devices able to control or eliminate unwanted calls.

and nuisance⁷ and cause a great expenditure of time and money to society which is not charged to the caller.

This Note argues that people have a right to be free from unsolicited telephone calls and examines two ways in which government could protect the callee's interest. First, the government could establish a "property rule," giving the callee an absolute right to prohibit any unsolicited calls from being made to him. Second, a "liability rule" could be established under which the caller would be allowed to make unsolicited calls, but would be forced to compensate the callee for the infringement of the right to be free from such calls. In general, a property rule would appear to be the preferable alternative. Given the enormous enforcement costs of such a system, however, a liability rule is preferable.

I. THE NECESSITY FOR REGULATION OF UNSOLICITED CALLS

A. THE NUMBER OF UNSOLICITED CALLS

When the Federal Communications Commission ("FCC" or "Commission") decided in 1980 not to regulate unsolicited telephone calls, one of the major reasons was its belief that it did not have jurisdiction over intrastate calls⁸ and that the number of interstate calls was too low to make any regulation effective and efficient.⁹ The Commission determined "that [since] only about three percent of all unsolicited telephone calls are interstate, regulatory action on our part would very likely only affect a small portion of all unsolicited calls."¹⁰ The source of this statistic is not indicated in the opinion. The opinion does, however, mention two statistics concerning the number of unsolicited telephone calls made nationally. One source determined that approximately seven million unsolicited telephone calls are made each business day,¹¹ while the other stated the figure at twelve million.¹² Taking the average of these two figures, it appears that approximately nine and a half million unso-

7. For several "horror stories" concerning the effects of unsolicited telephone calls, see S. 2193, 95th Cong., 1st Sess., 123 CONG. REC. 33, 371-72 (1977).

8. An argument can be made that the FCC's present jurisdiction would permit it to regulate intrastate unsolicited calls. In *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), the Court of Appeals ruled that the FCC's jurisdiction extends to all terminal equipment that is connected to the interstate network. Intrastate unsolicited calls are made over that network. Of course, Congress could expand the FCC's jurisdiction as was proposed in the Telephone Privacy Act. See *infra* text accompanying notes 33-36.

9. *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1024 (1980).

10. *Id.*

11. 77 F.C.C.2d at 1030 (citing M. ROMAN, *TELEPHONE MARKETING* (1976)).

12. *Id.* (citing R. STECKEL, *PROFITABLE SALES OPERATIONS* (1976)).

licited calls are made every business day.¹³ Estimating that each of these calls takes an average of thirty seconds to answer and respond to,¹⁴ roughly 79,160 man-hours are spent each day on unsolicited telephone calls.¹⁵

Thus, in terms of the time spent on the phone each day, it can hardly be said that unsolicited telephone calls are insignificant. However, some may welcome unsolicited telephone calls and buy the products or services offered. Nevertheless, a California survey done by the Pacific Telephone Company estimated that only .1% of people "like" receiving these calls.¹⁶ Assuming that this figure is correct,¹⁷ the nuisance resulting from these calls is enormous.

B. THE EFFECT OF LOWER LONG DISTANCE RATES

Perhaps a more significant reason for federal regulation of unsolicited telephone calls is the likely increase in the incidence of such calls resulting from the recent decrease in long distance rates.

In the late 1960's, new developments in microwave and satellite communications lowered the telephone industry's fixed costs. With these developments, many economists began to question whether the telephone industry was still a natural monopoly in the long-distance service market.¹⁸ In 1969, the FCC, to promote competition, allowed MCI to compete directly with AT&T in the long-distance market.¹⁹ In 1977, the District of Columbia Court of Appeals reversed an FCC ruling and allowed MCI and other companies to compete directly with AT&T's long-distance WATS²⁰ service.²¹ It thereafter became apparent to the

13. The Commission dismissed the number of unsolicited telephone calls as insignificant in comparison to the 735 million calls made each day nationally. *Id.*

14. This figure seems reasonable given the initial time needed to ascertain the identity and business of the caller. This figure also takes into account the time spent getting past the receptionist to a manager or supervisor. *See Comment, supra* note 5, 372-73.

15. Assuming the FCC is correct in its estimation that only three percent of all unsolicited calls are interstate, 2,375 man-hours are spent each day on unsolicited interstate calls.

16. FIELD RESEARCH CORP., THE CALIFORNIA PUBLIC'S EXPERIENCE WITH AND ATTITUDE TOWARD UNSOLICITED TELEPHONE CALLS 9 (Mar. 1978).

17. While the FCC report mentions this survey, 77 F.C.C.2d at 1030, it doesn't list any statistics that reflect how many callees "like" or "dislike" receiving unsolicited calls. The report does list the number of complaints made to the various telephone companies, *id.* at 1031, but complaint statistics reflect only those persons who are inclined to report such annoyances. This figure may be very low in comparison to those who quietly curse to themselves after hanging up the phone.

18. Note, *The Proposed Deregulation of Domestic Common Carrier Telecommunications*, 69 CALIF. L. REV. 455, 472 (1981).

19. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), *modification granted*, 27 F.C.C.2d 380 (1971).

20. "WATS [wide area telephone service] is a long distance telephone service for non-

FCC that both Congress²² and the courts were in favor of a more competitive telephone industry. Consequently, the Commission instituted its own study of the WATS market structure in order to discover how to encourage a more efficient long-distance telephone industry.²³

The results of this study and the rule changes stemming from it are both voluminous and complicated.²⁴ It is clear, however, that these changes will result in lower long-distance telephone rates to large-volume customers. The FCC's new regulations, often referred to as the "access charge plan," assign a higher fixed cost to each phone line or phone line access for long-distance service. This fixed cost was previously included in long-distance rates. Under these regulations, once the subscriber pays the access charge, average long-distance rates will be lower. The access charge plan will particularly benefit large-volume users, since they can spread this fixed cost over a larger quantity of long-distance calls.²⁵

FCC officials have estimated that after the seven year access charge phase-in period, long-distance rates will be thirty to forty percent lower.²⁶ Since the access charge plan has been approved, both AT&T and MCI have announced long-distance rate reductions of ten and a half percent for regular long-distance calling and six and a half percent for WATS service.²⁷

This price reduction will almost certainly bring a substantial increase in the number of unsolicited long-distance calls.²⁸ This is due to the fact that a soliciting organization's primary cost is its telephone service.²⁹ Any reduction in this cost is likely to be reflected in an ex-

residential use [that] offers customers a flat rate for unlimited calls within a specific area." Note, *supra* note 18, at 463. A random calling of 15 telephone solicitation companies revealed that all but one uses WATS lines.

21. MCI Telecommunications Corp., 57 F.C.C.2d 271 (1975) (mem.), 60 F.C.C.2d 25 (1976), *rev'd sub nom.* MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 10 (1978).

22. See S. 2827, 96th Cong., 2d Sess. § 222(d), 126 CONG. REC. S7022 (daily ed. June 13, 1980) (adding 47 U.S.C. § 222); H.R. 6121, 96th Cong., 1st Sess. § 3(d) (1979) (adding 47 U.S.C. § 233). See also H.R. REP. NO. 1252, 96th Cong., 2d Sess. 79 (1980).

23. Notice of Inquiry and Proposed Rulemaking, 67 F.C.C.2d 757 (1978).

24. Access Charges: MTS and WATS Market Structure, 48 Fed. Reg. 10,358 (1983) (codified at 47 C.F.R. pt. 69).

25. *Id.*

26. Block, *FCC Approves Crucial Access Charge Plan*, TELEPHONY, Jan. 10, 1983, at 13.

27. Block, *AT&T Files Interstate Rate Changes*, TELEPHONY, Oct. 10, 1983, at 14. MCI, AT&T's major competitor, also announced rate reductions of five percent for long distance this year. Wall St. J., Oct. 19, 1983, at 2, col. 3.

28. Charitable organizations will also increase their telephone solicitation efforts as the cost of phone service falls in order to maximize the amount of money received per dollar spent.

29. The only other major costs are rent and solicitors' salaries. Most telephone solici-

panded scope of operation.

II. PREVIOUS ATTEMPTS AT REGULATION

The first attempt to control unsolicited telephone calls was a suit brought by a private party against a telephone company.³⁰ The subscriber complained of numerous unwanted calls. He requested that an "asterisk" be put in the phone book beside the name and number of every person who did not wish to receive unsolicited calls and that penalties be established for solicitors who called any of those numbers.³¹ The California Public Utilities Commission dismissed the complaint, stating that high costs and enforcement problems would make the "asterisk" system undesirable.³²

In the late 1970's, after great public outcry over the increase in bothersome unsolicited calls, a bill known as the "Telephone Privacy Act" was introduced into Congress.³³ However, neither that nor any other bill³⁴ regulating unsolicited calls has been passed in either the House or the Senate.

The Telephone Privacy Act would amend Title II of the Communications Act of 1934³⁵ to prohibit unsolicited calls to people who do not wish to receive them. Under the Act, the telephone companies would prepare a list of the phone numbers of the people who do not want unsolicited calls and sell that list to the solicitors at cost. A criminal penalty would be imposed upon any solicitor who makes an unsolicited call to a number on the list. Noncommercial calls would be excluded and there is a provision for automatic dialer recorded message players ("ADRMP's"). This approach is very similar to the "asterisk" method, though it may be more convenient for the solicitors since they rarely use telephone books.³⁶

In response to public debate and congressional interest in the regu-

tation companies install many phones in one small room and could increase the number of phones per room if necessary. Also, most solicitors are paid on a commission basis so that their compensation is dependant on their sales volume. See Comment, *supra* note 5, at 372.

30. *McDaniel v. Pacific Tel. & Tel. Co.*, 60 Pub. Util. Rep. (PUR) 47 (1965).

31. *Id.* at 49.

32. *Id.* at 62.

33. S. 2193, *supra* note 7.

34. Other bills have concerned the use of automatic dialing recorded message players. See H.R. 10033, 95th Cong., 2d Sess., 123 CONG. REC. 27,088 (1977); H.R. 10032, 95th Cong., 2d Sess., 123 CONG. REC. 37,088 (1977); H.R. 9506, 95th Cong., 1st Sess., 123 CONG. REC. 33,492 (1977); H.R. 9505, 95th Cong., 1st Sess., 123 CONG. REC. 33,492 (1977).

35. 47 U.S.C. § 223 (1982).

36. Random calling of 15 telephone sales companies (e.g., Dunn and Bradstreet) by the author revealed that most use commercially prepared cards.

lation of unsolicited calls, the FCC instituted a study³⁷ to consider whether it should or could regulate unsolicited calls without legislative action and to determine the best way to correct the problem.³⁸ Several thousand comments were filed with the Commission from sources such as public interest groups, telephone sales organizations, and phone owners.³⁹ In a 1980 opinion, the FCC decided that it would not impose any type of regulation on unsolicited telephone calls.⁴⁰

The Commission, while recognizing a serious invasion of privacy, determined not to regulate the calls because of constitutional and practical considerations. Any regulation of telephone calls would hamper the caller's freedom of speech, and since phones are such an important means of communication in our society, "the ability to speak with others over the telephone would . . . be entitled [to] substantial protection."⁴¹ The opinion, however, stopped short of saying that all forms of regulation would be unconstitutional.⁴² The Commission also determined that any regulation of unsolicited calls would be too burdensome and expensive to enforce.⁴³

These constitutional and practical considerations will be further explored in the remainder of this Note. The Commission's contentions will be examined in light of present circumstances and discrepant statistical studies in order to decide whether any type of regulation can effectively control unsolicited calls.

III. CONSTITUTIONAL ISSUES

Any kind of regulation of unsolicited telephone calls will bring two constitutionally protected interests into conflict. First, any regulation restricting the solicitor's ability to speak to others via the telephone would implicate the First Amendment. On the other hand, allowing solicitors to call at will seems to constitute an invasion of the right to privacy derived from the Bill of Rights.⁴⁴ It is clear, as presently interpreted, this right to privacy includes the right to be left alone.⁴⁵

The history of First Amendment adjudication demonstrates that the right to free speech is not absolutely protected. The Supreme Court

37. Unsolicited Telephone Calls, 67 F.C.C.2d 1384 (1978).

38. *Id.* at 1388.

39. Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1025 (1980).

40. *Id.* at 1038.

41. *Id.* at 1034.

42. *Id.* at 1035.

43. *Id.* at 1025.

44. The Constitutional right to privacy was first recognized and defined in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

45. See generally *Mapp v. Ohio*, 367 U.S. 643 (1961); *Boyd v. United States*, 116 U.S. 616 (1885).

has held that time, place and manner restrictions of speech or other forms of communication do not violate the First Amendment if the regulation furthers an important governmental interest which is unrelated to the suppression of free expression.⁴⁶ Furthermore, "commercial speech" is accorded less protection than other forms of speech.⁴⁷ Therefore, since the protection of privacy is an important governmental interest,⁴⁸ properly tailored regulation of unsolicited commercial telephone calls would be likely to withstand a constitutional challenge.

Generally, in order to decide which one of these opposing interests is stronger in a given case, the Court has employed a balancing test. In *Rowan v. United States Post Office*,⁴⁹ the Supreme Court considered a situation analogous to regulation of unsolicited telephone calls. In *Rowan*, section 4009 of the Postal Revenue and Federal Salary Act of 1967⁵⁰ was challenged as being in violation of the First Amendment. Section 4009 provided that where an addressee received mail believed to be sexually provocative, the individual could prevent the advertisement from being sent to his address by complaining to the Postmaster General. The Court, while recognizing a First Amendment right, upheld the statute against the constitutional challenge.

The use of judicial balancing in these cases is clearly demonstrated by the Court's statement that "[in] weighing the highly important right to communicate . . . against the very basic right to be free from sights [and] sounds . . . it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."⁵¹ In defining the privacy interest, the Court stressed that "in today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder [the right] to exercise control over unwanted mail."⁵²

Rowan, therefore, establishes the basic right of an individual to de-

46. *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972); *United States v. O'Brien*, 391 U.S. 367, 377 (1967).

47. *Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n of New York*, 447 U.S. 557, 562-63 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). See also Comment, *Unsolicited Commercial Telephone Calls and the First Amendment: A Constitutional Hangup*, 11 PAC. L. J. 143 (1979). For the new test regarding the constitutional protection afforded commercial speech, see *infra* text accompanying notes 60-65.

48. "The State's interest in protecting the . . . privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1979).

49. 397 U.S. 728 (1977).

50. Pub. L. No. 90-206, § 4009, 81 Stat. 613, 645, *repealed by* Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970).

51. 397 U.S. at 736.

52. *Id.*

side from whom he or she wishes to receive mail in the home. There are, however, several differences between regulating unsolicited telephone calls and preventing unwanted mail from reaching one's mailbox.

First, the privacy infringement is more substantial when receiving an unwanted telephone call. An individual can quickly disregard any unwanted pamphlet or brochure. A telephone, however, must be answered when it rings, since there is presently no effective way to screen calls before picking up the receiver.⁵³ Once the callee has been interrupted, he must spend time ascertaining the identity of the caller and listening to the "pitch." The callee can hang up, but many people find it distasteful to be rude and will spend more time on the phone than they care to. Thus, considering the amount of time spent and the nature of the interruption, unsolicited telephone calls are more of a nuisance or invasion of privacy than unwanted mail.

Second, section 4009⁵⁴ allowed the addressee to request that no more mail be sent from a particular sender from whom mail has already been received. Any effective regulation of unsolicited telephone calls, however, would allow a callee to prohibit these calls before being contacted by a specific solicitor. This distinction might preclude *Rowan's* applicability to telephone solicitation.

Finally, the Supreme Court, analyzing the privacy issue in *Rowan*, emphasized the fact that mail is entering someone's dwelling place, as opposed to reading a pamphlet on the street or receiving an unwanted message from a billboard while riding in a train or car. The Court has not yet addressed the issue of whether a place of business deserves as much privacy as a private home when it comes to delivered mail, but any less stringent standard may tip the balance in favor of the freedom of speech.⁵⁵

In *Breard v. City of Alexandria*,⁵⁶ another situation analogous to unsolicited telephone calls, a ban on door-to-door solicitation was challenged on First Amendment grounds. In deciding this case, the Supreme Court employed a balancing test similar to that used in *Rowan*, stating that "the constitutionality of Alexandria's ordinance turns upon a balancing of the conveniences between a household's desire for privacy and the publisher's right to distribute publications."⁵⁷ The Court upheld the ban and reiterated that the First Amendment right is not absolute by its statement that "freedom of speech does not mean that one can talk or distribute where, when and how one

53. See *supra* note 6.

54. 81 Stat. at 645.

55. Section 4009, however, did not distinguish between businesses and private homes. It therefore seems that Congress also intended to protect businesses from unwanted mail.

56. 341 U.S. 622 (1951).

57. *Id.* at 644.

chooses."⁵⁸

The privacy and First Amendment interests involved in door-to-door solicitation are similar to those involved in unsolicited telephone calls. Both door-to-door and telephone solicitors must be dealt with immediately and the amount of time necessary to get rid of an unwanted salesman is about the same in both cases. Also, in both cases the salesman is restricted in one manner of advertisement, although he can still advertise in other ways (e.g., radio, television, or newspapers). Moreover, door-to-door solicitation restrictions came into effect in the 1950's for the same reason that restrictions of unsolicited telephone calls are being proposed in this Note. That is, as the Court said in *Breard*, "door-to-door canvassing has flourished increasingly in recent years with the ready market furnished by the rapid concentration of housing."⁵⁹

The Supreme Court, however, in several recent decisions has modified the balancing test used in *Rowan* and *Breard* for those cases in which commercial speech is involved. Commercial speech was originally granted First Amendment protection in *Bigelow v. Virginia*,⁶⁰ but the constitutional protection accorded such speech was not as extensive as that for noncommercial speech.⁶¹ Nevertheless, in *Bolger v. Young Drug Products*,⁶² the Court applied a new standard for testing the validity of regulations of commercial speech which may make any complete ban of unsolicited phone calls unconstitutional.

In *Bolger*, the Court struck down 39 U.S.C. § 3001(e) which, along with 18 U.S.C. § 1461, made it a crime to mail "any unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception."⁶³ After determining that Young Product's message was commercial speech (promoting the benefits of condoms), the Court

58. *Id.* at 642. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), the Court struck down an ordinance that prohibited the door-to-door distribution of circulars. The Court thought that the government did not have a right to prevent speakers from reaching willing listeners. The Court also noted, however, that a regulation making it unlawful to ring the doorbell of a householder who had indicated that he or she did not want to be disturbed would be constitutional. *Id.* at 148. This case can be distinguished from *Breard*, however, on the grounds that it involved noncommercial solicitation (religious leaflets). In *Green River v. Fuller Brush Co.*, 65 F.2d 112 (10th Cir. 1933), the court upheld an ordinance prohibiting door-to-door solicitation that was challenged on due process and equal protection grounds. For a discussion of the new constitutional protection afforded commercial speech, see *infra* text accompanying notes 60-65.

59. 341 U.S. at 626.

60. 421 U.S. 809 (1975) (advertisements concerning legal abortions paid for by profit-making organization).

61. *Friedman v. Rogers*, 440 U.S. 1 (1979), *reh'g denied*, 441 U.S. 917 (1979). In this case the Court allowed Texas to prohibit optometrists from practicing under trade names.

62. 103 S. Ct. 2875 (1983).

63. 39 U.S.C. § 3001(e) (1982); 18 U.S.C. § 1461 (1982).

applied the four part *Central Hudson* test.⁶⁴ The first part of the test is to determine whether "the expression is constitutionally protected." The second part questions "whether the governmental interest is substantial." If these inquiries yield positive responses, then the court must determine whether "the regulation directly advances the governmental interest asserted [and whether the regulation] . . . is more extensive than necessary."⁶⁵

In *Bolger*, the speech was held to be constitutionally protected because it was neither unlawful nor misleading, and concerned a matter of social interest.⁶⁶ As to the question of the substantiality of the government's interest, the government asserted that it had a duty to protect people from receiving materials which they might find offensive and that there was a governmental interest in aiding parents in discussing birth control with their children.⁶⁷ While the Court recognized a governmental interest in protecting people (especially children) from viewing certain material, it decided that this statute was too extensive.⁶⁸ The Court noted that the Postal Act upheld in *Rowan* already allows people to protect their mailbox. Further, the First Amendment does not permit the government to prohibit speech unless the captive audience cannot avoid the objectionable speech in any other manner.⁶⁹ In regard to the asserted interest in protecting children, the Court stated that a ban on unsolicited advertisements would only marginally help prevent children from learning about contraceptives and that a "restriction of this scope is more extensive than the Constitution permits."⁷⁰

This *Central Hudson* test may appear different from the one espoused in *Rowan* and *Breard*, but it is essentially a balancing of free speech against the interest that the government is trying to promote.

The last part of the *Central Hudson* test, however, appears to be a version of the least restrictive alternative test. It looks at whether another regulation could promote the governmental interest in a way less burdensome to free speech. The least restrictive alternative test is frequently used by the Supreme Court in deciding freedom of speech issues.⁷¹ The test requires the government to tailor its regulations so that they reach their legitimate ends with the least infringement on per-

64. 103 S. Ct. at 2881. The test was first stated in *Central Hudson Gas & Elec. v. Public Servs. Comm'n*, 447 U.S. 557 (1980).

65. 103 S. Ct. at 2881.

66. *Id.*

67. *Id.* at 2883.

68. *Id.*

69. *Id.*

70. *Id.* at 2884.

71. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 873 (2d ed. 1983).

sonal liberties. In applying the test in *Shelton v. Tucker*,⁷² the Court said, "the breadth of legislative abridgment [of personal liberties] must be viewed in the light of less drastic means of achieving the same basic purpose."⁷³

Any challenge to a complete ban on unsolicited telephone calls could assert that the government is infringing on the right of people to speak via the phone to others who wish to listen. The government could control unwanted calls through other less restrictive means, such as making a list of the numbers not to call available to the solicitors. A reply that the ban is the cheapest and most efficient way to reach the legitimate end of preventing bothersome calls might be rejected by the Court as quickly as it rejected the states' efficiency arguments in the dormant commerce clause cases.⁷⁴

In conclusion, a total ban on unsolicited telephone calls, even if limited to those calls amounting to commercial speech, would most likely face a strong constitutional challenge on First Amendment grounds. Therefore, any regulation imposed should be limited to giving the callee a choice as to whether or not to receive the unsolicited calls. This would bring the regulation under the *Rowan* analysis and avoid the problems of the least restrictive alternative test. Thus, the Telephone Privacy Act, since it allows individual phone owners to decide for themselves whether to receive the calls, is most likely constitutional.

IV. CALLEE'S ENTITLEMENT

It is useful to look at the controversy over unsolicited telephone calls as a conflict between two groups. One group is comprised of callers and those persons wishing to receive calls, while the other consists of unwilling callees. While an individual is not necessarily a member of just one group, it is helpful for analytical purposes to consider the groups as distinct with conflicting interests.

Society is often faced with conflicts between two or more competing groups, and the job of any government or legal system faced with these conflicts has been to resolve them. Calabresi and Melamed look at these decisions as a two-step process of first determining which group should be favored—the "setting of entitlement"—and then deciding how to best protect and defend the entitlement.⁷⁵ They use three crite-

72. 364 U.S. 479 (1960).

73. *Id.* at 488.

74. *See* *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1950). A state may not erect an economic barrier to entry where reasonable, nondiscriminatory alternatives are available. *Id.* at 354.

75. Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090-93 (1972).

ria for setting the entitlement: efficiency considerations, distributional goals, and other justice considerations.

In explaining the first criterion, Calabresi and Melamed note:

Economic efficiency means that we choose the set of entitlements which would lead to that allocation of resources which could not be improved in the sense that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before.⁷⁶

For example, if callers are granted the entitlement, an efficient number of unsolicited calls would be that number made where every caller would be unwilling to sell his rights to call for the highest price that every callee would be willing to pay to not be called. If the callees are granted the entitlement, an efficient number would be that made where every callee would be willing to sell his right to not be called for the highest price every caller is willing to pay.

It has been argued that regardless of who is initially granted the entitlement, economic efficiency will be achieved as long as there is an adequate market.⁷⁷ In order for the market to be adequate, however, negotiation costs must be low.⁷⁸ With respect to unsolicited telephone calls, negotiation costs are a problem. It would be extremely time consuming and expensive for every potential callee to contact every telephone sales company to either buy or sell the entitlement. A callee could not know what companies to contact, and even if he could, the cost of mailing each company an offer to negotiate would be prohibitive. It would be equally difficult for each caller to contact every potential callee before making an unsolicited call to negotiate for the entitlement.⁷⁹ Thus, at the present time there is no market for the buying or selling of rights to unsolicited telephone calls.

The lists of unwilling callees which would be created as a result of the Telephone Privacy Act,⁸⁰ however, would establish a market in which the parties could negotiate over the entitlement. This market would operate with relatively minor transaction costs and would promote the goal of efficiency regardless of where the entitlement is placed. Therefore, although efficiency does not provide an answer to the question of who is deserving of the entitlement, it does provide the

76. *Id.* at 1093-94.

77. Coase, *The Problems of Social Costs*, 3 J. L. & ECON. 1 (1960).

78. Calabresi & Melamed, *supra* note 75, at 1094-95.

79. It appears to be less costly, however, for the caller to initiate the negotiation. The caller knows whom he wants to call, while the callee is not likely to know who wants to call him. Note, however, that the nuisance resulting from a call to negotiate would be similar to that resulting from any unsolicited call.

80. *See supra* text accompanying notes 33-36.

basis for a very strong argument for the creation of unwilling callee lists.

The second criterion used for determining where to set the entitlement is that of the proper distribution of wealth.⁸¹ This criterion, however, seems inappropriate in deciding where to place the entitlement in the context of unsolicited telephone calls. The major difficulty would lie in trying to discern the relative wealth of the two competing groups.

Perhaps the criterion most useful in determining where to place the entitlement in this context is that referred to by Calabresi and Melamed as "other justice reasons."⁸² The authors divide this category into two elements: worthiness and consistency. Using as their example the conflict between silence lovers and noise lovers, Calabresi and Melamed state that where efficiency and redistribution goals provide no clear indication as to who should receive the entitlement, only two reasons are left on which to base the decision. "The first is the relative worthiness of silence lovers and noise lovers. The second is the consistency of the choice, or its apparent consistency, with other entitlements in the society."⁸³

Both of these concepts are vague and abstract. "The first sounds appealing, and it sounds like justice. . . . [But] to say that we wish, for instance, to make the silence lovers relatively wealthier because we prefer silence is no answer, for that is simply a restatement of the question."⁸⁴ Thus, the first reason is simply a moral determination that one activity is more noble than another. The second reason is appealing because it purports to treat like cases alike:

If the entitlement to make noise in other people's ears for one's pleasure is viewed by society as closely akin to the entitlement to beat people up for one's pleasure, and if good efficiency and distributional reasons exist for not allowing people to beat up others . . . , then there may be a good reason for preferring . . . silence rather than noise. . . . Because the two entitlements are apparently consistent, the entitlement to silence strengthens the entitlement to be free from . . . beatings. . . . It does so by lowering . . . enforcement costs. . . .⁸⁵

In conclusion, neither efficiency nor distribution considerations seem to give us a reason for giving the entitlement to either callers or callees. Since this Note has established that to allow solicitors to call at will would be an invasion of the callee's right to privacy, consistency and relative worthiness considerations seem to militate in favor of

81. Calabresi & Melamed, *supra* note 75, at 1098.

82. *Id.* at 1102.

83. *Id.*

84. *Id.* at 1102-03.

85. *Id.* at 1103.

granting callers the entitlement. This Note will continue on that premise.

V. PROTECTING THE ENTITLEMENT

Once the entitlement has been given to one group, the next step is to decide how government is going to protect it. Calabresi and Melamed lay out three different sets of rules that can be used to guard the favored group's interest: property, liability and inalienability.⁸⁶ A property rule protects an entitlement "to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller." A liability rule protects an entitlement "whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it."⁸⁷ This value may be more or less than the entitled party would have sold it for. Finally, an inalienability rule protects an entitlement "to the extent that [the government doesn't permit] its transfer . . . between a willing buyer and a willing seller."⁸⁸

An inalienability rule is inappropriate in the context of unsolicited telephone calls. By definition, the group who enjoys the entitlement, unwilling callees, do not want to talk to callers. But if the callees became willing to talk, either because they were given a fee or simply changed their minds, there is no reason for government to prevent the parties from communicating over the phone. Thus, this entitlement must be protected by either a property or liability rule.

Generally, when there is an adequate market with low negotiation costs, a property rule provides the most efficient and equitable method for protecting an entitlement.⁸⁹ A property rule is efficient because if the party granted the entitlement places a higher value upon it than the unentitled party, the entitled party will retain it; and if the unentitled party values the right more highly, it will be able to purchase the right in a voluntary transaction. A property rule is equitable because, unlike a liability rule, each individual's subjective value for the entitlement is recognized.

The list system envisioned by the Telephone Privacy Act⁹⁰ can be seen as a rough approximation of such a property rule. As previously discussed,⁹¹ this system would establish a list of the phone numbers of

86. *Id.* at 1105-15.

87. *Id.* at 1092.

88. *Id.* at 1092-93.

89. *Id.* at 1124-27.

90. S. 2193, *supra* note 7.

91. *See supra* text accompanying note 36.

unwilling callees which would be distributed at cost to those companies engaged in telephone solicitation. In addition to protecting the callee's entitlement, this list would establish a market in which the caller could negotiate for the right to make unsolicited calls.⁹² In practice, however, the operation of this list as a market mechanism is problematic. First, the list would constitute only a rough approximation of callees' preferences, with the callee only being able to decide whether or not he wants to receive unsolicited calls in general.⁹³ Secondly, there would most likely be a serious free rider problem, since those callees who would otherwise be willing to receive unsolicited calls would be inclined to place their names on the list in order to receive the fees from the caller.

In addition to these market problems, two additional difficulties exist in connection with the implementation of a list system. The first is the cost of administering the list, and the second is the cost and adequacy of enforcement.⁹⁴ The first problem can be solved by the Telephone Privacy Act under which the phone companies create the lists by collecting the names of those not desiring unsolicited calls and then pass the cost onto the callers. The second problem, however, is more serious. The FCC has indicated that it would be very expensive and perhaps impossible to prevent callers from calling those on the lists.⁹⁵ After discussing the costs of the possible enforcement mechanisms of the list system, this Note will examine whether, in light of these costs, a liability rule would be a more desirable means of protecting the callee's entitlement.

VI. ENFORCEMENT

The greatest difficulty with protecting the callee's entitlement by means of a list system is the cost of enforcement. As the FCC stated in referring to the Telephone Privacy Act, "a regulation of this kind would be difficult to enforce and expensive to implement."⁹⁶ The same opinion points out that without drastically changing the present phone system, the callee or telephone company would have no way of knowing by whom an illegal call was made.⁹⁷ Presently, most solicitors use false names and addresses, and this practice will undoubtedly increase if criminal penalties are imposed for illegal calls.⁹⁸ While there are sev-

92. See *supra* text accompanying note 80.

93. To allow a callee to decide exactly which companies or organizations he would accept calls from would require numerous lists and would result in prohibitive administrative expense.

94. *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1037 (1980).

95. *Id.* at 1038.

96. *Id.* at 1037.

97. *Id.* at 1038.

98. Comment, *supra* note 5, at 372.

eral possible methods of enforcement, all have significant drawbacks.

A callee could, of course, agree over the phone to buy the goods and have them traced back to the solicitor through the mail when they arrived. It is doubtful, however, that many callees would agree to participate, since this procedure would require a great expenditure of time and effort. The telephone company or FCC could monitor the solicitors' phone lines in order to determine whether illegal phone calls were being made, but with the number of calls made each day it would be necessary to have a large staff to listen to the calls.⁹⁹ The telephone company could also change its record keeping system so that all the numbers a solicitor calls would be checked against the forbidden numbers. It seems, however, that the cost of such record keeping would be extremely high.

Another option would be to have the solicitors themselves pay the costs of enforcement. In a sense, this seems fair, since the solicitors are causing the problem. But if these costs are too high, the solicitors could be driven out of business, though perhaps not to everyone's chagrin.

Once the list of unwilling callees is compiled, one might think that the solicitors would voluntarily refrain from calling the listed numbers regardless of the penalties. Since those people have stated that they don't want unsolicited calls, the chance that they would buy or contribute would appear to be so slight that they are not worth calling. The trouble is that if only .1% of callees "like" receiving unsolicited calls,¹⁰⁰ the vast majority of phone owners might want to be on the list, which would substantially curtail the telephone solicitation business. Faced with this situation, telephone solicitors would have a significant incentive to violate the law by calling those listed, and experience shows that a sufficient number of these calls would result in sales to make the enterprise profitable. The reasons for the disparity between the low percentage of people who profess to "like" unsolicited calls and the profitability of these operations are probably psychological.¹⁰¹ A smooth talking salesperson with a rehearsed "pitch" is at an advantage over an unassuming callee. In addition, however, in the case of calls to

99. For other criticisms of this approach, see *id.* at 387. Of course, penalties could be increased to compensate for the low probability of being caught. In general, however, "the magnitude of the threatened punishment [appears to be] not as important a consideration as the probability of discovery and punishment." W. LAFAYE & A. SCOTT, JR., *CRIMINAL LAW* 23 (1972).

100. See *supra* notes 16-17 and accompanying text.

101. See P. ZIMBARDO & F. RUCH, *PSYCHOLOGY AND LIFE* 584-85 (1972). The discrepancy between the low number of those receptive to these calls and the apparent profitability of telephone solicitation companies could be attributed to a high profit margin on each sale and the fact that individuals when responding to a survey are more likely to give a thoughtful answer than when talking to a salesman with a smooth "pitch." *Id.*

businesses whose numbers are on the list, the solicitor might offer personal incentives to a purchasing agent in order to make a sale to the business.¹⁰²

Therefore, at the present time, the cost of enforcing any system that prohibits solicitors from calling those individuals who have stated that they don't want to receive the calls seems too great to make such a system practical.

VII. PROPERTY OR LIABILITY RULE?

If an entitlement is not adequately protected by one of the three rules discussed in Section V, an economic externality arises.¹⁰³ An externality is the cost to one group of losing a right to another without compensation. This has the effect of increasing the occurrence of the conflicting group's activity since that group is not required to pay for the cost that it imposes on the entitled group.¹⁰⁴

For example, if society determines that people have a right to clean air, but the government fails to enforce that right, factories would be able to pollute without paying compensation for the harm to the environment. Since the factories would not be paying for the pollution they cause, they would be able to lower the cost of their goods. This would increase the demand for their goods, causing more to be made and ultimately benefiting the factory owners. Similarly, if a callee's right to be free from unwanted calls is not protected, more unsolicited calls will be made. This increase will benefit telephone sales companies and their customers at the expense of unwilling callees.

The solution to the problem is for government to restructure the activity that causes the externality so that the cost is paid by those who enjoy its benefit.¹⁰⁵ This can be accomplished by establishing one of the three rules described in Section V.¹⁰⁶ In determining which rule will most efficiently protect the entitlement, the cost of enforcement must be taken into account.¹⁰⁷ If by using a property rule the cost of preventing others from taking the right exceeds the subjective value that is lost by using a liability rule, society as a whole can be said to be better off by

102. Comment, *supra* note 5, at 373.

103. "Externalities are said to arise when the decisions of some economic agents . . . affect the interests of other economic agents in a way *not* setting up legally recognized rights of compensation or redress." J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 532 (2d ed. 1980).

104. *Id.*

105. *Id.* at 534-39.

106. *Id.* at 535-38. Calabresi & Melamed, *supra* note 75, at 1105-15.

107. Calabresi and Melamed take enforcement costs into account in determining where to set an entitlement. See Calabresi & Melamed, *supra* note 75, at 1093. These costs are important as well with respect to the protection of the entitlement.

employing a liability rule.¹⁰⁸

A liability rule uses an objectively determined value to measure how much must be paid for the taking of the entitlement.¹⁰⁹ Those people who would not be willing to sell their right for this objective price would be injured to the extent that their real (subjective) price is higher than the objective price they are offered. Nevertheless, society would benefit from using a liability rule if, all things being equal, the aggregate value of these losses is less than the cost to society of enforcing a property rule.

A liability rule is cheaper to enforce than a property rule. The enforcement of a liability rule would require only that the government monitor the number of calls being made. The enforcement of a property rule, however, would require that the government determine who was being called.

There are many instances in which a property rule will be preferred regardless of the price of enforcement. For example, most people would be appalled if someone could rape another and have to pay only an objectively determined monetary price as the penalty.¹¹⁰ It is doubtful, however, that many would be outraged by the imposition of a liability rule in the case of unsolicited telephone calls. Answering an unwanted call would not appear to offend anyone's sense of personhood or property, but is rather just a nuisance.

In addition to lower enforcement costs, a liability rule has appeal in terms of the free speech issue. A liability rule would allow parties to make unsolicited calls, but would force the caller to compensate the callee for the invasion of his privacy. This may in fact be the best balance between freedom of speech and the right to privacy.

The use of a liability rule in this context would also help to insure that an efficient number of unsolicited calls is being made. A liability rule protecting the callee's entitlement would work by increasing the phone bill of those companies making unsolicited telephone calls and then distributing the additional funds to callees in the form of lower phone bills. To implement this cost shifting system, it would be necessary to measure the value in dollars of an unwanted call. Of course, this value will differ according to the circumstances, but a dollar figure can be derived which would reflect the cost to the average callee.¹¹¹

108. *Id.* at 1106.

109. *Id.* at 1092.

110. *Id.* at 1124-27.

111. A dollar figure could be calculated from the man-hours spent on these calls. See *supra* text accompanying notes 13-15. It might also be possible to establish different cost tiers, so that, for example, a call to a private residence at 9:00 P.M. would cost more than a call to a business at 5:00 P.M. The more complicated the system, however, the more expensive and less desirable it becomes.

The FCC or states would assess this cost upon each solicitor based on the number of unsolicited calls he makes.¹¹² Each solicitor would then have to take into account the annoyance cost which was formerly imposed upon unwilling callees. This would result in diminishing the number of unsolicited calls and ultimately having the people who do buy goods over the phone pay for the annoyance to others.

There is, however, a problem in determining how to distribute the funds that are raised by this new charge. Fairness considerations would dictate that they should go to each callee according to how much he is injured by unsolicited calls. The only way this option could work would be if people would honestly indicate the degree to which they are bothered by the unwanted calls. This is unlikely given the incentives to exaggerate their true annoyance. This being the case, it appears that the only feasible alternative would be to distribute the funds in across-the-board rate decreases.

CONCLUSION

People have a right to be free from unwanted and annoying unsolicited telephone calls. Due to the present number of these calls and their potential increase in the near future, federal or state governmental action to protect the callee is warranted. The best solution to the problem would be for each callee to decide whether he wishes to receive these calls or not. Because of the enormous enforcement cost of that system, however, a second alternative of forcing callers to pay callees for their time should be implemented.

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112. Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1037 (1980).

