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THE DUTY TO DEFEND ADVERTISING INJURIES CAUSED  
BY JUNK FAXES: AN ANALYSIS OF PRIVACY, SPAM,  
DETECTION AND BLACKMAIL

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# THE DUTY TO DEFEND ADVERTISING INJURIES CAUSED BY JUNK FAXES: AN ANALYSIS OF PRIVACY, SPAM, DETECTION AND BLACKMAIL

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## I. INTRODUCTION

This paper deals with insurance coverage of a firm that engaged in sending out junk faxes, or spam. In part II, we offer a legal analysis of a lawsuit involving this matter. Part III is devoted to a philosophical and economic analysis of the issue.

## II. LEGAL ANALYSIS

### A. BACKGROUND

In the recent case of *American States Insurance Company v. Capital Associates*,<sup>1</sup> the Seventh Circuit Court of Appeals considered whether there was a duty, under the terms of a policy of insurance

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1. *Am. Sts. Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939 (7th Cir. 2004).

covering advertising injuries, for the firm to defend an action filed against the insured for sending unsolicited advertising to fax machines. The case is important because it concerns an issue of first impression in the United States.<sup>2</sup> The precedential authority of the opinion is greatly enhanced because its author, Judge Frank H. Easterbrook,<sup>3</sup> is widely regarded as an influential scholar and judge who has authored numerous scholarly articles on the right of privacy.<sup>4</sup>

This case arose when the insured, Capital Associates, sent an unsolicited advertisement to the fax machine of JC Hauling.<sup>5</sup> That act of the insured violated the *Telephone Consumer Protection Act*,<sup>6</sup> which makes it unlawful “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”<sup>7</sup> The insurer, American States Insurance Company, had previously issued a policy to Capital Associates covering advertising injury.<sup>8</sup> The aggrieved recipient of the fax, JC Hauling, filed a class action against the insured, Capital Associates, on behalf of all parties who received the junk fax.<sup>9</sup> Capital Associates then tendered the claim to American States and demanded a defense under the advertising injury coverage.<sup>10</sup> American States, believing the claimed advertising injury was not covered by the policy, quickly filed a federal suit seeking a declaratory judgment from the federal

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2. The court said “Ours is the first federal appellate decision on the subject . . . .” *Id.* at 943.

3. Circuit Judge, United States Court of Appeals for the 7th Circuit. Senior Lecturer in Law, University of Chicago Law School. Judge Easterbrook is the author of numerous law review articles. See [www.law.uchicago.edu/faculty/easterbrook/](http://www.law.uchicago.edu/faculty/easterbrook/) (accessed May 7, 2006).

4. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S. Ct. Rev. 309 (1981). See also Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 Geo. L. J. 2381, 2387 (1996) (crediting Judge Easterbrook with the perception that “[w]hen disclosure will diminish the quantity or quality of information generated, prohibiting disclosure may have a positive net effect.” *Id.*)

5. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

6. 47 U.S.C. § 227(b)(1)(C) (2000).

7. *Id.*

8. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

9. *Id.*

10. *Id.*

district court that the policy did not require either a defense or indemnity.<sup>11</sup>

### B. DISCUSSION

The policy of insurance defined an advertising injury as “[o]ral or written publication of material that violates a person’s right of privacy.”<sup>12</sup> Another clause in the policy excluded any injury that was “expected or intended from the standpoint of the insured.”<sup>13</sup> In its request for declaratory judgment, American States contended that the sending of an unsolicited telephone fax does not result in an advertising injury and that even if it does, the injury caused to the receiving party is expected or intended from the standpoint of the insured.<sup>14</sup> The federal district court trial judge found that the unsolicited fax violated the corporate recipient’s right of privacy and declared that American States must defend Capital Associates.<sup>15</sup> American States quickly appealed to the Seventh Circuit Court of Appeals. The learned trial judge failed to enlighten the litigants with his definition of the parameters of the term “privacy” as used in the policy.<sup>16</sup> He discussed privacy in a generic sense but failed to discuss the seclusion or secrecy interests that form the basis of Judge Easterbrook’s opinion.

Recall that the terms of the coverage concerned whether the unsolicited telephone fax violated JC Hauling’s right of privacy. Judge Easterbrook commenced the inquiry into the case by exploring the meaning of the word “privacy” as used in the policy.<sup>17</sup> He wrote that the right of privacy is generally regarded as protecting two principal interests. They are secrecy and seclusion.<sup>18</sup> A wish on the part of an individual to conceal a past criminal conviction, a divorce, a drug rehabilitation, his movie rental records, a bankruptcy, or a loathsome disease from business associates or social friends is asserting a secrecy-

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11. *Id.* See *Am. Sts. Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 2003 U.S. Dist. LEXIS 25532 (S.D. Ill. Dec. 9, 2003).

12. *Am. Sts. Ins. Co.*, 392 F.3d at 940.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 942.

17. *Id.* at 941.

18. *Id.* (citing Richard S. Murphy, *Property Rights as Personal Information: An Economic Defense of Privacy*, 84 *Geo. L. J.* 2381 (1996)).

styled right of privacy.<sup>19</sup> On the other hand, a person who wants to keep his telephone number and street address private to avoid solicitors ringing his doorbell or calling on his home telephone is asserting a privacy interest in the sense of seclusion.<sup>20</sup> It is also true that it is possible to combine the two interests.<sup>21</sup> For example, in two well-known cases the courts have discovered a privacy right to engage in sexual activity with a person of the same sex<sup>22</sup> and to have an abortion.<sup>23</sup>

American States argued that the language of its advertising coverage should be interpreted by the court to deal with a secrecy interest in privacy rather than a seclusion interest.<sup>24</sup> If that is so American States is off the duty-to-defend hook because the fax to JC Hauling clearly did not disclose any embarrassing secret information about the recipient such as a long ago criminal conviction,<sup>25</sup> and, as a consequence, did not trigger a duty to defend. Nor did the fax direct public attention to a true but misleading fact as in *Lovgren v. Citizens First National Bank of Princeton*.<sup>26</sup> Judge Easterbrook said that the language of the advertisement coverage might also be read to cover improper disclosures of things such as social security numbers, credit and bank records, or other personal information that could be used to aid identity theft, citing *Reno v. Condon*.<sup>27</sup> In *Reno*, the Supreme Court decided that the Commerce Clause powers of Congress allowed it to forbid states from selling personally-identifying information such as driver's license numbers.<sup>28</sup> But JC Hauling did not claim that Capital Associates published any information of that sort about it and

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19. *Id.* See also, Murphy *supra* n. 5 at 2386.

20. *Am. Sts. Ins. Co.*, 392 F.3d at 941.

21. *Id.*

22. See generally *Lawrence v. Texas*, 539 U.S. 558 (2003). See also N. Stephan Kinsella, *Supreme Confusion, Or, A Libertarian Defense of Affirmative Action*, <http://www.lewrockwell.com/kinsella/kinsella11.html> (last updated July 4, 2003).

23. *Roe v. Wade*, 410 U.S. 113 (1973).

24. *Am. Sts. Ins. Co.*, 392 F.3d at 941.

25. See *Gates v. Discovery Commun., Inc.*, 34 Cal. 4th 679 (Cal. 2004) (holding that the plaintiff was able to proceed with the cause of action even though the newspaper published truthful information about his criminal convictions).

26. 126 Ill. 2d 411, 418 (Ill. 1989).

27. *Am. Sts. Ins. Co.*, 392 F.3d at 941. See also *Reno v. Condon*, 528 U.S. 141 (2000).

28. *Reno*, 528 U.S. at 148.

the district judge did not so find.<sup>29</sup> The district judge had merely stated, without elaborating, that the *Telephone Protection Act*<sup>30</sup> was understood to protect privacy.<sup>31</sup> In doing so, he cited a case concerning Congress's intent to protect the seclusion interest of telephone subscribers: *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*<sup>32</sup> The *International Science & Technology* case used the term "privacy" in the sense of seclusion from a knock on the door or a ringing telephone.<sup>33</sup> But in this case the trial judge failed to even consider the different privacy interests of secrecy and seclusion and to properly apply them to the facts of the case and the operative contractual terms of the policy.<sup>34</sup>

On appeal, Judge Easterbrook wrote that the key issue in the case was whether the insurance policy covered the sort of seclusion privacy interest affected by faxed ads.<sup>35</sup> He discussed two areas of inquiry that the court should consider in reaching a decision about the policy coverage. First, do corporations like JC Hauling really have an interest in seclusion?<sup>36</sup> The court thought not. The court opined that corporations are usually open for business and that a successful business practice generally encourages telephone calls and any other communications that might alert them to all sorts of business opportunities.<sup>37</sup> Importantly, most state and federal cases have held that corporations lack privacy interests.<sup>38</sup> The *Morton Salt* case involved a demand from the Federal Trade Commission that Morton Salt turn over a statement of "prices, terms, and conditions of sale of salt . . .".<sup>39</sup> Morton Salt objected on Fourth Amendment grounds, claiming an expectation of privacy in the maintenance of the requested business records.<sup>40</sup> In ruling that the federal agency could obtain the records, the U.S. Supreme Court declared that it was well-settled that

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29. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

30. 47 U.S.C. § 227(b)(1)(C) (2000).

31. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

32. 106 F.3d 1146 (4th Cir. 1997).

33. *Am. Sts. Ins. Co.*, 392 F.3d at 942. *See also* 106 F.3d at 1150.

34. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See, e.g., U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

39. *Id.* at 637.

40. *Id.* at 651.

“corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>41</sup> Judge Easterbrook was unconvinced that JC Hauling had an expectation of privacy in this situation.<sup>42</sup> A point in his favor in this regard is that one can convincingly argue that JC Hauling had less of an expectation of privacy than Morton Salt because no information of any kind was sought from JC Hauling.

Secondly, Judge Easterbrook wrote that the language of the policy strongly suggests that the coverage is limited to only a secrecy interest.<sup>43</sup> This is so because the terms of the policy indicate that it covers a “publication” that violates a right of privacy.<sup>44</sup> Here, the facts indicate that the unsolicited fax published no embarrassing facts or other information about JC Hauling that would violate a secrecy interest.<sup>45</sup> In a secrecy situation, publication matters because it will reveal the secret information protected by the privacy interest.<sup>46</sup> In a seclusion situation, publication of the private information is irrelevant because it is the unwelcome intrusion of the knock on the door or the ringing telephone that disturbs the recipient, rather than the content of the message.<sup>47</sup> The unsolicited fax to JC Hauling was more analogous to seclusion privacy than to secrecy privacy interests covered by the policy. To summarize up to this point, the federal statute’s language, “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine,” prohibits the means of communicating the message, in this case the ad itself; the actual content is all but entirely irrelevant.<sup>48</sup> But the advertising injury coverage spelled out in the policy, “ ‘publication’ ” of material “that violates a [person’s] right of privacy” more reasonably deals with the content of the communication that might contain information that violates a secrecy interest.<sup>49</sup>

So it appears fairly certain that the federal statute’s drafters and the policy of insurance intended to use the key deciding term “privacy”

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41. *Id.* at 652.

42. *Am. Sts. Ins. Co.*, 392 F.3d at 942.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 943 (citing 47 U.S.C. § 227(b)(1)(C) (2000)).

49. *Id.* at 942.

in altogether different ways.<sup>50</sup> The federal statute is intended to protect a seclusion interest by regulating the method of the communication of the advertisement to telephone users; it does not address its content.<sup>51</sup> The American States insurance policy terms were contractually intended to cover the content of the message rather than its means of communication.<sup>52</sup> The appellate court ruled that the advertising injury clause of the kind found in American States' policy does not cover the normal consequences of junk fax advertising.<sup>53</sup>

But that was not the end of the inquiry. What of the policy clause excluding harm that is "expected or intended from the standpoint of the insured?" That question gave little pause to Judge Easterbrook. He quickly resolved the question about the meaning of the clause that excluded injury that "is 'expected or intended from the standpoint of the insured,' " in favor of American States.<sup>54</sup> He said that senders may be unclear about whether unsolicited faxes violate the federal law but they all must know that unsolicited faxes deplete the recipient's property, such as electricity, ink and paper, consume the attention of employees and tie up fax lines.<sup>55</sup> This knowledge triggers the policy's exclusion of injury that "is expected or intended from the standpoint of the insured."<sup>56</sup> This is so because the sender is surely aware that every junk fax invades the target's interest in labor hours, office supplies and maintaining an open fax line which can generate business prospects.<sup>57</sup> The appellate court ruled that American States did not have a duty to defend Capital Associates.<sup>58</sup> We think that this part of the case was properly decided.

### C. CONCLUSION

So the practical question becomes: How do we deal with this drafting issue and avoid the quicksand of privacy law when writing

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50. *Id.* at 942-43.

51. *Id.* at 943.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* Easterbrook states that Illinois law "requires insurers to defend when coverage is a close issue." The court did not think this was a close issue. *Id.*



advertising clauses in insurance policies? Easy. We cloak our language in terms of contract rather than privacy. Recall that Judge Easterbrook's opinion appears to be grounded in privacy law. But was it? No; we think the astute observer will notice that what Judge Easterbrook was doing, while discussing the parameters of privacy law, was really interpreting the implied contract between American States and Capital Associates.<sup>59</sup> We believe that *American States* was actually a contracts case, the terms of which dealt with privacy.

Now to turn to some backwoods-lawyer homespun advice on how to avoid this issue in the future. The best way is to draft the coverage clause in a contractual manner that spells out the particular type of privacy, secrecy and/or seclusion, and for that matter, any other interests of the insurer covered by the policy. This approach ensures that the often-confusing privacy rights issues confronted in *American States* never arise. Why is this so? Because it is well settled that parties may contract away their privacy interests in voluntary contract. When the contract governs the rights and duties concerning the use of private information, the contract has been found enforceable.<sup>60</sup> This is so because the privacy information is secured, protected, or waived in a voluntary transaction.<sup>61</sup> Perhaps the leading case on this point is *Snepp v. United States*,<sup>62</sup> involving a promise by a CIA agent not to publish any information about the Agency's intelligence-gathering activities.<sup>63</sup> Perhaps thinking that his information was so valuable to the public that the agreement was not enforceable, Snepp quit the CIA and published a book.<sup>64</sup> The Supreme Court said that the agreement was enforceable and that Snepp had to give his book profits to the CIA.<sup>65</sup> So the principles of contract law that surely apply to voluntary transactions

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59. For more on this, see *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793, 801-02 (N.D. Ohio 1965). Here, a physician who gave a patient's health information to an insurance company was found liable on an implied contracts theory. *Id.*

60. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (enforcing confidentiality agreement does not offend the First Amendment); see *Anderson v. Strong Meml. Hosp.*, 151 N.Y. Misc. 2d 353 (1991) (breach of promise to not disclose HIV status of patient is actionable).

61. See generally Steven A. Bibas, Student Author, *A Contractual Approach to Data Privacy*, 17 Harv. J. L. & Pub. Policy 591, 605 (1994) (proposing that people can voluntarily contract away privacy issues).

62. 444 U.S. 507 (1980).

63. *Id.* at 507-08.

64. *Id.* at 507.

65. *Id.* at 515-16.

govern the terms of the coverage rather than the misty law of privacy. We so recommend.

### III. PHILOSOPHICAL AND ECONOMIC ANALYSIS

This section of the paper will be devoted to a philosophical and economic analysis of several of the issues raised in the previous section. The perspective taken will be that of libertarianism.<sup>66</sup> This is the view that just law consists solely of enactments requiring that no one violate the person and legitimately-owned property of anyone else. Property is first carved out of nature through homesteading,<sup>67</sup> and then owes its legitimacy to any voluntary act such as trade, gifts, purchase, gambling, etc.<sup>68</sup>

#### A. PRIVACY AND PROPERTY RIGHTS

How does this philosophy impact the issue of privacy? Libertarianism asks of all acts, to determine if they should be legal: do

66. Walter Block, *Libertarianism vs. Libertinism*, 11:1 J. of Libertarian Stud., 117 (Fall 1994); Walter Block, *Defending the Undefendable* (Fleet Press Corp 1976); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism* (2d. ed., Open Court 1989); Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (Kluwer Academic Publishers 1989); Jeffrey Rogers Hummel, *National Goods Versus Public Goods: Defense, Disarmament, and Free Riders*, 4 Rev. of Austrian Econ. 88 (1990); N. Stephan Kinsella, *New Rationalist Directions in Libertarian Rights Theory*, 12:2 J. of Libertarian Stud. 313 (Fall 1996); N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*, 11:2 J. of Libertarian Stud. 132 (Summer 1995); N. Stephan Kinsella, *The Undeniable Morality of Capitalism*, 25 St. Mary's L. J. 1419 (1994); N. Stephan Kinsella, *Estoppel: A New Justification for Individual Rights*, 17 Reason Papers 61 (Fall 1992); Murray N. Rothbard, *The Ethics of Liberty* (N.Y. U. Press 1998); Larry J. Sechrest, *Rand, Anarchy, and Taxes*, 1:1 J. of Ayn Rand Stud. 87 (Fall 1999); Aeon J. Skoble, *The Anarchism Controversy in Liberty for the 21<sup>st</sup> Century: Essays in Contemporary Libertarian Thought* 77-96 (Tibor R. Machan & Douglas B. Rasmussen eds., Rowman and Littlefield 1995); Edward Stringham, *Market Chosen Law*, 14:1 J. of Libertarian Stud. 53 (Winter 1998-1999); Patrick Tinsley, *Private Police: A Note*, 14:1 J. of Libertarian Stud. 95 (Winter 1998-1999).

67. Hans-Hermann Hoppe, *The Ethics and Economics of Private Property* (available at <http://www.mises.org/etexts/hoppe5.pdf> (accessed May 7, 2006)); John Locke, *An Essay Concerning the True Origin, Extent and End of Civil Government* § 27 (originally published 1689) (available at <http://www.gutenberg.org/dirs/etext05/trgov10h.htm> (accessed May 7, 2006)).

68. See generally Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Collier Macmillan 1978).

they constitute a per se violation of, or trespass against, person or property rights? Rights to bodily integrity may be undermined through assault and battery, murder, rape, etc. Does an interference with privacy rise to this level? It certainly need not do so.<sup>69</sup> That is, it is possible to imagine numerous cases wherein a man's privacy is ruined, but there is no uninvited border crossing against his body. For example, A tells B's secret to C. B's privacy has been shattered. But A has free speech rights,<sup>70</sup> and since rights cannot conflict,<sup>71</sup> B can have no "privacy right" as against A.<sup>72</sup>

Are violations of privacy incompatible with property rights in physical possessions? That is, do they constitute theft, or trespassing, or some other such violation of property rights? Again, they *may* do so, but they certainly *need* not do so. If they violate property rights in such a manner, they would be proscribed by libertarian law *not* because they are incompatible with rights to privacy, of which there are none, but because they amount to theft, or trespassing.

69. Of course, it most certainly can. Rape, murder, kidnapping, etc., are all denigrations of privacy. But these are prohibited, under libertarian law, *not* because they interfere with privacy, but due to the fact that they constitute attacks on one's most important possession, one's own body.

70. See generally John Stuart Mill, *On Liberty* (Stefan Collini ed., Cambridge U. Press 1989) (originally published 1859).

71. If they do, one or both is incorrect or mis-specified.

72. Murray N. Rothbard, *The Ethics of Liberty* 121-22 (N.Y. U. Press 1998), (available at [www.mises.org/rothbard/ethics/ethics.asp](http://www.mises.org/rothbard/ethics/ethics.asp) (accessed May 7, 2006)) ("It might, however, be charged that Smith does *not* have the right to print such a statement, because Jones has a 'right to privacy' (his 'human' right) which Smith does not have the right to violate. But is there really such a right to privacy? How can there be? How can there be a right to prevent Smith by force from disseminating knowledge which he possesses? Surely there can be no such right. Smith owns his own body, and therefore has the property right to own the knowledge he has inside his head, including his knowledge about Jones. And therefore he has the corollary right to print and disseminate that knowledge. In short, as in the case of the 'human right' to free speech, *there is no such thing as a right to privacy except the right to protect one's property from invasion. The only right 'to privacy' is the right to protect one's property from being invaded by someone else.*") One might quibble with the wording that Smith has a right "to own . . . knowledge," since knowledge is simply information and cannot per se be "owned." See, e.g., N. Stephan Kinsella, *Against Intellectual Property*, 15:2 J. of Libertarian Stud. 1 (Spring 2001) (available at [www.mises.org/journals/jls/15\\_2/15\\_2\\_1.pdf](http://www.mises.org/journals/jls/15_2/15_2_1.pdf) (accessed May 7, 2006)). However, it is certainly true that Smith has a right to use his body—this is what it means to own it—and since his body contains knowledge about Jones, Smith, therefore, has the corollary right to use this knowledge, e.g. to print and disseminate it, as Rothbard notes. Rothard, *The Ethics of Liberty* at 121-22.

Take wiretapping as a case in point. This is a crime, *not* based on the fact that it reduces privacy, although, certainly, it does, but because it constitutes trespassing. States Rothbard: “[N]o one has the right to burgle someone else’s home, or to wiretap someone’s phone lines. Wiretapping is properly a crime *not* because of some vague and woolly ‘invasion of a “right to privacy”,’ but because it is an invasion of the *property right* of the person being wiretapped.”<sup>73</sup>

It is on the basis of considerations of this sort that we reject the court’s view that “corporations can claim no equality with individuals in the enjoyment of a right to privacy.”<sup>74</sup> It is not that corporations such as JC Hauling, the owners of the fax machine abused by Capital Associates, have lesser rights of privacy than private persons. *No one, person or corporation, has any such “right.”* Rather, Capital Associates is guilty of treading on the *property rights* of JC Hauling; to wit, the former caused the latter to waste paper, ink and man-hours, without permission or agreement.

This tradition of libertarianism offers a sharp contrast to that of the “Chicago School” of law and economics in their handling of privacy. In the former case, as we have seen, it is all a matter of property rights. The latter relies upon so-called “cost-benefit analysis.” How does this work? If wiretapping is at issue, the court, under the sway of this problematic philosophy, will ask not who *owns* the building, the wires, the connections, the telephones, etc., but rather which course of action will more greatly raise, or lower by a smaller amount, G.D.P. or social wealth. For example, if the benefit to the wiretapper is \$500, and the loss to the person whose property is invaded is only \$400, then the judicial nod will go to the former. If these amounts of money are reversed, e.g., the gains to the trespasser are only \$400, while the cost to the property owner is \$500, then the court will find the wiretapping illegal.<sup>75</sup>

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73. Rothbard, *supra* n. 73, at 122.

74. *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

75. For papers in this Chicago law and economics tradition, see Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960); Harold Demsetz, *Block's Erroneous Interpretations*, 10:2 Rev. of Austrian Econ. 101 (1997) (available at [http://www.mises.org/journals/rae/pdf/rae10\\_2\\_6.pdf](http://www.mises.org/journals/rae/pdf/rae10_2_6.pdf) (accessed May 7, 2006)); Harold Demsetz, *Ethics and Efficiency in Property Rights Systems*, in *Time, Uncertainty and Disequilibrium* (Mario J. Rizzo ed., Lexington Books 1979); Harold Demsetz, *Towards a Theory of Property Rights*, 57:2 Am. Econ. Rev. 347 (1967) (available at <http://www.compilerpress.atfreeweb.com/Anno%20Demsetz%20Property%20Rights.h>

One problem with this way of approaching the issue is that the court cannot allocate costs to the contending parties in this manner since it cannot really have knowledge of this information. Costs are essentially foregone opportunities, and, as such, are subjective.<sup>76</sup> To

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tm (accessed May 7, 2006)); Harold Demsetz, *Some Aspects of Property Rights*, 9 J. L. & Econ. 61 (1966); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Leg. Stud. 257 (1974); Richard A. Posner, *The Law and Economics Movement*, 77 Amer. Econ. Rev. 1 (May 1987); Richard A. Posner, *Economic Analysis of Law* (3d ed., Little, Brown 1986); Richard A. Posner, *Wealth Maximization Revisited*, 2 Notre Dame J. L., Ethics and Pub. Policy 85 (1985). For a critique from the libertarian perspective, see Walter Block, *O.J.'s Defense: A Reductio Ad Absurdum of the Economics of Coase and Posner*, 3:3 European J. L. & Econ. 265 (1996); Walter Block, *Ethics, Efficiency, Coasian Property Rights and Psychic Income: A Reply to Demsetz*, 8:2 Rev. of Austrian Econ. 61 (1995) (available at [http://www.mises.org/journals/rae/pdf/rae8\\_2\\_4.pdf](http://www.mises.org/journals/rae/pdf/rae8_2_4.pdf) (accessed May 7, 2006)); Walter Block, *Coase and Demsetz on Private Property Rights*, 1:2 J. of Libertarian Stud. 111 (Spring 1977) (available at [http://www.mises.org/journals/jls/1\\_2/1\\_2\\_4.pdf](http://www.mises.org/journals/jls/1_2/1_2_4.pdf) (accessed May 7, 2006)); Roy E. Cordato, *Knowledge Problems and the Problem of Social Cost*, 14 J. of the History of Econ. Thought 209 (Fall 1992); Roy E. Cordato, *Welfare Economics and Externalities in an Open-Ended Universe: A Modern Austrian Perspective* (Kluwer Academic Publishers 1992); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12:2 Hamline L. Rev. 229 (Spring 1989); Elisabeth Krecke, *Law and the Market Order—An Austrian Critique of the Economic Analysis of Law*, 7:1 J. Economistes et des Etudes Humaines 19 (1996); Robert W. McGee, *Commentaries on Law & Economics: 1997 Yearbook* (Robert W. McGee ed. 1998); Gary North, *Undermining Property Rights: Coase and Becker*, 16:4 J. of Libertarian Stud. 75 (Fall 2002); Gary North, *The Coase Theorem: A Study in Economic Epistemology* (Institute for Christian Econ. 1992); Gary North, *Tools of Dominion: The Case Laws of Exodus* (Institute for Christian Econ. 1990) (available at [http://www.entrewave.com/freebooks/docs/372e\\_47e.htm](http://www.entrewave.com/freebooks/docs/372e_47e.htm) (accessed May 7, 2006)); Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2:1 Cato J. 55 (Spring 1982) (available at <http://www.mises.org/rothbard/lawproperty.pdf> (accessed May 7, 2006)); Edward Stringham, *Kaldor-Hicks Efficiency and the Problem of Central Planning*, 4:2 Q. J. of Austrian Econ. 41 (Summer 2001) (available at [http://www.mises.org/journals/qjae/pdf/qjae4\\_2\\_3.pdf](http://www.mises.org/journals/qjae/pdf/qjae4_2_3.pdf) (accessed May 7, 2006)).

76. William Barnett II, *Subjective Cost Revisited*, 3 Rev. of Austrian Econ. 137 (1989) (available at [http://www.mises.org/journals/rae/pdf/rae3\\_1\\_9.pdf](http://www.mises.org/journals/rae/pdf/rae3_1_9.pdf) (accessed May 7, 2006)); James M. Buchanan, *Cost and Choice: An Inquiry in Economic Theory* (U. of Chicago Press 1969); James M. Buchanan & G.F. Thirlby, *L.S.E. Essays on Cost* (N.Y. U. Press 1981); Roy E. Cordato, *Subjective Value, Time Passage, and the Economics of Harmful Effects*, 12:2 Hamline L. Rev. 229 (Spring 1989); Thomas J. DiLorenzo, *The Subjectivist Roots of James Buchanan's Economics*, 4 Rev. of Austrian Econ. 180 (1990) (available at [http://www.mises.org/journals/rae/pdf/rae4\\_1\\_6.pdf](http://www.mises.org/journals/rae/pdf/rae4_1_6.pdf) (accessed May 7, 2006)); Roger W. Garrison, *A Subjectivist Theory of a Capital-Using Economy*, in Gerald P. O'Driscoll & Mario J. Rizzo, *The Economics of Time and Ignorance* (Oxford 1985); J. Patrick Gunning, *The New Subjectivist Revolution: An Elucidation and Extension of Ludwig von Mises's Contributions to Economic Theory*

be sure, there are some occasions upon which judges *must* make such determinations,<sup>77</sup> but there is simply no good reason to force them to play this role when there is no need for it. Another difficulty, even assuming judicial omniscience in this regard, is that property rights can *change, whenever* there is an alteration in relative prices. For example, on one day, or in one place, the benefits to the wiretapper can be \$500 and the costs to the victim \$400, leading to one determination. On the next day, or on the same day in a different jurisdiction, these figures can be reversed, implying the exact opposite finding. This would not be a system of *law*; it would be the very *opposite*. Necessarily, there *could be no such thing* as a precedent.

### B. SPAM

The proper remedy, under libertarian law, would be the imposition of criminal penalties. According to a recent newspaper article headline, "Spammers face 'mail fraud' charges and 20 years in the federal pen!"<sup>78</sup>

This might seem like a draconian sentence imposed on spammers by federal anti-spam legislation, but it is compatible with libertarian law. The law is clearly unconstitutional since the Constitution nowhere

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(Rowan & Littlefield 1991); Ludwig von Mises, *Human Action: A Treatise on Economics* (3d ed., Henry Regnery Co. 1966) (originally published 1949); Mario J. Rizzo, *The Mirage of Efficiency*, 8 Hofstra L. Rev. 641 (Spring 1980); Mario J. Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, in *Time, Uncertainty, and Disequilibrium* 71 (Mario J. Rizzo ed., Lexington Books 1978) (available at <http://www.econ.nyu.edu/cvstarr/working/1978/RR%2078-02.pdf> (accessed May 7, 2006)); Murray N. Rothbard, *Man, Economy and State* (The Ludwig von Mises Institute 2001); Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics*, in *The Logic of Action One: Method, Money and the Austrian School* 211 (Edward Elgar 1997); Murray N. Rothbard, *The Myth of Efficiency*, in *Time, Uncertainty, and Disequilibrium* 90 (Mario J. Rizzo ed., Lexington Books 1978) (available at <http://www.mises.org/rothbard/efficiency.pdf> (accessed May 7, 2006)); Dieter Schmidtchen, *Time, Uncertainty, and Subjectivism: Giving More Body to Law and Economics*, 13 Intl. Rev. L. & Econ. 61 (1993); *Subjectivism, Intelligibility and Economic Understanding* (Israel M. Kirzner ed., N.Y. U. Press 1986).

77. Estimates for harm and suffering, for example.

78. Stephen Kinsella, "Spammers face 'mail fraud' charges and 20 years in the federal pen!," <http://blog.lewrockwell.com/lewrw/archives/004377.html> (commenting on David Shepardson, *Feds Charge 4 Under Spam Law*, 1A Detroit News (Apr. 29, 2004),

<http://www.detnews.com/2004/technology/0404/29/a01-137416.htm?searchtext=> (accessed May 7, 2006).

authorizes the federal government to regulate such activity. However, there is a higher law than mere federal law, and that is libertarian law. In principle, spam is a crime. As correctly found in the now-classic case of *CompuServe Inc. v. Cyber Promotions, Inc.*:<sup>79</sup>

[W]here defendants engaged in a course of conduct of transmitting a substantial volume of electronic data in the form of unsolicited e-mail to plaintiff's proprietary computer equipment, where defendants continued such practice after repeated demands to cease and desist, and where defendants deliberately evaded plaintiff's affirmative efforts to protect its computer equipment from such use, plaintiff has a viable claim for trespass to personal property . . . .<sup>80</sup>

Why is this consistent with libertarianism? Because the owner of property such as a personal computer (PC) has the right to control it, which includes the right to exclude others from using it. Sending an e-mail to someone is a *means of using the PC*—it causes things to happen to the PC to which the owner does not consent. It is analogous to knocking on someone's door. Normally, this is permitted by the owner, and in many contexts, this permission or license is implied by the context (e.g., a woman does not trespass if she walks on her neighbor's sidewalk and knocks on his front door to borrow a cup of sugar). The latter's consent for such innocuous uses of his property is implied.<sup>81</sup> Yet it can be revoked: e.g., he can erect a fence or "No Trespassing" sign, or tell his neighbor she is no longer welcome on his property. If, subsequent to this, she then knocks on his door, she has committed trespass, since she is now using his property without permission.

Similarly, in the case of spamming, especially where warned not to spam, someone is using the victim's computer without his permission; there is an implied denial of consent to send unsolicited

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79. 962 F. Supp. 1015 (S.D. Ohio 1997) ("regarding the commercial use of the Internet, specifically the right of an online computer service to prevent a commercial enterprise from sending unsolicited electronic mail advertising to its subscribers" *Id.* at 1017).

80. *Id.* at 1017.

81. The common law has long recognized there is implied license, or permission, to use other's publicly-accessible property for certain lawful uses, unless the consent has been withdrawn. *See, e.g., Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654 (Tex. 1999); *R. v. Evans*, [1996] 1 S.C.R. 8, 1996 CanLII 248 (S.C.C.); *Robson v. Hallett* [1967] 2 QB 939; *Davis v. Lisle* [1936] 2 KB 434.

commercial e-mail, just as there is implied lack of consent for a dozen people to hold an Amway meeting on a neighbor's front lawn. If they want to hold such a meeting, they must *first* obtain permission from the owner.

Consider in this regard a Houston neighborhood, West University Place. It is a small, self-contained mini-city island within Houston. It is only about two square miles, with twenty acres reserved for commercial purposes, but it is fairly densely populated with approximately 13,200 families living in 5,600 homes.<sup>82</sup> Unlike Houston proper, West University Place has land use zoning.<sup>83</sup>

A recently-enacted West University ordinance<sup>84</sup> prohibits door-to-door soliciting in several cases:<sup>85</sup> too early in the day or too late, for any unregistered solicitors, or where the homeowner has a "no soliciting" sign posted.<sup>86</sup> A more recent amendment provides for a "do-not-disturb list," which lists addresses of residents who have indicated that commercial soliciting is not welcome.<sup>87</sup>

Are these rules compatible with libertarianism? There can be no doubt that they are. Property owners have the right to exclude, or to permit ("license"), others to enter on or use their property. There is normally a presumption that neighbors and others with peaceful purposes in mind can walk up to your door and knock on it, e.g. to borrow a cup of sugar. They have implicit license. There is a presumption in an area based on conventional usage and tradition, etc. But anyone at any time can change this, e.g. by telling someone they are unwelcome or by posting a sign. And there is no implicit permission for Girl Scouts to knock on anyone's door at, say, 4:00 a.m. to sell cookies; in such conditions the presumption is reversed.

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82. See *West U Resident's Guide* § West U History, <http://65.57.255.193/westu/upload/images/NRGuideR.pdf> (accessed May 7, 2006).

83. For a libertarian critique of zoning, see Michael Goldberg & Peter J. Harwood, *Zoning: Its Costs and Relevance for the 1980s* (Walter Block ed., Fraser Institute 1980); Bernard H. Siegan, *Land Use Without Zoning* (Lexington Books 1972); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J. L. & Econ. 71 (1970).

84. City of West University Place, Texas, Charter & Ordinances § 15.011, <http://www.westu.org/upload/images/body/2003chapter15.pdf> (accessed May 7, 2006).

85. *Id.*

86. The City of W.U. Place, *City Currents* 5 (Summer 2004), [http://www.westu.org/upload/images/cc\\_summer2004.pdf](http://www.westu.org/upload/images/cc_summer2004.pdf) (accessed May 7, 2006) (a newsletter for the citizens of W.U. Place).

87. *Id.*



This ordinance largely reflects libertarian principles. It prohibits soliciting too early or too late. It prohibits soliciting those who have made it clear they do not welcome it—they do not give permission for this use of their property (by means of a sign or signing up on a public, publicized and easily accessible list). It even makes an exception for those under fourteen years of age, because most of us would not want to keep our neighbors' kids from coming by to ask for donations to the Little League or from selling Girl Scout cookies.

Of course, similar comments could be made about spam. If you have a publicly-accessible or known e-mail address, the presumption is that people can e-mail you to send you a message. But you could rebut it for a specific person, like someone stalking or harassing you; you could also rebut it for a specific group of people, such as those selling penis enlargement devices, Viagra, pornography or letters from Nigeria and elsewhere offering all sorts of fraudulent financial deals.<sup>88</sup> This is because sending out an e-mail is a way of using another person's computer,<sup>89</sup> since the computer is negatively impacted. Therefore, you have to have permission, at least tacit, to send e-mail. Nor is there any need to sign up on a "do-not-spam" list, since the presumption should be that nobody wants any spam,<sup>90</sup> unless they explicitly welcome it.<sup>91</sup>

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88. As the court held in *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997), "A great portion of the utility of CompuServe's e-mail service is that it allows subscribers to receive messages from individuals and entities located anywhere on the Internet. Certainly, then, there is at least a tacit invitation for anyone on the Internet to utilize plaintiff's computer equipment to send e-mail to its subscribers." *Id.* at 1023-24. However, as the court recognized, this implied consent may be revoked: "On or around October 1995, CompuServe notified defendants that it no longer consented to the use of its proprietary computer equipment. Defendants' continued use thereafter was a trespass." *Id.* at 1024.

89. Tom W. Bell, *Internet Law*, ch. 6, <http://www.tomwbell.com/NetLaw/Ch06.html> (accessed May 7, 2006).

90. For an alternative view on this matter, see Mises Economic Blog, *Dissent on Spam*, <http://blog.mises.org/archives/001913.asp> (last updated Apr. 27, 2004).

91. States Rothbard on this: "Unfortunately, while the 1938 Federal Rule of Civil Procedure 23 provided for at least one type of nonbinding class action, the 'spurious class action,' the revised 1966 rules make all class action suits binding upon the class as a whole, or rather on all those members of the class who do not specifically request exclusion. In an unprecedented step, voluntary action is now being assumed if *no* action is taken." Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, in *The Logic of Action Two* 167 (Edward Elgar 1997) (originally published 1982) (available at <http://www.mises.org/rothbard/lawproperty.pdf> (accessed May 7, 2006)).





















