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Hanging up on the First Amendment: An Analysis of Contemporary Telemarketing Regulations

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I. Introduction

"Hello."
"Yes, hello, uh, is Mr. or Mrs. (a complete butchering of the consumer's name) available?"
"What is this regarding?"
"The deal of a lifetime."
"Of course, sorry, they just stepped out. . ."

Nearly every consumer in America is familiar with this hypothetical phone call. In fact, in 1990, a congressional survey revealed that eighteen million Americans receive telephone solicitation calls each day.[1] As annoying and inconvenient as these calls may be, they also provide people with jobs and many even offer legitimate products and services to people that may not be readily able to shop outside of their homes.[2] In fact, telemarketing sales generated $435 billion in 1990.[3]

As annoying and frustrating as these telephone calls may be,

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[1] Michael E. Shannon, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 381 (2001) (stating the extent of the telemarketing problem).

[2] *Id.*

[3] Ann Marie Arcadi, *What About The Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991"*, 1991 COLUM. BUS. L. REV. 417, 417 (1991).

constitutional considerations dictate that the government cannot necessarily place a blanket ban on all of these calls.[4] Instead, the First Amendment interests of telemarketers must be balanced against the consumer's privacy interests.[5] As a result, many state legislatures have enacted a variety of approaches in an attempt to balance these interests.[6] These approaches include encouraging consumers to use the means available to them, passing statutes requiring solicitors to maintain no-call lists, and banning all calls placed by automated calling machines.[7] Such initiatives give rise to serious issues about how far consumer protection should reach. Is it proper for consumer protection legislation to reach into the sphere of the First Amendment?[8] Is it proper to punish a telemarketer for the failure of the consumer to engage in appropriate action?

This paper will first discuss the history of regulation in the telemarketing industry.[9] Next, the paper will look at the radical approach taken by the Arkansas legislature, which made these calls potentially criminal.[10] The paper will then critique the Arkansas

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[4] Shannon, *supra* note 1, at 382.

[5] *Id.* Sherrie Marshall, who was a former Commissioner at the Federal Communications Commission ("FCC"), clarifies what these competing interests mean: "[t]elemarketing, by its very nature, presents policy-makers with two seemingly conflicting interests: Those of responsible telemarketers trying to conduct their business, and those of consumers with legitimate expectations of privacy in their. . .homes. . . ." *Id.*

[6] *Id.*

[7] *Id.* at 383.

[8] The First Amendment of the United States Constitution states that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. This Amendment has been interpreted as protecting both the speech of callers as well as the right of the consumer to receive information. *See* Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy,* 4 YALE J. ON REG. 99 (1986). However, because the typical consumer in this case has expressed a desire to not receive the information, the First Amendment right of the caller will be focused on exclusively.

[9] The telemarketing problem is in reference to the attempts to balance the First Amendment interests of the telemarketers against the privacy interests of the consumers. *See infra* Part II (discussing telemarketing regulations, constitutional concerns associated with telemarketing, and some proposed solutions).

[10] *See infra* Part III.

statute and the Court of Appeals opinion that upheld the statute.[11] Finally, the paper will discuss the impact of the statute and decision on the interests involved.[12]

II. Background

The background of this article will first explain the history of government and private regulation of telemarketing, and will then define the constitutional concerns inherent in the "telemarketing problem."[13]

A. Governmental Regulation of Telemarketers

Governmental regulation of telemarketing has occurred on both the state and federal level. At the federal level, the two main pieces of telemarketing legislation are the Telephone Consumer Protection Act and the Telemarketing Sales Rule. Regulation at the state level has been less comprehensive and thus has generated a variety of legislation. Statewide do-not-call lists have been among the more successful of these attempts.

1. The Telephone Consumer Protection Act

The first major federal legislation aimed at restricting telemarketing was the Telephone Consumer Protection Act of 1991 ("TCPA").[14] One of the motivating factors for the enactment of this legislation was the use of automated telemarketing machines.[15] The TCPA made it a violation of federal law to use these machines without prior approval from the consumer receiving the call.[16]

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[11] *See infra* Part IV.

[12] *See infra* Part IV.

[13] *See infra* Part II. A - B.

[14] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(6), 105 Stat. 2394, 2394 (1991).

[15] Shannon, *supra* note 1, at 388. This was a blanket ban on pre-recorded messages that are left on a answering machine or played to a caller when a number is dialed by an automated machine. *Id.* The TCPA made it a federal violation to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B) (2002).

[16] 47 U.S.C. § 227(b)(1)(B) (2002). The use of automatic dialers are not just annoying, they can also be very dangerous. Arcadi, *supra* note 3, at 419. The

While this solved the problem of automated calls, Congress determined that live-operator calls could not be subjected to a similar blanket ban because of the First Amendment considerations of free speech and free expression.[17] Instead, the TCPA gave the Federal Communications Commission ("FCC") broad discretion as to the methods it may use to deal with live operator phone calls.[18] The FCC's efforts culminated in legislation that required individual telemarketers to keep their own lists of people who desired to be on a no-call list.[19] This was not the strictest approach possible, as the FCC could have mandated a national no-call directory.

The Act provided two different remedies.[20] The first remedy was a private right of action for the consumer and the second remedy was a state right of action.[21] The statute provides for injunctive or monetary damages. In addition, the TCPA provides telemarketers with an affirmative defense if they can prove that they implemented reasonable procedures to prevent violations of the rule.[22]

2. The Telemarketing Sales Rule

In 1994, Congress, in an attempt to supplement the TCPA, enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act, which authorized the Federal Trade Commission ("FTC") to prescribe rules prohibiting abusive telemarketing acts and practices.[23] The FTC exercised this authority by adopting the Telemarketing Sales Rule that regulates a number of different fraudulent and abusive[24] activities of telemarketers. The

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machines dial in a sequential order, so it is possible that they will tie up all of the lines of an individual business. *Id.* This is particularly dangerous in the case of hospitals, where patients cannot contact their physicians, physicians cannot contact their patients, and even ambulances cannot be contacted. *Id.*

[17] Shannon, *supra* note 1, at 389.

[18] 47 U.S.C.A. § 227(c)(1)(a) (stating that the FCC may require "the use of electronic databases, telephone network technologies, special directory markings, and industry-based or company-specific 'do-not-call' systems. . . .").

[19] 47 C.F.R. § 64.1200(e)(2)(i) (2002).

[20] 47 U.S.C. § 227(b)(3); 47 U.S.C. § 227(f)(1).

[21] *Id.*

[22] *Id.*

[23] Shannon *supra* note 1, at 391.

[24] *Id.* at 392. The FTC defines an "abusive practice" as initiating an outbound telephone call to a person that has stated that they do not wish to receive calls from

consequences for violating such regulations can include a fine of up to $10,000 per violation.[25]

3. State Regulation of Telemarketers

In addition to federal government actions, states also retain the authority to regulate telemarketing calls. Initially, there was a large outpouring of state legislation aimed at solving the telemarketing problem.[26] Most state statutes require each company to maintain their own no-call lists.[27] These efforts have done little to appease unhappy consumers who are still removed from call lists one company at a time.[28] Furthermore, many callers violate the law, but are not being punished at all, to the extent that they could be.[29]

However, other states have begun to maintain statewide no-call lists and databases. To have their name included in these lists generally costs the consumer a small initial fee and an even smaller renewal fee.[30] Any telemarketer that wants to call a resident of that state must purchase a copy of that list and must refrain from calling the names on the list under penalty of law.[31] Residents of these states rushed to be included on these lists.[32] By the end of 2000, these lists included more than 1.6 million people.[33] However, these databases

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the seller. *Id.* However, the rule allows for an affirmative defense by which a seller can claim that they accidentally called the consumer. *Id.*

[25] Shannon *supra* note 1, at 392.

[26] *Id.* at 393. More than 150 bills aimed at telemarketing were introduced in the first half of 1999. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 412. In Alaska, not a single person has been fined as a result of the telemarketing legislation. *Id.* In Arkansas, the state allows telephone solicitors up to ten free violations before they are fined. *Id.*

[30] *See* Margie Boule, *Telling Telemarketers Where To Go*, PORTLAND OREGONIAN, Dec. 14, 2000, at E01, *available at* 2000 WL 27112653. For example, in Oregon, a resident can pay an initial fee of $6.50 and an annual renewal fee of $3.00. People on these lists in Oregon are given a hot-line number that they can call and then the Attorney General will file an action against the telemarketer. *Id.* To date, the state has filed over thirty-five lawsuits; they use the money recovered in the suits to cover the costs of the program. *Id.*

[31] *Id.*

[32] *See* Shannon, *supra* note 1, at 410.

[33] *Id.* Some of the statistics supporting the popularity of these databases include

are not flawless. Many critics point to the numerous exceptions contained in the regulations, as well as the far from vigilant enforcement of the statutes.[34]

B. Private Regulation of Telemarketing

Many telemarketers viewed governmental regulation of their field as a threat and began efforts to pre-empt legislation.[35] For example, the Direct Marketing Association ("DMA") offers a service to consumers that allows them to write to the DMA and ask to be included on a non-solicitation list.[36] In turn, the 4,800 business members of the DMA pledge to refrain from calling these customers.[37]

In addition, a 1994 congressional staff report recommended that private company's no-call lists be compared against the no-call list compiled by an organization called Private Citizen, Inc.[38] This group has been very successful in their efforts to utilize the federal laws to prevent the calling of customers on no-solicitation lists.[39] Consumers pay a $20 fee and the organization delivers the names of these consumers to over 1,000 businesses that utilize telemarketing along with a notice that if they call any of the numbers on the list, they will have to pay a fine.[40] Private Citizen, Inc. reports that they

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the fact that 110,000 Missouri residents signed up for the service in the first week that it was offered. Shannon, *supra* note 1, at 410. New York has begun compiling a database that includes 430,000 phone numbers. *Id.* Also, Tennessee has a database that includes 535,000 phone numbers. *Id.*

[34] *Id.*

[35] This is evidenced by the fact that the telemarketing businesses themselves began to institute measures of regulation on their own. *See id.* at 391-94.

[36] *Id.* at 386.

[37] *Id.*

[38] *Id.* at 387. Private Citizen, Inc. is described as being the first and largest organization in America specializing in cutting junk calls and junk mail. *Id.* This organization maintains a directory of those who have requested to be on a non-solicitation list. *Id.* In addition, the organization also provides consumer members with a newsletter and information on telemarketing laws. *Id.* The directory is sent to over 1500 firms that use telemarketing. *Id.* The organization reports that it has seen a huge drop in solicitation calls since the directory has been established. *Id.*

[39] *Id.*

[40] Arcadi, *supra* note 3, at 418. The warning that is placed on the list of names reads as follows, "I will accept junk calls, placed by or on your behalf, for a $100 fee, due within thirty days of such use. . . .Your junk call will constitute your

have collected $700,000 in fines and settlements since 1996.[41]

C. Constitutional Considerations

When analyzing the constitutional considerations of telemarketing, two competing interests are at issue.[42] The First Amendment interests of the caller must be weighed against the privacy interests of the consumer.[43] In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the United States Supreme Court held that commercial speech is not completely outside the protection of the First Amendment.[44] In that case, the court voided a Virginia statute that prevented a licensed pharmacist from advertising the price of prescription drugs on the grounds that it was an impermissible restraint on commercial free speech.[45] More recently, in *Village of Schaumburg v. Citizens For A Better Environment*, the Court held that "solicitation is characteristically intertwined with informative and perhaps persuasive speech" and entitled to the protections of the First Amendment.[46] In that case, the court struck down an ordinance that required a non-profit organization to obtain a permit for solicitation if the group used more than twenty-five percent of its revenue to pay the salaries of its canvassers.[47] Furthermore, content-regulated commercial speech is afforded the same First Amendment analysis regardless of whether it comes from a charitable or commercial solicitor.[48]

Because the First Amendment protects commercial speech from impermissible government regulation, the Court has developed a standard to determine whether a particular regulation may be

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agreement to the reasonableness of my fee." *Id.*

[41] Shannon, *supra* note 1, at 382.

[42] *Id.* at 383.

[43] *Id.*

[44] 425 U.S. 748, 762 (1975).

[45] *Id.*

[46] 444 U.S. 620, 632 (1980).

[47] *Id.*

[48] *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). The court here noted that even though the state has power to regulate commercial speech under some circumstances, it may not use this power to limit the content of commercial speech, and that such regulations must be subjected to strict scrutiny. *Id.* at 577.

sustained.[49] The standard basically consists of three elements.[50] First, does the regulation have a direct and substantial effect on the solicitation activity?[51] Second, does the regulation serve a sufficiently strong state interest?[52] Third, is the regulation narrowly drawn so that it does not unnecessarily interfere with First Amendment freedoms?[53]

The first element, whether the regulation has a direct impact, is easily answered in the case of telemarketing calls. If the regulation serves to limit or prohibit the calls, then the regulation clearly has a direct and substantial effect.

The second element, whether the regulation serves a sufficiently strong state interest, has also been answered by the courts. On the consumer side of the equation, courts have held that in determining what limits are appropriate on protected speech, the nature of the forum plays an integral role.[54] Courts have held that protecting the citizen from unwanted communications that come into the private forum of their home is a legitimate state interest. In addition, the court in *Schaumburg* stated that a village has a legitimate interest in protecting the public from fraud, crime, and undue annoyance.[55] In general, either of these two interests will function to fulfill the sufficient state interest requirement of the above three-prong test.

Therefore, the main issue is whether the third element has been met. This question must be answered under the facts and

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[49] Arcadi, *supra* note 3, at 423.

[50] *Id.* The court in a previous decision held that there was an additional element. In *Central Hudson Gas & Electric Corp. v. Public Service Commission,* the Court held that the first element should be a determination that the expression is protected by the First Amendment. 447 U.S. 557 (1980). Because the determination has already been made that the speech at issue here is protected, only the last three elements listed in the paper will be considered.

[51] Arcadi, *supra* note 3, at 423.

[52] *Id.*

[53] Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984).

[54] Frisby v. Schultz, 487 U.S. 474, 479 (1988). Courts consistently have held that the home of the consumer is a private forum, and that protecting the citizen from unwanted communications that enter this forum is a legitimate state interest. *Id.* In determining the nature of the forum, the courts take into consideration the character of the property at issue. *Id.* In the realm of telemarketing, the forum is the place where the telemarketing call is received, which is generally in the home of the consumer. *Id.*

[55] *Vill. of Schaumburg*, 444 U.S. at 637.

circumstances surrounding the particular legislative act. The question of whether something is narrowly drawn in a manner sufficient to pass First Amendment scrutiny is not always answered affirmatively. For example, in *Schaumburg*, the Court determined that a ban on solicitation for a charity that did not use even three-fourths of its donations for charitable purposes was not narrowly drawn. The Court decided this because while even a lower percentage could potentially indicate fraud, this alone was not a sufficient connection between fraud and the banned solicitation.[56] The next section of the paper will focus on the application of this standard to a controversial Arkansas statute.

III. Discussion

This portion of the paper will first analyze the statute that the Arkansas legislature adopted in response to the "telemarketing problem." This will be followed by a discussion of *National Federation of the Blind v. Arkansas*,[57] the case that presented a facial challenge to the constitutionality of the Arkansas statute.

A. ARK. CODE ANN. § 4-99-201

The proper title of the Arkansas Code Provision at issue in this case is "Caller identification – Information offered – Penalty for violation."[58] The statute begins with the requirement that any person placing a telephone call to an Arkansas resident offering any commercial product or service or soliciting a charitable contribution must identify themselves and the organization.[59] The caller must also, at that time, state the purpose of the telephone call along with a brief description of what is being offered.[60]

The second portion of the statute states that if the consumer receiving the telephone call indicates that they do not want to hear the information the caller is offering, then the caller shall not attempt to provide the consumer with any more information about these matters

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[56] *Id.*

[57] Nat'l Fed'n of the Blind v. Pryor, 258 F.3d 851 (8th Cir. 2001).

[58] ARK. CODE ANN. § 4-99-201 (2002).

[59] *Id.*

[60] *Id.*

during the telephone call.[61] The statute then defines the possible punishments for a violation of these duties.[62] The statute enumerates a wide range of possible penalties.[63] Also, the statute states that a violation of the section is an unfair and deceptive act or practice, as defined by the Deceptive Trade Practices Act, and that all remedies, penalties, and authority granted to the Attorney General under that Act shall be available to the Attorney General for the enforcement of the provision.[64] Further, perhaps the most remarkable aspect of the penalties section states in subsection (b) that "[a] violation of this section is a Class A misdemeanor."[65] Therefore, the legislature of Arkansas, through the enactment of this statute, made a consumer's failure to hang-up a crime of the telemarketer.

B. *National Federation of the Blind v. Arkansas*

Arkansas Statute Section 4-99-201 drew almost immediate attention because of the criminal penalty. While this was not the first time a criminal penalty had been imposed as part of a telemarketing regulation, the penalty was unique for the fact that the criminal punishment was not imposed because the caller violated a no-call list; instead the punishment was imposed when a caller made a perfectly legal call, but the consumer failed to hang-up the telephone.[66]

The constitutionality of the statute was attacked in a facial challenge by the National Federation of the Blind of Arkansas ("NFBA") and Larry Wyland.[67] The portion of the statute challenged by the plaintiffs contains the following subsection:

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[61] ARK. CODE ANN. § 4-99-201 (2002).

[62] *Id.*

[63] *Id.*

[64] *Id.* The statute then specifies that the section does not limit the rights or remedies that are otherwise available to a consumer under any other law, and that the obligations of the statute are cumulative and should not be deemed to limit the obligations imposed under any other law. *Id.*

[65] *Id.*

[66] Boule, *supra* note 30. Oregon had a telemarketing statute that provided that if companies violated settlement agreements imposed as a consequences of a "no-call-list" violation, then the owners of the company could be put in jail for up to six months. *Id.*

[67] *Nat'l Fed'n of the Blind*, 258 F.3d at 854. The National Federation of the Blind is an Arkansas charity that routinely solicits contributions. *Id.* Larry Wyland is a blind resident of Arkansas. *Id.*

> (2) If the person receiving the telephone call indicates that he or she does not want to hear about the charity, goods, or services, the caller shall not attempt to provide additional information during that conversation about the charity, goods, or services.[68]

The plaintiffs also contest the penalty of a Class A misdemeanor and a violation of the Arkansas Deceptive Trade Practices Act.[69] They alleged that the statute should have been declared unconstitutional because it violates their First Amendment rights, it violates their Fourteenth Amendment rights, and should be declared void-for-vagueness.[70] The state filed a motion to dismiss the plaintiffs' claims on the grounds that the statute was constitutional on its face.[71] The United States District Court for the Eastern District of Arkansas agreed with the state and held that the statute was constitutional. The plaintiffs appealed and the case went up to the United States Court of Appeals for the Eighth Circuit, which affirmed the decision of the district court by holding that the statute was constitutional on the grounds presented below.[72]

1. First Amendment Concerns

The appellate court agreed with the plaintiffs and found that the statute was a direct government regulation on speech because the regulation was equivalent to compelled silence.[73] Therefore, because it can be viewed as "compelled silence," and because the charity fund-raising speech involved is protected by the First Amendment, the statute must survive the First Amendment scrutiny if it is to be held constitutional.[74]

The direct effect requirement of the First Amendment review is satisfied here by the fact that the regulation places restrictions on

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[68] *Id.*

[69] *Id.*

[70] *Id.* They argued that their right to solicitation was protected under the First Amendment. *See supra* note 9.

[71] *Nat'l Fed'n of the Blind,* 258 F.3d at 854.

[72] *Id.*

[73] *Id.* The court states that "when government cuts off debate by decreeing that a dialog must end, it is regulating speech." *Id.*

[74] *See supra* text accompanying notes 51-53.

the business of the telemarketers.[75] Therefore, a government regulation that limits such activity can only be constitutional if two conditions are met.[76] First, the regulation must serve a "sufficiently strong, subordinating interest that the state is entitled to protect."[77] Second, the regulation must be narrowly drawn to serve that state interest "without unnecessarily interfering with First Amendment freedoms."[78] In applying the above standard to the statute at issue, the court noted that the statute only limited the solicitation activity of charities in certain circumstances, but did not serve as a blanket restriction.[79] The court stated that:

> The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[80]

To this end, the court acknowledged that the state has a well-recognized interest in protecting the ability of a consumer to avoid unwanted communications in their home.[81] The court further explained that communications that enter the home are different than communications in a public forum because the former is an intrusion of privacy.[82] According to the court, because the communications have entered the home, the interest of the state is sufficient to pass that portion of the First Amendment analysis.[83]

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[75] *See supra* text accompanying notes 51-53.

[76] *See supra* notes 51-53 and accompanying text.

[77] *See supra* notes 51-53 and accompanying text.

[78] *See supra* notes 51-53 and accompanying text.

[79] *Nat'l Fed'n of the Blind*, 258 F.3d at 856. The court noted that the regulation only affects telephone calls to unwilling listeners in their homes. *Id.*

[80] *Id.* at 855 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[81] *Id.*

[82] *Id.* The court notes that in the public forum, those that do not want to be part of the communication have the opportunity to avoid offensive speech "by averting their eyes" or plugging their ears. *Id.*

[83] *Nat'l Fed'n of the Blind*, 258 F.3d at 855. The court also noted that the

The court held that the impact the statute had on free speech was narrowly drawn and insubstantial, and therefore could withstand First Amendment scrutiny. The plaintiffs argued that the statute was not narrowly drawn because consumers have other ways to prevent the communications from reaching them.[84] The court held that the regulation was narrowly drawn because the only requirement it imposes is that the offending caller ends the call.[85] Further, the analysis of whether the regulation is drawn narrowly is not affected by the size of the benefit to the public, however small.[86] In addition, the court held that there was not a substantial effect because the statute did not prohibit an organization from calling an Arkansas resident, and the only impact of the statute "is to end solicitation calls to unwilling residents who otherwise would not hang up." The court noted that simply because the statute ended calls, it still left open non-criminal, alternative means of communication with these unwilling listeners.[87]

The court stated that they are not in the position to second-guess the Arkansas legislature's conclusion that many consumers have difficulty with telemarketers and reasonably need help in dealing with this problem, and that this statute is narrowly drawn to reasonably help them deal with the problem.[88] The court also noted that the statute is not overbroad because there is not a significant danger that the statute will significantly compromise the protection of the First Amendment rights of parties not before the court in the present case.[89]

Supreme Court also held that a vendor had no right under the Constitution or any other authority to send unwanted materials into the home of another. *Id.* (citing Rowan v. United States Post Office Dep't, 397 U.S. 728, 736-37 (1970)).

[84] *Id.* at 856. The plaintiff advanced that the residents could protect themselves from unwanted calls by using unlisted numbers, by screening their call with answering machines, by using caller identification devices or by hanging up the telephone. *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* At this point, the court noted that it would not express an opinion on whether the State was correct in asserting that the proper statutory construction meant that these penalties would also apply to immediate callbacks. *Id.* However, the court does note that if this was to be a proper interpretation of the statute, then it would certainly increase the restriction that the statute places on speech. *Id.*

[88] *Id.*

[89] *Id.*

2. Fourteenth Amendment Concerns

The court quickly dismissed the Fourteenth Amendment concerns by stating that "[b]ecause charity solicitors do not have an absolute First Amendment right to press their telephone messages on unwilling households, the statute may draw rational distinctions among speakers who are not similarly situated."[90] Therefore, because Arkansas' legislature decided that the consumers needed more protection from charity and commercial solicitors than other callers, these groups are not similarly situated and may be treated differently as long as the distinction is rational.[91]

3. Public Policy and Other Concerns

This court noted that the plaintiffs were not correct when they argued that there would be harm to the residents of Arkansas because solicitors would misread the statute and believe that it meant that they could not contact Arkansas residents at all.[92] The court stated that there was simply no evidence that this was correct.

The plaintiffs also expressed concern over the fact that the statute did not make clear what the term "indicates" means, as stated to in the statute.[93] The court then explained away the ambiguity of the statutory language by quoting the United States Supreme Court in stating: "Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the. . .ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity, but we think it is clear what the

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[90] *Nat'l Fed'n of the Blind*, 258 F.3d at 856.

[91] *Id.* at 857.

[92] *Id.*

[93] *Id.* The plaintiffs argued that the lack of a definition of this term made the statute impermissibly vague because it required the caller to guess when a consumer's response rose to the level that it would be seen as an "indication," thus requiring the telemarketer to end the call. *Id.* The court noted that the term could be readily defined by the common meaning and by the dictionary definition. *Id.* The court did not address the fact that this guess on the telemarketer's part would give rise to a risk of criminal prosecution. *Id.* The court also noted that even though the plaintiffs listed possible ambiguous responses that would leave the caller guessing, the Attorney General of Arkansas interpreted the statute as requiring an "affirmative and clear indication" that the consumer did not want the call to continue. *Id.* The court held that this was sufficient to ensure that the statute would not be enforced in an arbitrary or discriminatory manner. *Id.*

ordinance as a whole prohibits."[94]

IV. Analysis / Impact

The Eighth Circuit applied a liberal First Amendment standard to a statute that imposed a criminal penalty on a free speech violation. The decision takes telemarketing reform a step too far. Because of the vague language of the statute, the weak competing state interest that the court mistakenly assumes was present, and the sufficiency of the alternative options, the statute should have been struck down as unconstitutional.

A. The Language of the Statute Requires the Caller to Balance Their Intuition Against a Criminal Record

In *National Federation of the Blind*, the plaintiffs contended that the statute should be unconstitutional because it is void-for-vagueness. The court dismissed this argument too quickly with the blanket excuse that statutory language can never be mathematically certain, but that the meaning of the ordinance is clear.[95] However, fundamental tenents of criminal law establish that this excuse cannot be sufficient when a criminal penalty is attached to the statute.

One of the requirements for a defendant to be charged with a crime is that the defendant has notice that the alleged act was criminal at the time it was committed.[96] This notice need not be actual notice, but constructive notice is required.[97] In other words, notice is sufficient if the defendant could ascertain that his conduct constitutes criminal action.[98] For this to occur, the necessary conduct must be criminal under the law when it is consummated. The main justification for this fundamental legal principle is the need for stability in the law.[99] This requires that the reasonably objective

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[94] *Id.*

[95] *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

[96] *See* JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 111-70 (4th ed. 2000). This is also referred to as the principle of legality. *Id.* at 153.

[97] *Id.*

[98] *Id.*

[99] *Id.*

person has notice that their actions are criminal.[100] This provides the average person with the tools necessary to conform their conduct to the requirements of the criminal law.[101]

In the present case, this requirement of illegality is not sufficiently fulfilled. The potential defendant (i.e., the caller) does not even have the tools to ascertain whether their conduct is criminal. Generally, these tools are found within the statute: However, in the Arkansas statute, the wording is too vague for a reasonably objective person to understand that their conduct may be criminal. The statute requires that the caller hang-up when the consumer "indicates that he or she does not want to hear about [the product, service, or good being offered]." However, the statute does not explain what such an indication may be. For example, is silence, a sigh, or an ambiguous response a sufficient indication to invoke the criminal penalty if the caller does not hang-up?

The fact that the court declined to rule on the proper statutory construction of the statute adds to the statute's vagueness. The caller is unsure about what constitutes an indication; they are also unclear as to whether the statute prohibits call-backs.[102] While this may seem like a minor semantics debate, when a criminal penalty is attached, it becomes a much more serious issue. Therefore, because the statute does not conform to the principle of legality, it should have been struck down on void-for-vagueness grounds.

B. The Purported State Interest Was Not Present and Therefore the Statute Could Not Survive First Amendment Scrutiny

In *National Federation of the Blind*, the court acknowledged that the state had a sufficient interest in protecting the ability of a consumer to avoid unwanted communications in their home.[103] The court stated that communications that enter the home are different than communications in the public forum. This is because in a public forum, those that do not want to be part of the communication have the opportunity to avoid offensive speech "by averting their eyes" or plugging their ears.

The distinction that the court draws here is faulty in light of modern technology. Because of the developments in

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[100] KAPLAN, *supra* note 96, at 153.

[101] *Id.*

[102] *Id.*

[103] *See supra* note 93 and accompanying text.

telecommunication, those who are truly offended by the calls can take steps to eliminate the annoyance. Through the use of answering machine screening, caller ID devices, and privacy manager options on the telephone, the consumer in the private forum can just as easily avert their eyes or plug their ears as in a public forum.[104] In addition, the justification that the state has a sufficient interest in protecting a consumer from unwanted communications is not appropriate in light of the facts of the case.[105] The Arkansas statute does not prevent communications from entering the home.[106] In fact, the statute expressly authorizes the caller to make the telephone call as long as they meet a few specific requirements. Therefore, the communication only becomes unwanted after it has already entered a private home.

Once the consumer has been given the information required by the statute, they have a simple choice: continue to listen or decline and hang-up the telephone. The only true interest advanced by the statute is the protection of people that have expressed the desire not to hear about a product or service, yet fail to hang-up the telephone. The protection of this small group of people, who may be characterized as irrational for their failure to hang-up the telephone, can hardly be considered a state interest strong enough to offset the First Amendment interests of the seller.

C. The Alternative Options Are a Sufficient Solution to the Telemarketing Problem

Because the state interest should be properly characterized as the protection of consumers that do not cut off unwanted solicitations, there are two solutions that can protect these consumers by stopping the communication from entering their homes. First, no-solicitation directories can prevent customers from being solicited.[107] Second, the consumer can utilize new telephone technologies to screen the unwanted calls before they are received.[108]

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[104] *See supra* Part IV.C (discussing the new telephone technologies and other alternative solutions to the telemarketing problem).

[105] *See supra* Part III (discussing the court's reasoning behind holding that there was a sufficient state interest).

[106] ARK. CODE ANN. § 4-99-201 (2002).

[107] *See supra* Part I.A.3 (discussing the option of no-call directories and databases).

[108] *See supra* note 84 (enumerating the new developments in telephone technology that consumers can utilize to prevent unwanted telemarketing calls).

There is no reason to believe that imposing a criminal penalty, as the Arkansas statute does, will protect people anymore than no-solicitation directories or new telephone technologies. These solutions take the appropriate approach to the problem by requiring those consumers to take actions to protect themselves. By utilizing these services, their privacy rights will be preserved and there will not be an infringement upon the First Amendment rights of the callers. The end result is that the callers that fail to hang-up after they have expressed their discontent will not cause a criminal penalty to be imposed on another person due to their irrational behavior.

Unfortunately, as a result of the liberal application of the First Amendment standard, telemarketers are now forced to interpret vague language at the risk of criminal prosecution under a statute that should not have properly withstood First Amendment scrutiny.[109] The liberal application of the First Amendment standard dilutes the strength of the First Amendment. By holding that the protection of a small group of people who refuse to hang-up the telephone is a sufficient state interest, the court opens the doors for any number of interests that would be sufficient by that standard. Instead, the traditional state interests should be adhered to in order to preserve the integrity of the First Amendment.

In addition, requiring a consumer who refuses to hang-up the telephone to take affirmative steps in preventing the unwanted communications serves the broad public policy of avoiding the wasteful use of government resources on protecting those that can protect themselves. Furthermore, state do-not-call lists, state databases, and new telephone technologies adequately protect consumers, while respecting the rights of the callers.[110] Finally, the penalties that may be imposed on callers do not match the "crime." While it is true that misdemeanors generally do not carry any jail sentence and the violator simply has to pay a fine, the penalties of this statute may lead to harsher consequences. The possibility exists that due to a prior criminal offense, an individual could be on probation, and any further criminal violation could result in the individual having their parole revoked. In these instances, an individual could be sent to jail because a consumer, unknown to them, does not make a clear indication that they do not want any more information and the consumer does not hang-up the telephone.

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[109] *See supra* note 93 and accompanying text (discussing an argument that the wording of the Arkansas statute is too vague).

[110] *See supra* Part IV.C (discussing the new telephone technologies and other alternative solutions to the telemarketing problem).

Allowing the statute to stand protects irrational behavior, while harming both the caller and the consumer.

V. Conclusion

The Eighth Circuit applied a liberal First Amendment standard to a statute that imposed a criminal penalty on a free speech violation. The decision takes telemarketing reform a step too far. Because of the vague language of the statute, the weak competing state interest that the court mistakenly assumes was present, and the sufficiency of alternative options, the statute should have been struck down as unconstitutional.[111] Instead, the Arkansas decision is likely to deter callers from providing certain products and services to consumers. Consumers that are not able to shop outside of the home may not have the opportunity to obtain certain products and services. Telemarketers may lose their jobs or end up in jail, all because a consumer refused to hang-up the telephone. In short, if you are ever solicited for a product in Arkansas that you do not want, make sure to hang-up the telephone – someone's freedom may be at stake.

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[111] *See supra* Part IV (analyzing the shortcomings of the Arkansas statute).

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