Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy

Mark S. Nadel

Follow this and additional works at: http://digitalcommons.law.yale.edu/yjreg

Part of the Law Commons

Recommended Citation
Mark S. Nadel, Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy, 4 Yale J. on Reg. (1986).
Available at: http://digitalcommons.law.yale.edu/yjreg/vol4/iss1/5
Rings of Privacy: Unsolicted Telephone Calls and the Right of Privacy

Mark S. Nadel†

“So that is the telephone. It rings and you run.” This early description of the telephone by the artist Degas1 still rings true today. So strong is this Pavlovian response that, reportedly, a person standing on a building ledge, ready to jump to his death, returned to his building to answer his telephone.2 As one court has remarked, “A ringing telephone is an imperative which, in the minds of many, must be obeyed with a prompt answer.”3

This compelling quality has made the telephone a desirable medium for disseminating information.4 The device has spawned a rapidly growing billion dollar industry which includes “telemarketing,”5 phone surveying, and soliciting by phone. Yet, consumer reactions to unsolicited telephone calls vary. A survey conducted for Pacific Telephone indicated that many recipients did not mind survey, solicitation, or sales calls.6 Others,

† Adjunct Assistant Professor, Benjamin Cardozo Law School and New York Law School; Research Associate, Columbia University Center for Telecommunications and Information Studies; B.A. 1978, Amherst College; J.D. 1981, Harvard Law School. The author would like to thank Eileen Benner, Jonina Duker, Irene Greene, Sheila Karr, Jeff Masoner, Morey McDaniel, Eugene Nadel, Carl Oppedahl, Gordon Persinger, Eric Rolseth, and Fred Tregaskis for their particularly useful comments on earlier drafts of this piece.


5. See sources cited supra note 4. Telemarketing, selling by phone, is already replacing door-to-door sales and direct mail for many tasks. Many businesses using telemarketing recognize that “alternative advertising media [are] much less effective than telephone solicitation.” Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1027 (1980). See also Planned Parenthood League v. Attorney Gen., 391 Mass. 709, 464 N.E.2d 55, 59 (1984) (“The parties agree that telephone solicitation is a much more effective way of procuring contributions than direct mail requests”). This is due, in part, to the increasing availability and decreasing cost of automatic dialer recorded message players (ADRMPs). ADRMPs sell for as little as $500 and can complete as many as 100 calls an hour. Smith, Dial ‘N’ for Nuisance, Wall St. J., Feb. 24, 1986, at 42D, col. 1.

6. The Field Research Report, commissioned by Pacific Telephone Company, reported that 0.1% of the respondents “liked” receiving calls made by sales people and 0.2% liked calls soliciting money for charitable purposes. 1.7% reported favorable feelings with respect to calls asking for their vote or support for a political candidate, and 3.7% liked calls made by interviewers in authentic public opinion surveys. In addition, for categories of sales, charitable solicitations, political solicitations, and opinion polls, 9.1%, 27.1%, 43.4%, and 50.2%, respectively, answered that they “did not mind” receiving

Copyright © 1986 by the Yale Journal on Regulation.
however, found so called “junk” calls annoying, particularly when the calls were made by automatic dialer recorded message players (ADRMPs). In the survey just mentioned, 25.1% of the respondents considered unsolicited sales calls an invasion of privacy. In 1985 the Washington legislature reached the same conclusion. That year, a survey in Washington state indicated that 75% of all respondents favored some form of regulatory action against unsolicited calls, and half of those favored prohibition of all unsolicited calls.

Unsolicited callers reply to those irritated by unsolicited calls by suggesting two simple remedies: taking the phone off the hook or hanging up quickly on unwanted calls. Unfortunately, neither is adequate. Taking the telephone off the hook is not a viable option for those reluctant to miss other calls, and the opportunity to hang up does not satisfy those dragged out of the shower or otherwise disturbed. Many of the estimated 13.9% of consumers with unlisted telephone numbers may have sought that refuge to protect themselves from such calls. Yet even they are not protected from callers using lists compiled from sources other than the phone book or made by sequential dialers (machines which dial telephone numbers consecutively).

This Article discusses what actions might be taken to ensure the privacy of those who want it while protecting the rights to free speech of those such calls. Field Research Corp., The California Public’s Experience With and Attitude Toward Unsolicited Telephone Calls 9 (Mar. 1978) (unpublished report prepared for the Pacific Telephone Company on file with the Yale Journal on Regulation) [hereinafter Field Report].

A study conducted by Simmons Market Research Bureau in 1984 for the Direct Marketing Association noted that “51% of [recipients of telephone sales messages] listen to the complete message, 42% cut off the speaker sometimes, and only 7% hang up consistently.” Fannin, Will New Laws Hang Up Telemarketers?, MARKETING & MEDIA DECISIONS, May 1985, at 47, 48.

This term is suggested by the similarity of unsolicited calls to “junk” mail. The FCC even used this term in the title of its 1978-80 inquiry into the subject. See Unsolicited Telephone Calls ("Junk Phone Calls") 67 F.C.C.2d 1384 (1978).

The Field survey indicated that this group consisted of 86.9%, 65.4%, 46.3%, and 37.1% of respondents, respectively, for categories of sales calls, charitable solicitations, political solicitations, and opinion polls. Moreover, 60.9% found ADRMP calls “very annoying.” Field Report, supra note 6, at 9.

9. See Field Report, supra note 6, at 18.

10. Act of Apr. 22, 1985, ch. 121, § 1, 1985 Wash. Legis. Serv. 315 (West). The legislature also found that its current laws regulating unsolicited phone calls do not adequately protect the privacy of telephone subscribers. Id.

11. The survey was administered to a representative sample of residential subscribers by Ebasco Business Consulting Company. WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, REGULATION OF TELEPHONE SOLICITATION IN WASHINGTON STATE 21-25 (1985) [hereinafter WASHINGTON REPORT].

12. Nor are telephone answering machines an adequate solution. One New York psychologist was flabbergasted when she turned on her answering machine reserved for patients’ messages to find that a sales pitch for burglar alarms had appropriated half of her 30-minute tape and cut off some patients’ calls. Newsday, Mar. 8, 1984, § 2 at 7.

who benefit from unsolicited calls. Part I reviews the constitutional issues involved when regulators and legislators attempt to protect privacy by restricting expression. These issues include the strength of the right of privacy, which is determined by the forum and nature of the communication, and the First Amendment requirement that any regulation be narrowly tailored and not content- or speaker-based. Part II reviews some existing and proposed means of regulating unsolicited calls. This type of regulation involves five major issues: defining unsolicited calls, distinguishing among different types of unsolicited calls, restricting the hours of the calls, allocating the costs of regulation, and determining whether regulation should be state- or federally-imposed. Part III discusses solutions to the problem of unsolicited calls. After reviewing existing alternatives, two types of solutions are proposed. The first is a no solicitation directory to identify those telephone subscribers who do not want unsolicited calls from unsolicited callers. The second type of solution uses telephone technology in one of two ways—either to create the telephone equivalent of a "no solicitors" sign or to allow individuals to block calls from designated telephone numbers.

I. Constitutional Law: Privacy Versus Freedom of Expression

The constitutional right of privacy supports regulation protecting individuals against undesired unsolicited phone calls. The First Amendment, however, protects the speech of the callers, including the commercial speech of the telemarketers. The right to receive information is also protected by the First Amendment. Remedies to the problem of undesired unsolicited calls must thus balance privacy interests against free expression interests.

A. The Privacy Interest

The reasonableness of a restriction on speech to protect privacy depends to a great extent on the strength of the privacy interest involved. Decisions in this area have identified two factors for measuring the strength of the claimed privacy interest: the forum in which the challenged communication is received and the nature of the communication. Privacy interests are strongest in the home. Privacy interests also provide strong protection against blaring aural communication that cannot be avoided easily but provide relatively little protection from innocuous visual messages.

14. U.S. CONST. AMEND. I ("Congress shall make no law abridging the freedom of speech.").
Courts have consistently held that an individual's privacy right is paramount when he is at home, and the government may legislate to protect against disturbing communications. As the Supreme Court recently explained:

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. The State's interest in protecting the well being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

The Supreme Court has often stated that “a man's home is his castle” and has stressed that “in the privacy of the home...the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.”

The second factor affecting the importance of privacy interests is the nature of the communication. The Supreme Court has noted that visual communication is less intrusive than aural communication because those who do not desire to receive the visual messages can “effectively avoid further bombardment of their sensibilities simply by averting their eyes.”

Similarly, disturbing mail may be disposed of easily. As the

17. Cases involving communications directed at individuals outside their homes are of limited relevance to the issue of privacy against telephone calls because courts have held that individuals lose a significant degree of their privacy rights when they venture outside their homes, where the right of expression is generally dominant and individuals are usually expected to avoid any messages they find disturbing. FCC v. Pacifica Found., 438 U.S. 726, 749 n.27 (1978); M. Nimmer, Nimmer on Freedom of Speech § 1.02[F][2][d] (1984); but see F. Haiman, Speech and Law in a Free Society 146 (1981) (finding such cases highly relevant). However, when “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,” Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975), the Court may recognize significant privacy interests even outside the home under the “captive audience” doctrine. See Lehman v. City of Shaker Heights, 418 U.S. 298, 302-03 (1974) (plurality opinion) (upholding municipal policy forbidding political advertising in city public transit vehicles).


20. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (citing Rowan v. Post Office Dep't, 397 U.S. 728 (1970)) (supporting FCC determination that certain language in daytime radio broadcast was indecent). Professor Chafee has stated that “[g]reat as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.” Z. Chafee, Free Speech in the United States 406 (1948). Professor Stone acknowledged the irony of “making the closed mind a principal feature of the open society.” Stone, Fora Americana, 1974 Sup. Ct. Rev. 233, 262 (quoting H. Kalven, The Negro and the First Amendment 159 (1965)).

Supreme Court stated, "[T]he short, though regular, journey from mailbox to trash can . . . is an acceptable burden." Mail waits passively for the recipient's attention, and undesired mail can generally be screened almost automatically.

Unsolicited calls are intrinsically more intrusive than mail and other forms of visual communication. As Professor Franklyn Haiman has noted, "[T]he intrusion on others created by sound, especially when it is amplified electronically, is far more troublesome" than that created by visual communication. Furthermore, like door-to-door solicitations, telephone calls are on the active end of an active-passive spectrum since they virtually compel a reaction from anyone with a telephone. Intrusive communication provides greater justification for regulating the communicator than more passive communication. Since unsolicited phone calls reach the individual in his or her home and are aural rather than visual, they are especially appropriate candidates for regulation.

B. General Principles of Regulation of Speech

After identifying privacy interests of a sufficient magnitude, a regulator must meet First Amendment standards in choosing a remedy. The Supreme Court has repeatedly stated that content- or speaker-based regulations will not be tolerated. Any permit process for speakers will be closely scrutinized to ensure that government officials are not given the discretion to discriminate covertly on the basis of subject matter.

The time, place, or manner of the speech may be regulated when the regulation furthers a legitimate governmental interest unrelated to the speech's content. For example, courts have upheld reasonable limitations

(1975). See also M. Nimmer, supra note 17, at 1-35. Professor Haiman suggests that the description of the offensive placards in Lehman as the "blare of political propaganda" indicates that the Court considered the ads comparable to aural stimuli in their intrusiveness. F. Haiman, Speech and Law in a Free Society 146 (1981) (quoting and adding emphasis to Lehman).


23. F. Haiman, supra note 21, at 157.

24. Both municipalities and the Supreme Court have recognized the intrusiveness of door-to-door solicitors. As the Court has noted: "[U]nwanted knocks on the door by day or night are a nuisance, or worse, to peace and quiet." Breard v. Alexandria, 341 U.S. 622, 626-27 (1951).


26. See, e.g., Lovell v. City of Griffin, 303 U.S. 444 (1938) (ordinance requiring permission of city manager to distribute circulars held unconstitutional). The courts will also closely examine any system which allows government officials to treat speakers differently based on subjective categorizations. In Hannegan v. Esquire, Inc., 327 U.S. 146 (1946), for example, the postmaster determined postage rates for various publications based upon his determination of whether a particular publication "contributed to the public good and public welfare." The Supreme Court invalidated the procedure, holding that such unreviewable discretion could not be vested in a government regulator.

27. Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding ordinance forbidding use of sound trucks in
on the hours for door-to-door solicitation. Such restrictions cannot be imposed, however, if other similarly disruptive communications remain unregulated. If restrictions do not reach all communications having similar qualities, they will be examined by the courts to determine the sincerity of the interests that regulators claim to protect.

C. Balancing the Rights of Privacy and Free Speech

While privacy interests may prevail over speech interests in the homes of recipients, cases in this area indicate that further inquiry is often necessary to determine the legality of a particular piece of protective legislation. In particular, the courts have expressed concern over the extent to which regulations prevent communicators from reaching willing recipients. Courts seek to ascertain whether or not more narrowly tailored remedies or less drastic means are available to achieve the regulatory goals in question.

Such inquiries have led courts to prescribe different regulatory standards depending on the medium of communication at issue. Since restrictions on broadcast media such as radio, television, or sound trucks limit the dissemination of messages to both unwilling and willing recipients, they are more difficult for courts to justify. On the other hand, courts are more receptive to restrictions on point-to-point media, including mail and phone communications, because such restrictions need not prevent dissemination of messages to willing recipients. For example, while the courts have been unwilling to accept absolute bans on communication by mail, the Supreme Court upheld a statute that permits those individuals disturbed by "erotically arousing or sexually provocative" mail to

public streets.


29. See, e.g., Connecticut Citizens Action Group v. Town of Southington, 508 F. Supp. 43, 47 (D. Conn. 1980) (6 p.m. curfew on door-to-door canvassers struck down where ice cream trucks were allowed to sell in same neighborhoods after 6 p.m.).


Unsolicited Telephone Calls

unlist the help of the post office to prevent further mailings. It was held that no First Amendment right was breached because the act did not restrict the reception of messages by willing recipients.

Similarly, the Court has invalidated blanket restrictions on door-to-door canvassing, noting that a provision allowing the prosecution of canvassers who ignored "no solicitors" signs would protect those residents who did not want to be disturbed, while safeguarding the interests of those who wished to receive the communication.

Reasoning from the cases discussed above, one could conclude that the Court would not be likely to tolerate broad bans on unsolicited telephone calls. As with mail and door-to-door solicitations, it is possible that less drastic solutions exist which do not prevent communication to willing recipients through unsolicited calls.

D. Regulation of Unsolicited Telephone Calls in the Courts

Like statutes restricting door-to-door and mail solicitations, laws prohibiting annoying telephone calls have been attacked on First Amendment grounds. After determining whether the statutes are drawn to protect the fundamental interest in privacy, the courts have gone on to scrutinize statutes to ensure that they are not so drastic as to inhibit free speech unnecessarily.

Courts generally have enforced this standard by requiring that regulations restricting telephone calls "directly advance the governmental interest [in privacy] in the least intrusive fashion to serve the particular interest." In addition, courts have characterized statutes regulating

34. See, e.g., Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980); Martin v. Struthers, 319 U.S. 141, 143-44 (1943) (law prohibiting ringing doorbell or knocking unnecessarily "substitutes the judgment of the community for the judgment of the individual householder").
35. Rules restricting expression in order to protect privacy also arise in the context of labor relations. In Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239-40 (1966), the NLRB required employers to disclose the names and addresses of employees prior to union elections. In upholding the Excelsior rule against suggestions that employees have a right to be free of political propaganda, the courts held that employees may not be contacted if they declare their desire not to be contacted. See NLRB v. Q-T Shoe Mfg. Co., 409 F.2d 1247, 1250 (3d Cir. 1969) (although lists of employees would be disclosed to candidate unions, "the employee retains the right to insulate himself against offensive solicitation").
36. See, e.g., State v. Elder, 382 So.2d 687, 692-93 (Fla. 1980) (upholding statute criminalizing anonymous phone calls made with intent to annoy, abuse, threaten, or harass); Planned Parenthood League v. Attorney Gen., 391 Mass. 709, 715, 464 N.E.2d 55, 61 (1984) (invalidating statute because it did "virtually nothing to promote the State's alleged substantial interest in residential privacy").
37. See, e.g., People v. Klick, 66 Ill. 2d 269, 274, 362 N.E.2d 329, 331-32 (1977) (statute criminalizing making of phone calls with intent to annoy unconstitutionally overbroad); State v. Dronso, 90 Wis. 2d 110, 117, 279 N.W.2d 710, 714 (Wis. Ct. App. 1979) (invalidating statute regulating phone calls on the ground that "there are times when citizens make legitimate calls with the intent to annoy the recipient of the call").
annoying telephone calls as regulating conduct, not speech, and have dismissed challenges of vagueness when these statutes contain specific intent requirements. The Supreme Court has not yet been called upon to determine the validity of these kinds of statutes. In dicta, however, the Court has expressed its sympathy with legislators attempting to limit harassment by phone: "One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place . . . [T]he problem of harassing phone calls is hardly hypothetical."

II. Current Regulation and the Key Issues

This Part reviews existing and proposed regulatory solutions to the problem of unsolicited phone calls. It then discusses some of the difficult problems such solutions must overcome.

A. Existing and Proposed Regulations

Forty-five states have laws that prohibit harassment by telephone calls made with the purpose, intent, or knowledge that the call will annoy. In addition, some states specifically prohibit calls made at "inconvenient hours" or calls which impair the ability of the person called to use his or her phone.


States have attempted to satisfy this least intrusive means standard by carefully limiting the reach of their telephone harassment statutes. See, e.g., State v. Patterson, 534 S.W.2d 847, 851 (Mo. App. 1976) (limiting scope of statute to calls made "solely to harass"); Schuster v. State, 450 S.W.2d 616 (Tex. Crim. App. 1970) (excluding from state statute calls made "for a lawful business purpose").


40. For example, a Georgia court upheld a state law prohibiting harassing phone calls, explaining that "the victim's subjective ideas on what is or is not harassing are not in issue. The point is that the defendant telephones intending to harass and the defendant certainly knows if he is doing that." Constantino v. State, 243 Ga. 595, 598, 255 S.E.2d 710, 713, cert. denied, 444 U.S. 940 (1979).


42. The only states to lack such specific laws are California, North Carolina, Oklahoma, Oregon, and Rhode Island.


44. ALASKA STAT. § 11.61.120(a)(2) (1986); MICH. COMP. LAWS ANN. § 750.540e(c) (West Supp. 1986); NEB. REV. STAT. § 28-1310 (1)(d) (1986); S.C. CODE ANN. § 16-17-430(3) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 49-31-31(4) (1983); TEX. PENAL CODE ANN. § 42.07(a)(5)
Unsolicited Telephone Calls

Some states have addressed the problem more directly. Fifteen states explicitly regulate calls made by ADRMPs. Some of these states require the caller to secure the consent of the party called, and two states prohibit calls between 9 p.m. and 9 a.m., as well as calls to certain numbers, such as "public safety" or unlisted numbers.

Local governments have also regulated unsolicited calls. Bedford Heights, Ohio, for example, passed an ordinance banning all unsolicited commercial calls. The promulgation of this type of ordinance, however, would be unfair to national telemarketers and survey researchers because of the difficulty of staying informed about the myriad restrictions imposed locally. Finally, the Federal Communications Commission (FCC) believes the existing AT&T tariffs are an adequate solution to the problem of "improper or abusive" solicitations. These tariffs prohibit the "use of the service in such a manner as to interfere unreasonably with the use of the service by one or more other customers," and most local telephone companies have identical language in their tariffs.

States have recently sought to extend their regulation of unsolicited telephone calls. In the 1984-85 legislative session, bills on the subject were introduced in twenty-two states. These bills contained four types of telemarketing regulations. The first type would have offered telephone service subscribers the option of indicating to potential callers, through asterisks in the regular directory or the compilation of "no call" lists, their


48. Bedford Heights, Ohio, Ordinance 76-45 (March 2, 1976). These municipal ordinances are usually passed to protect consumers against fraud rather than to protect their privacy.


50. Id.

desire to avoid unsolicited calls. The second type of proposed regulation sought to ban or regulate ADRMP calls. The third type would have restricted the hours for making unsolicited calls, and the fourth type sought to establish registration regulation for unsolicited calls.

B. Key Issues

This section discusses five major issues to be addressed when constructing a regulatory regime to control unsolicited phone calls: defining "unsolicited calls;" distinguishing among types of unsolicited calls; restricting the hours for such calls; establishing and allocating the costs of any regulatory solution; and regulating by state or federal law.

1. Defining Unsolicited Calls

The first problem facing all proposals is the difficulty of defining "unsolicited telephone calls." The definition should take into account several factors: whether the call has been implicitly solicited, or made to a business, or made by a caller having a prior relationship with the recipient. Solicited calls do not disturb the privacy of recipient, so they are expressly excluded by state statutes regulating unsolicited calls. These exclusions apply both to calls actively solicited by consumer requests and to calls that are implicitly solicited, such as those providing information to consumers about prior purchases. Determining whether a call is implicitly solicited is fairly simple; any call offering information directly relating to a prior transaction of the party called and of apparent interest to that party has been implicitly solicited.

Although most social calls are unsolicited, general harassment statutes regulate such calls when they become disturbing. The regulations

52. Crocker, supra note 51. Such bills were introduced in Colorado, Florida, New Jersey, New York, and Ohio, and one that applies only to ADRMPs was introduced in Nebraska.
53. Id. at 8-9. Such bills were proposed in Arizona, Massachusetts, Pennsylvania, Texas, Washington, Wyoming, Maryland, and Tennessee.
54. Id. at 9. A Virginia measure proposed to allow computer dialed calls only between 9 a.m. and 9 p.m.; the New York assembly considered a measure banning all telephone solicitation calls between 5 p.m. to 7 p.m. and 10 p.m. to 8 a.m.
55. Id. at 9. Such bills were introduced in California, Wyoming, and Indiana.
56. Following a three year investigation the FCC noted that "[t]he term 'unsolicited telephone call' does not have a precise, generally accepted definition" and then defined it loosely as "a business call from an organization with which the recipient has had minimal if any prior dealings [but not] . . . unwelcome personal calls or misdialed calls." Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1029 n.9 (1980).
58. See statutes cited supra note 57.
59. See supra notes 42-44 and accompanying text.
discussed here should not apply to calls made by social acquaintances of
the party called.\(^{60}\) Similarly, it does not seem necessary or desirable to
regulate unsolicited business-to-business calls.\(^ {61}\) Individuals do not enjoy
the same degree of privacy at the workplace as they do in their homes.\(^ {62}\)
In fact, businesses generally welcome unsolicited commercial calls since
such calls might generate business contacts. Furthermore, secretaries and
receptionists can screen out any undesired telephone calls.

Calls from institutions with a prior relationship with the recipient are
more difficult to categorize. The FCC offers three examples of such calls:
“A caller requesting a contribution on behalf of the called party’s alma
mater or a hospital where that person has been a patient . . . [or] a store . . .
calling a long-time customer to inform him of a sale.”\(^ {63}\) If the person
calling on behalf of such an institution is also a classmate or friend, the
call would be considered personal rather than unsolicited and would be
treated like the personal calls. Of course, it is not always clear where to
draw the line, and the FCC recognizes that if it attempted to do so, diffi-
cult First Amendment problems might result.\(^ {64}\) One solution might be to
require such callers to request consent for future calls when they initially
request the recipients' telephone numbers. Consent for such calls might
even be presumed when the individuals provide their telephone numbers,
so long as the institution offers them the option of not receiving such
calls.\(^ {65}\)

2. Distinguishing Among Types of Unsolicited Calls

Whether regulations should treat different types of unsolicited calls dif-
derently is another important question. The debate on this issue has
generally focussed on whether noncommercial calls should be made ex-
empt from regulation, but calls may be distinguished based on other rele-
vant characteristics. Once a method for classifying phone calls has been
adopted, there remains the issue of who should determine which types of
calls are more desirable than others.

\(^ {60}\) This would permit an insurance sales representative to call old school acquaintances to try to
sell them insurance, but such minor intrusions would seem de minimus.

\(^ {61}\) Close to half of all telemarketing calls are business-to-business. See Dreyfuss, supra note 4.

\(^ {62}\) See supra notes 17-20 and accompanying text.

\(^ {63}\) Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1036 (1980).

\(^ {64}\) Id. at 1036.

\(^ {65}\) Institutions might even compile lists of telephone numbers for sale to others, so long as they
inform the solicited individuals that they intend to sell their lists and that those using the list would
enjoy the same calling status as the institution (i.e., they would not be unsolicited callers). Individuals
should have the option of not releasing their numbers for that purpose.
a. *Categorizing Calls*

Non-commercial callers argue that they should be exempt from regulation for two reasons. First, restrictions on non-commercial calls would severely impair information gathering capabilities of organizations. In particular, polling organizations claim that such restrictions might ruin them entirely. Survey researchers and pollsters also claim that they deserve greater freedom than commercial calls because their activity is more important than commercial calls to our democratic way of life.

Second, non-commercial callers contend that people find surveys less disturbing than sales pitches. Empirical evidence supports this claim. Moreover, pollsters claim that telephone subscribers consider surveys to be more valuable than commercial calls.

Prominent commentators agree that noncommercial callers should not be regulated. In his comments to the FCC, Walter Baer, who was responsible for petitioning the FCC to conduct a study, argues in favor of a distinction between commercial calls and those made for political or other noncommercial purposes. In sponsoring the 1977 Privacy Act, Representative Les Aspin explicitly exempted noncommercial calls. Many state regulations do likewise.

However, other factors argue against distinguishing between commercial and non-commercial calls. It has been pointed out that survey callers are often seeking information from individuals which the caller later sells,

---

66. Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1028 (1980) ("prohibitions on calls to subscribers with unlisted numbers or those who have indicated a desire not to receive unsolicited calls would produce serious distortions in the information gathered").


68. *Id.*

69. *Id.*

70. See Field Report, supra note 6, at 9.

71. Rupp Address, supra note 67.


73. The Telephone Privacy Act limited its reach to commercial calls, defined as follows: The term ‘commercial telephone call’ means (under regulations of the Commission) any call made for business purposes by or on behalf of any business enterprise, other than a call made by an organization described in paragraph (3) [labor], (4) [agricultural], or (5) [horticultural] of section 501(c) of the Internal Revenue code of 1954 on its own behalf, by a political organization, or by a public opinion polling, or radio or television audience rating, organization.

74. See statutes cited supra note 45. Others making the distinction between commercial and non-commercial calls include former U.S. Senator Paula Hawkins. After convincing the Florida State Legislature in 1978 to outlaw ADRMP calls for commercial purposes (she chaired the state’s Public Service Commission at the time), she used ADRMPs in her unsuccessful reelection campaign to the Senate in 1986. See COMM. WEEK, Oct. 20, 1986, at 60, col. 3.

75. Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1028 (1980).
Unsolicited Telephone Calls

returning no benefit to the individual, as opposed to sales callers who hope to enter into a mutually beneficial transaction. Furthermore, various groups have contended that differential treatment would be unlawful. The FCC has endorsed the following position:

[Exempting calls made for political and charitable solicitation or survey research purposes from regulations applicable to commercial sales calls would also appear to raise serious constitutional questions . . . . We have no information that subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation. As the Court noted in Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977), “the consumers’ concern for the free flow of commercial speech may often be far keener than his concern for urgent political dialogue.”

b. Individuals’ Preferences

A former representative of a photo portrait company tells a story about a presentation he made to a consumer protection group in Pennsylvania. After most of the group indicated to him that they would choose not to receive unsolicited calls, he asked how many of them or their children had sat for portraits with his company. Since this community was in his former territory, he was not surprised to find that many had. When he asked how many in this latter group had been contacted by his company through unsolicited phone calls, most admitted that they had. He pointed out to these people that they would not have been contacted if they had prohibited all unsolicited calls. Confronted by this dilemma, most explained that, actually, they were only disturbed by a small number of unsolicited calls and would prefer that only those be excluded.

Many caller groups believe their position is similar to that of the portrait photo company, and think it is unfair to lump them together with other unsolicited callers. If forced to make an all-or-nothing choice between receiving or not receiving unsolicited calls, telephone subscribers might exclude desirable calls to protect themselves from irritating ones.

77. Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1025 (comments of Georgetown Institute for Public Interest), 1027 (comments of various business and industry associations), and 1029 (comments of AT&T).
78. Id. at 1035.
79. Conversation with Fred Tregaskis, Campaign Communications Institute of America (July 1985).
The best solutions to the telemarketing problem would thus allow individuals to select the types of calls they receive, rather than presenting them with an all-or-nothing choice. As discussed in Part I, if the government were to decide which calls were desirable, significant constitutional problems would arise. The statute, which allows individuals to refuse mail that they find "erotically arousing or sexually provocative," avoids the First Amendment problem because all discretion is left with the individual and not reviewable by any government officials.

Similarly, permitting individuals to choose what types of calls to exclude is desirable. The government might propose categories such as the following: solely informational calls, sales or contribution related calls, non-profit calls, commercial calls, and reminders. These categories would help individuals select exactly the degree of privacy they desired. Individuals might choose to exclude all calls, all but "non-profit" calls, only "sales or contribution related" calls, or any combination of these five types of unsolicited calls.

A directory could be compiled using code numbers to indicate the most commonly used instructions or distinctions (such a directory is described in Part III). The use of multiple code symbols might look bizarre, but the list could always be kept on-line in a computer capable of using the codes to customize a list for any telemarketer.

In accordance with this approach no government body would be involved in deciding the types and scopes of categories. The government would select the most appropriate categories for coding, but any category could be chosen by any consumer. Juries would enforce subscriber preferences in suits alleging that a caller had violated the express wishes of the

80. See supra note 26 and accompanying text.
82. As the Supreme Court said when evaluating that Act in Rowan v. Postmaster, 397 U.S. 728, 737 (1977), "Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."

Armed with this wide discretion, some people during the late 1960's and early 1970's sought to stop advertising mailings from firms engaged in Vietnam War related activities, which they considered to be obscene. Courts upheld their right to do so. Baer, Controlling Unwanted Communications to the Home, TELECOMMUNICATIONS POL'Y, Sept. 1978, at 218, 222.
83. See infra notes 127-33 and accompanying text.
84. This was one of the fears expressed by the California Public Utilities Commission which led to the asterisk approach in the McDaniel case. The Commission observed that:

If an asterisk listing were ordered, even McDaniel concedes that there would be many problems in establishing an acceptable general description of which calls are deemed unacceptable . . . . Pacific Telephone and Telegraph Company contends that if McDaniel is entitled to an asterisk for his particular dislikes, others would be entitled to symbols for theirs, and that the telephone book would have a myriad of stars, circles, ampersands, and other symbols which would be confusing and have no practical effect.

individual. Such a dispute would be analogous to a suit for trespass in which a homeowner posts a sign prohibiting door-to-door solicitation and then charges a solicitor with ignoring the sign. These controversies would not be of constitutional dimension unless a subscriber sought to discriminate among callers according to some criteria like race or sex, in which case the prohibition would not be enforceable. 88

c. ADRMP Versus Live Calls

Some states have attempted to solve the problem of undesired unsolicited calls by regulating only unsolicited calls made by ADRMPs, 86 and a number of proposed bills would have continued that distinction. 87 Although such legislation might withstand an equal protection challenge, 88 it would place great weight on a relatively minor difference and solve only part of the problem of unsolicited calls. Even though subscribers may be more averse to ADRMP calls, a comprehensive solution would be better public policy. An ADRMP ban would stifle some communicators; others would simply shift to more expensive live calls. To the extent that ADRMPs are less expensive, legislators should protect access to that medium so that speakers with relatively less wealth can assert their right to free expression.

3. Restricting Hours of Unsolicited Calls

As mentioned above, regulations restricting unsolicited calls to particular hours have been adopted in two states 89 and are being considered by several more. 90 AT&T supported such regulation in testimony before the FCC. 91 This type of regulation is analogous to regulations restricting hours for door-to-door sales. 92 Hourly restrictions on unsolicited telephone calls are likely to be upheld as constitutional time-place-and-manner regulations under the same reasoning used to uphold regulation of door-to-door sales. 93 The least drastic

86. See supra note 45.
87. See supra note 53.
88. Underinclusiveness does not necessarily imply unconstitutionality. See Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all").
89. See supra note 47.
90. See supra note 54.
92. See supra note 28 and accompanying text.
93. See Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1036-37 (1980). One of the justifications for hourly limits on door-to-door sales was that such limits make night burglars more conspicuous. See Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182, 187 (3d Cir. 1984)
means test, however, might require that this type of regulation be invali-
dated due to the existence of a less drastic alternative requiring individual
identification.

One complication of hourly restrictions arises because many individuals
have non-traditional work schedules and sleep during the day. Should
these people be subject to unsolicited calls while asleep and denied them
during their waking hours? Were there no practical way to accommodate
these non-traditional schedules, then the inadequacies of a reasonable
compromise would have to be tolerated. But there is a solution; in a direc-
tory like the one discussed above, individuals could specify the hours they
prefer to receive calls as well as the types of calls they wish to receive.
Subscribers might find it useful, for example, to require that there be no
calls during their particular dinner hour, no calls before noon, no calls on
weekdays, or no calls on weekend mornings.

4. Establishing and Allocating Costs of Regulation

The cost of compliance with the proposed legislative rules may be sig-
nificant. Who should shoulder that cost? The First Amendment does not
permit callers to be saddled with unreasonably taxing obligations, nor
does it permit receptive subscribers to be burdened by extra duties. The
right of privacy would presumably include the right to enjoy privacy with-
out incurring excessive expenses.

In Minneapolis Star & Tribune Co. v. Minnesota Commissioner of
Revenue, the Supreme Court struck down a tax directed at newspapers
because it constituted an unconstitutional burden on the First Amendment
right of free speech. With regard to unsolicited telephone calls, Minneapo-
lis Star suggests that the Court would find a scheme which burdens call-
ers with excessive costs unconstitutional. The case also indicates that it
would not be appropriate to require special tariffs for unsolicited calls or
ADRMP usage. Today, however, the availability of inexpensive

(demonstration of significant incidence of burglary and home invasion that justified limit on hours of
door-to-door solicitation).


95. Although the Supreme Court has not yet accepted the argument, regulations burdening inex-
penlive forms of expression may be particularly suspect. As Justice Black noted in his dissent in
Kovacs v. Cooper, 336 U.S. 77 (1949), a ban on loudspeakers would have a disproportionate impact
on those with smaller budgets and “there are many people who . . . do not have enough money to
own or control publishing plants, newspapers, radios, moving picture studios, or chains of show
places.” 336 U.S. at 102. The California Supreme Court endorsed this position in Wollam v. City of
Palm Springs, 59 Cal. 2d 276, 379 P.2d 481 (1963), recognizing that “in certain circumstances the
sound truck may be the only practical means for communication of opinion; alternative modes . . .
may be prohibitively expensive, not available, or not effective.” Id. at 284, 379 P.2d at 486.

96. This was the position of the FCC in its inquiry into unsolicited calls. Unsolicited Telephone
Calls, 77 F.C.C.2d 1023, 1038 n.27 (1980). The FCC explained:
computers and database programs makes it possible to regulate unsolicited calls without incurring a cost that would be an unconstitutional burden on the caller. If a solution involving a no solicitation list were implemented, an industry trade group or private firm might be established to compare callers' lists against a master list of those desiring no calls.  

The Court has generally been opposed to regulations that impose economic burdens on willing recipients of messages. For example, in *Lamont v. Postmaster General*, the Court struck down a rule that placed an affirmative obligation on addressees to fill out a form before they could receive mail considered to be communist propaganda. Using similar reasoning, the FCC concluded that it would be unlawful to prohibit unrequested contacts to the home “absent an appropriate indication that the householder does not want to be disturbed.” It is unlikely that the Court would uphold the proposed legislation that would require a subscriber's affirmative consent before he or she could be called.

There remains the issue of what burdens may be placed on those who wish to maintain their privacy. The 1977 Telephone Privacy Act provided that a telephone company cannot charge a subscriber for listing him as unwilling to receive unsolicited commercial calls; the cost of this service must be borne by the entities obtaining the phone lists. Yet, in other contexts those desiring privacy shoulder at least part of the cost. Most local telephone companies add a surcharge for having an unlisted telephone number. Courts have required homeowners who wish to be protected from undesired door-to-door sales to purchase signs proclaiming their distaste for interruptions.

There does not appear to be a constitutional issue raised by requiring those who wish to avoid certain telephone calls to pay a reasonable

The costs to the telephone network for a particular message would appear to have no relation to the content of the message, the fact that it was unsolicited, or its placement through use of an ADRMP. To the extent that unsolicited telephone calling organizations generate large calling volumes, they pay for such usage in the same way as any other subscriber.

97. Callers and mailers generally prefer not to contact those who strongly object to their presence because such contacts waste time and resources. Yet, maintaining systems like the Telephone or Mail Preference Services and purging lists of unreceptive individuals involves substantial costs. Depending on the size of the lists, it may be less expensive to send direct mail to all members of multiple lists than to merge and purge duplicate names.

98. 381 U.S. 301 (1965).


100. See supra note 50; see also Unsolicited Telephone Calls, 77 F.C.C.2d 1023, 1029 (1980) (AT&T "expressed doubts concerning the lawfulness of a prohibition on unsolicited calls to telephone subscribers who have not affirmatively indicated a desire to receive them").


102. For example, New York Telephone charges an extra twenty dollars per year. NYNEX WHITE PAGES MANHATTAN 10 (1985-1986).

103. See supra note 34 and accompanying text.
amount to cover the cost of administering a “no call” system. Consumers might be asked to pay for special listings in the telephone book, special telephone equipment, or operating company services. Alternatively, localities could finance or subsidize the process.  

5. Regulating by State or Federal Law

Although the problem of protecting telephone subscribers against undesired unsolicited telephone calls is nationwide and thus may be susceptible to a single remedy, the FCC may not have the statutory authority to promulgate a national regulatory solution. The Supreme Court has recently interpreted the Communications Act of 1934 to forbid the FCC from preempting legislation by the states in matters involving “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication.”

Despite the Supreme Court’s position, several groups favor regulatory uniformity. Both the National Association of Regulatory Utility Commissioners and the Missouri Public Service Commission requested that a Federal-State Joint Board be convened pursuant to Section 410 of the Communications Act to investigate these matters. Ideally, this inquiry would lead to the endorsement of a model Telephone Privacy Act which could be enacted separately in each state, in whole or with slight modification.

One advantage of a national model act is that the industry might be more receptive to proposals by a single, national group with special expertise in telecommunications. Presumably, such a group would understand the industry’s concerns and would probably not burden them with inefficient regulations. If a model act were formulated and endorsed by such a group, the group’s credibility would help ensure that their version of the act would be adopted by state legislatures with minimal modification. Industry groups would be more likely to support the model act if they believed it would result in uniform regulation nationally.

104. A similar funding proposal was made concerning “no solicitation” signs. See Note, Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation, 63 WASH U.L.Q. 71, 85-86 n.117 (1985).


106. Louisiana Public Service Comm’n v. FCC, 106 S.Ct. 1890 (1986). Congress could amend the Communications Act of 1934 to give the FCC this power pursuant to its power under the Commerce Clause.


108. Id. at 1026.
Unsolicited Telephone Calls

III. Suggested Solutions

Two types of solutions appear to provide privacy for the consumer with a minimal hindrance to callers: no solicitation directories, which would limit the making of unwanted unsolicited calls, and new telephone technologies, which would enable subscribers to screen unwanted calls. Before describing these proposed solutions, this Part reviews some existing alternatives.

A. Existing Alternatives

There are three existing alternatives to the unsolicited calls problem. First, individuals may choose to have unlisted numbers. Second, asterisks may be placed by phone directory listings of those who do not want unsolicited calls. Finally, an industry group of telemarketers operates a service which enables individuals to indicate to participating national telemarketers that they do not want unsolicited sales calls by listing their numbers with the group.

1. Unlisted Numbers

Individuals with unlisted numbers can secure partial protection from undesired unsolicited calls, but these individuals forfeit some desired calls as well. Furthermore, this protection is incomplete because an unlisted number does not prevent all unsolicited calls; sequential dialers call unlisted numbers, and many telemarketers obtain phone numbers from sources other than directories.109

Unsolicited calls to unlisted numbers could be made illegal, but that might encourage more subscribers to remove their names from directories at a higher cost to themselves as well as to the telephone company, whose operators presumably would be burdened with additional requests for those unlisted numbers. Meanwhile, some subscribers with unlisted numbers might not mind receiving some types of unsolicited calls, such as calls reminding them of important events like elections or soliciting contributions for charitable organizations.

2. Asterisks in Regular Directories

The placement of asterisks by phone directory listings to indicate that unsolicited calls are unwelcome was first proposed in 1964 by Stanford Law School student Morey McDaniel.110 He predicted that many callers

would comply voluntarily with such a system, since they would assume that calls to such individuals would be counterproductive. He also guessed that civil suits could serve to enforce the regulations. Many of the proposed bills regulating unsolicited calls recommended the implementation of a similar asterisk system.

The use of asterisks, however, is not a satisfactory solution. Asterisks are best suited to binary “yes-no” characterizations. It would be more practical to employ a non-binary code to make more complex and meaningful distinctions among the types of calls. McDaniel also recognized that more comprehensive “lines of information” could be used by subscribers immediately below their phone number in the directory to indicate specific instructions to potential callers.

Yet even McDaniel felt that this alternative would not be practical. Extra information would add lines, pages, and ounces to the telephone books, and this information would only be useful to a small number of callers who generally do not use phone books. Meanwhile, as McDaniel understood, many subscribers might consider it “churlish” to reveal this information to every friend, acquaintance, or stranger who happened to look up their names in the telephone book.

Some have suggested that identifications be provided in address directories since these appear to be more widely used by telemarketers. If these directories are used by many others besides telemarketers, however, it would probably be most economical to compile a much smaller, separate list or directory of only those subscribers who had objections to some type of unsolicited telephone calls. Publishing these smaller directories would save money, paper, and unnecessary embarrassment.

asked Pacific Telephone to include in its directory an asterisk in front of his name and those of any other subscribers who so requested and a statement in the front of the directory warning solicitors, salesmen, canvassers, surveyors, fundraisers, and others not to call those names with an asterisk. The Commission refused his request because it concluded that the legislature was the proper forum for McDaniel’s proposals. Id. at 50. The legislature, in fact, had failed to act on two previously introduced bills on this subject. Id. at 57.

111. Id. at 52.
112. See supra note 52.
114. Id. at 60-61.
115. Id. at 60. See also Breard v. Alexandria, 341 U.S. 622, 640 (1951).
116. Address directories list individuals and their phone numbers by address. They are generally used to reach all the occupants of a particular neighborhood. PT&T agreed to exclude McDaniel from its address directory at his request. McDaniel v. Pacific Tel. & Tel. Co., 60 Pub. Util. Rep. 3d (PUR) 47, 57-60 (1965).
3. The Telephone Preference Service

The most appealing existing solution to the problem of unsolicited calls is the Telephone Preference Service (TPS) operated by the Direct Marketing Association (DMA). The TPS is modeled after the DMA’s Mail Preference System (MPS) and provides telemarketers with lists of persons who wish to avoid unsolicited phone calls.117 The MPS constructs lists of individuals who do not want to receive unsolicited mail, and mailers can, for a fee, receive these lists and remove those names from their master lists.118 In addition to establishing the TPS, the DMA has attempted to preempt any legislative action in the area of telemarketing by writing its own code for ethical telemarketing and by meeting with citizens’ groups.119

After several years of testing, the TPS now has consumers submit their names to the DMA if they want them to be removed from lists used by national telemarketers.120 The service is publicized through news releases, Action Line print and broadcast reporters, donated advertisements, and speakers. As of July 1985, the TPS no solicitation list contained 22,000 names.121 To publicize the service, Bell Atlantic in April 1986 began including information about the TPS in the white page directories of four of its Chesapeake & Potomac telephone companies.122

117. The Mail Preference Service can be contacted at the Direct Marketing Association Inc., 6 East 43rd St., New York, N.Y. 10017.
118. Mailers who pay $175.00 or $275.00 to subscribe to the MPS receive quarterly tapes with these names and remove them from their lists. Between 1971 and 1983, 511,000 names were collected for the removal list, including 46,000 added in 1983 (the most recent year for which figures were available). Conversation with Jeane Ross, Director of Ethics and Consumer Affairs, Direct Marketing Association, Washington, D.C. (Sept. 10, 1985). Since 1974 the MPS has also offered consumers the option of adding their names to additional mailing lists to receive more direct mail. 592,000 names have been submitted for this purpose, including 115,000 in 1983. Id.
119. The DMA guidelines for telemarketing include rules suggesting that calls be made during reasonable hours; that ADRMPs not be used unless they release the line immediately after the called party hangs up; that names of those who do not want to be called be removed from one’s list; and that callers refrain from contacting those with unlisted or unpublished numbers unless a prior relationship exists. DIRECT MARKETING ASSOCIATION, GUIDELINES FOR TELEPHONE MARKETING.
120. The DMA’s code of ethics includes another method for limiting the number of undesired contacts. The code requests that catalogers offer customers an opportunity to withhold their names from the mailing lists they rent out. For example, the Fall 1984 Lands’ End catalog advises that: “We make our mailing list available to carefully screened companies whose products and services might be of interest to you. If you would prefer not to receive such mailings, please copy your label exactly and mail to...” Similarly, Illinois Bell enclosed a special notice in the bills it sent to subscribers which asked them to return a short address form if they desired to be removed from the list to be sold. Letter to the author from Bob Bulmash, consumer advocate, Warrenville, Illinois (Oct. 29, 1985).
121. After several years of testing, including a failed 800 number, the TPS is now operated by having consumers submit their names to the DMA by mail. Internal memorandum to the Direct Marketing Association Board of Directors from the DMA Telephone Preference Service Subcommittee (Jan. 9, 1985) (on file with the Yale Journal on Regulation).
122. In the directories for the District of Columbia, Maryland County/Lower Eastern Shore, and
At present, however, the TPS is not without problems. First, the TPS is used only by telemarketers, so it can only help consumers seeking to avoid telemarketing calls. Subscribers have no means of blocking calls from charities, poll organizations, and those doing survey research. Second, the TPS is informally run and compliance is voluntary; only about twenty telemarketing firms participated as of mid-1986. While the DMA and many of its members maintain that the industry can regulate itself, others disagree. In a survey of telemarketers, 27% thought the industry unable to regulate itself, for, as one respondent noted, “There will always be sweatshop type operations which will continue to hurt the credibility of the rest of us unless regulators step in.”

On the other hand, ethical telemarketers are understandably concerned that if they support a narrow piece of legislation prohibiting unethical practices, the legislation might be amended to include provisions that are more burdensome for the industry, though perhaps popular with
B. Suggested Remedies

1. No Solicitation Directories

The existence of the TPS proves that it is both reasonable and practical to compile lists of those who prefer not to receive unsolicited calls and to use these lists to prevent telemarketers from calling such individuals. Yet the failure of the trade group to convince all of its members to participate suggests the need for some formal legal duty that would require all callers to observe the wishes of telephone subscribers. Since experts in marketing have been unable to convince each other that the TPS is in their own best interests, legislation seems necessary. With the addition of some legal compulsion, the TPS model appears to be an excellent way to protect subscriber privacy against undesired calls.

If compliance were mandatory, then a more formal procedure for implementing a TPS-type scheme would be necessary. A more elaborate system for distinguishing among types of calls would ensure that the wishes of consumers are more closely adhered to for administering this sort of plan. The DMA, however, does not appear eager to accept responsibility. Furthermore, the mandatory no solicitation list would have to be made available to all at a nominal price.

Local telephone companies could play a major role in compiling a no solicitation directory. During discussions with subscribers about their listings in the white pages directory, phone companies could inform subscribers about the existence of a directory for those anxious to avoid unsolicited calls. In addition to giving the address or phone number of a government designated list compiler and the cost of a listing, phone companies might consider acting as compilers themselves. As an experienced directory publisher of the white and yellow pages with an existing procedure for billing and collecting funds from subscribers and a desire for additional revenue, the local telephone company would seem to be an ideal compiler.

127. As one representative of AT&T has noted, "[E]xperience has shown that when we try to legislate the solution it becomes cumbersome and mainly unworkable. As new technologies are developed, many times existing regulations are not appropriate." Correspondence from Clarence R. Smith, Senior Marketing Consultant, AT&T Communications (Feb. 5, 1986).
128. The phone company is already publishing information about the TPS in the front of the white page directory in a number of Bell Atlantic directories. See supra note 122.
129. Presumably it was such reasoning that led to the selection of the local telephone company for this task in the 1977 Telephone Privacy Act. See supra note 73.
Since the compilation of the no solicitation directory would resemble the procedure for selling one-line classified advertisements, local newspaper publishers might also be candidates for the assignment. The listings would simply include subscribers' telephone numbers along with code numbers representing any special instructions. The cost of one line would surely be minimal, especially if the entry included merely a seven digit number and a three digit code.

Although so decentralized a process could make it more difficult for telemarketers to attain access to the list of prohibited numbers, this need not be the case. It would be easy for the DMA, the American Telemarketing Association (ATA), or another private firm to consolidate the separate lists. The lists should also provide more information about the preferences of individuals than is contained in the TPS list. Information about inclusion on a list to avoid some or all types of unsolicited calls could be distributed to telephone subscribers when they sign up for telephone service, and annually thereafter as suggested in the 1977 Telephone Privacy Act.\textsuperscript{130} A reply card could be included, or an address or phone number might be provided for further information. Subscribers could have the option of spelling out their instructions to unsolicited callers as "lines of information" listings,\textsuperscript{131} but there would also be the less expensive option of selecting code numbers to represent their preferences. For example, 003 might represent "no calls between 7 p.m. and 8 p.m.;" 015 "no calls from charitable organizations;" and 142 "only calls from local organizations."

If telemarketers felt a strong desire to contact those desiring no telephone calls, the list compiler might ask consumers on the list if their names and addresses could be released. In this way these individuals could be contacted by mail. Firms could write to them to request permission to call, perhaps offering a free gift for such permission. The cost of maintaining this additional address list could be financed by charging telemarketers who desire to use it.

Individuals should be able to remove their names from no solicitation lists at no charge; this would be done automatically by the telephone company when a subscriber terminates service. Frequent updating would insure that the list did not contain numbers of people who did not object to receiving unsolicited calls.

Enforcement of preferences as expressed on no solicitation lists may prove more problematic. When the California Public Utilities Commission reviewed Morey McDaniel's proposal for asterisks in regular

\textsuperscript{130} See \textit{supra} note 73.
\textsuperscript{131} This idea is similar to the one of Morey McDaniel. See \textit{supra} note 110.
directories, it noted that enforcement would be very difficult. It speculated that voluntary compliance would be minimal, since it would be easier for telemarketers to contact every number. Yet this reasoning ignores the fact that it is generally in the industry's best interest to avoid calling those who do not want to receive calls; sellers do not have unlimited amounts of time and telephone calls are not free. The best evidence against the California PUC position is the existence of the MPS and the TPS, both of which are run voluntarily.

As for those who did not obey voluntarily, the PUC stated that McDaniel himself conceded that it was impractical to expect asterisk listings to be enforced by civil suits. However, it is not clear that a litigation remedy would be unmanageable; such actions would be comparable to suits for trespass. Unsolicited callers could be required by law to respect the express wishes of those listed in the no solicitation directory, and calls made in violation of those wishes would be treated as electronic trespasses or harassment. Occasional accidental calls to those on "no call" lists could be handled just like accidental rings of the doorbell at a home with a "no solicitors" sign. Callers who persistently disturb the subscribers on the list could be dealt with by local authorities. These suits could be brought by individuals or district attorneys.

2. **Technological Options**

Emerging telephone technologies provide two potential remedies in addition to no solicitation directories: tone devices and so called "CLASS" technology.

a. **Tone Devices**

Telephone subscribers could attach tone devices to their phones to inform unsolicited callers that calls are unwelcome. When turned on, the device would answer telephone calls by emitting a designated tone which could be heard by the caller, while delaying the ring of the telephone for a short interval (perhaps five seconds). Unsolicited callers would be required to hang up immediately after hearing the tone; thus, their unsolicited call would never ring. All other callers would also hear the tone, but they would ignore it. After the short delay, their calls would proceed normally.

133. Id. at 55.
134. The enforcement of more conventional telephone harassment statutes has apparently not involved insurmountable problems. See supra notes 39-40 and accompanying text.
The device could be turned on whenever a subscriber preferred not to be disturbed by unsolicited calls, and it would not annoy desired callers to the extent that an explicit message such as "hang up if this is an unsolicited call" would. Its only costs would be those of the device itself and the time of callers who had to wait for the short delay when the device was on. CHIP System, a group of former employees of Dun & Bradstreet Salesnet who are experienced with telemarketing, is developing and seeking a patent for a device with these properties, which they have named TELL-M.135

This device is the telephonic equivalent of a "no solicitors" sign, unobtrusively warning unsolicited callers not to disturb a subscriber. It also permits subscribers to preempt annoying calls during any particular hours they desire. While the simplest form of the device would indicate only that unsolicited calls were unwelcome, slightly more complicated versions could emit different tones which might indicate different preferences for various categories of unsolicited calls. Thus, more sophisticated unsolicited callers might purchase equipment to tell them whether or not a particular tone indicates that they must hang up.

The device could be sold at a reasonably low price and might be provided free to consumers requesting it, if the DMA or local governments were willing to purchase large quantities and distribute them as a public service. In fact, the DMA might find it less expensive to distribute the devices free or at a reduced price than to maintain its TPS.

Those who ignored a warning from the device might be prosecuted under existing harassment statutes.136 Alternatively, legislators might pass a law expressly prohibiting callers from ignoring such warnings. A violation of this law might be treated as a trespass or some other minor misdemeanor, punishable by a small fine.

b. The CLASS Technology

In an excellent 1978 article entitled "Controlling Unwanted Communications to the Home," Walter Baer explored potential technological solutions to the problem of unsolicited telephone calls.137 Although he was careful to recognize that consumer demand for different systems was speculative, and thus their economic feasibility was unclear, Baer strongly encouraged telephone companies and equipment manufacturers to give serious attention to incorporating the technical capacity for such services

136. See supra notes 39-40 and accompanying text.
137. Baer, supra note 82.
when they design new switching systems and the “intelligent telephones” of the future. As Baer explained, each technical approach requires some physical means of first identifying and then blocking unwanted messages. He offered suggestions for both.

Today, all telephone rings sound alike to almost all recipients—a call must be answered before the caller can be identified. Yet, as Baer explained, it is technically feasible and not very expensive to permit subscribers to distinguish among callers before answering. For example, in 1984 experiments with a system called CLASS (Customer Local Area Signaling Services), telephone subscribers in Harrisburg, Pennsylvania and Orlando, Florida were able to store a list of numbers in a computer and the telephone was able to identify whether or not an incoming call came from one of the numbers listed.138 For an extra charge, a device could even display the actual number of almost all incoming calls.139 One aspect of the system that makes it slightly inefficient in solving the problem of unsolicited calls is that callers have the option of withholding their number from the party called. This problem could be remedied easily, however, by requiring unsolicited callers to forward their numbers.

Subscribers would still not be able to distinguish between unsolicited commercial calls and calls made by friends from unexpected phone numbers—pay phones, for example—not stored in the subscriber’s machine. The first draft of the this author’s study suggested that unsolicited callers might be required to use phone numbers that were specially designated for such use in their Local Access and Transport Area, for instance, numbers with fourth and fifth digits of 00. Alternatively, it was suggested that unsolicited callers be required to identify themselves by dialing an extra digit after the regular number. Unfortunately, neither of these plans appears to be very practical. Even if the first option were implemented gradually, many people currently using such designated phone numbers would be inconvenienced.140 The second is unworkable under the current


139. It should be noted, however, that the equipment required to display the incoming number is classified as customer premise equipment (CPE), and local telephone companies are prohibited from providing such equipment. Second Computer Inquiry, 77 F.C.C.2d 384 (1980), on reconsideration, Amendment of Second Computer Inquiry, 84 F.C.C.2d 512 (1981).

140. Implementation of this system would require the selection of specially designated telephone code numbers for use by unsolicited callers. Because local calls are less expensive than toll calls, the majority of unsolicited calls would presumably originate within the local calling area of the recipient and selection of code numbers could be left to the local telephone companies (in their tariffs) or state Public Utility Commissions.

Still, because telemarketers make significant use of WATS lines, national uniformity would be advantageous. It would certainly not hurt for the states collectively to discuss this matter. In fact, it would probably be desirable for a National Association of Regulatory Utility Commissioners commit-
North American Numbering Plan since the only tones sent over the lines before the called party answers are the ten digits of a telephone number.\(^{141}\) Instead, it might be practical for the telephone company to require all unsolicited callers to register the numbers they use. This list could be stored in a database so the telephone company (or a private firm) could offer consumers the service of screening out calls from numbers listed in this database.

If this screening service could be operated as a monopoly service by the local phone company, it could be offered at a regulated rate. If, however, it were possible for competitive firms to interface with the local switching mechanism, then rates could be set by competition. Meanwhile, terminal equipment might be designed to access and store the numbers from the database (possibly during early morning hours) and also might be used to screen out such calls automatically.

This scheme could be expanded to allow subscribers to distinguish among different types of unsolicited calls. Under such a plan each unsolicited caller would identify itself by a code number. For example, code number “1” might stand for non-profit callers; “2” for commercial sales callers; “12” for local politicians, “34” for market researchers, and so forth. Subscribers could then screen out all unsolicited calls except, for example, those coming from non-profit callers and local politicians by blocking all calls from numbers on the list except those from numbers with codes “1” and “12.”

Once consumers identify the calls, they can treat them as they prefer. Subscribers to the CLASS system could be alerted by a distinctive ring for certain pre-selected numbers, permitting subscribers to ignore unwanted calls without missing desired calls.\(^{142}\) Subscribers could also establish a list of calls to be blocked, so that callers from such numbers received the recorded message: “At this time the party whose number you’re calling is not accepting your call.” The subscriber’s phone need not even ring.\(^{143}\)

Using the codes associated with the numbers of unsolicited callers, screening services could treat different categories of calls differently, as dictated by the subscriber. Thus, a resident might program her telephone to block all calls from telephone numbers in the database with code “2” (commercial sales), record on an answering machine (without ringing) all such calls with a code “34” (market research), and let the phone ring, but

---

\(^{141}\) Conversation with Raymond Cooper, Bell Core, Administrator of the North American Numbering Plan for the United States (Dec. 1985).

\(^{142}\) See Hirschman, Swinehart & Todd, supra note 138, at 10.

\(^{143}\) See Robbins, supra note 138, at 30.
Unsolicited Telephone Calls

with a specially designed ring, for all other unsolicited calls (numbers on the database with all other codes).

Allocating the cost of such a screening service raises economic and constitutional issues. If market failure forced regulators to set the price, they would have to decide whether to price it as a luxury service and try to secure extra revenues to be used to subsidize other basic services, or whether to price it at cost, regarding it as protecting a fundamental right of privacy. While consumers would balk if asked to pay for what they regard as a right, they might accept their local government's use of general tax revenues to fund the cost of the service.\textsuperscript{144} Another option is to incorporate the cost into basic local rates, though higher rates might prove politically troublesome.

When CLASS systems will become generally available is a matter of speculation. Illinois Bell engineers claim that CLASS may never be implemented in some communities, including about half of Chicago, due to the cost of upgrading current equipment.\textsuperscript{145} Results from test markets, however, suggest that 10-20\% of the country could have access within a year or two, half the country within four or five years, and almost the entire country within ten years.\textsuperscript{146}

Conclusion

Undesired unsolicited telephone calls are an irritating problem for many people. At the same time, however, many other recipients of the calls and those who make them find them very valuable. Therefore, any response to the problems they create must balance the interests of those who despise them with the interests of those who benefit from making and receiving them.

The constitutional considerations make it clear that the legal responses most likely to be upheld are those most narrowly tailored, leaving to each individual, rather than a government body, the decisions of what types of unsolicited calls are desirable (or undesirable) and when it would be preferable to receive such calls. A review of the specific issues raised by attempts at regulation suggests that the best solutions to the problem will take into account all unsolicited calls, not just commercial calls or calls

\textsuperscript{144} It appears to be unconstitutional to impose such burdens on individual callers. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

\textsuperscript{145} According to engineers at Illinois Bell, CLASS will never be implemented in communities with 1ESS, SXS and XBAR offices. In addition, they feel that it is currently too expensive to implement CLASS in 1AESs offices, the type serving about 50\% of the lines in the Chicago LATA. Correspondence from Bob Willenborg, Illinois Bell (Nov. 26, 1985).

\textsuperscript{146} Conversation with Butch Hutchinson, Coordinator of the CLASS experiment for Universal Data System (July 1985).
made by ADRMPs. In addition, telephone subscribers should be given the opportunity to distinguish among the types they do not wish to receive—sales calls, surveys, or charitable solicitations—rather than facing an all-or-nothing choice. Ideally, new telephone technologies will provide such an individualized remedy with a minimum of government regulation. The development of CLASS technology would allow subscribers to block calls from unsolicited callers, while tone devices could serve as “no solicitors” signs for callers.

If the problem of undesired unsolicited telephone calls were insignificant and increasing slowly it would not require a legal response before such technological solutions became available. However, the recent regulatory activity at the state level indicates that the demand for action is significant and increasing. One solution currently available is the no solicitation directory. The directory, which is modeled after the DMA’s Telephone Preference Service, would be legally required and would allow consumers to select which types of unsolicited calls they desire. Until the telemarketing problem can be resolved through telephone technology, this type of directory is the best available solution.