

Journal of Law & Commerce

Vol. 36, No. 1 (2017) • ISSN: 2164-7984 (online)
DOI 10.5195/jlc.2017.133 • <http://jlc.law.pitt.edu>

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Andy Loo and Walter Block



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THE POLITICAL PHILOSOPHY OF IMPERSONATION:
A LIBERTARIAN ANALYSIS

Andy Loo and Walter Block***

ABSTRACT

Impersonation is a criminal act; it constitutes invasion and, in some cases, fraud. Although often associated with the term “identity theft,” impersonation is primarily a violation of the rights of the recipient of the communication, rather than that of the person being impersonated, whose rights are only sometimes violated. The present paper is devoted to defending this position. It attempts to overcome the objection that there is no violence necessarily connected to this act, or that the violence is directed toward the person being impersonated instead of the recipient of the impersonating message.

* Department of Economics Stanford University.

** Harold E. Wirth Eminent Scholar Endowed Chair and Professor of Economics, Joseph A. Butt, S.J. College of Business, Loyola University New Orleans.

I. INTRODUCTION

Suppose A sends a letter to C in the name of B, without B's consent. From a libertarian standpoint, does such an act possibly, or necessarily, constitute any crime?

For the purposes of this paper, an act of *impersonation* is defined as the sending of a message that appears to come from a person other than the actual sender, without the consent of the person from whom the message appears to come. We will call the person who sends the message the *sender*, the person who receives the message the *recipient*, and the person who is being impersonated the *victim*. Thus, A is the sender, B is the victim, and C is the recipient.¹

The fact that impersonation is often known as a type of "identity theft" seems to suggest that it is primarily a violation of the victim's rights. However, as we will demonstrate in the sections that follow, impersonation generally constitutes aggression against the recipient, whereas aggression against the victim is only an occasional and secondary implication.

II. BACKGROUND

Since this is a libertarian analysis, it behooves us to say at least a few words about this political economic philosophy.² But, we shall refrain from being effusive, since this challenge of impersonation confronts other legal

¹ See Walter E. Block, *The Human Body Shield*, 22 J. LIBERTARIAN STUDIES 625, 625 (2011); Walter E. Block, *Response to Jakobson on Human Body Shields*, 2 LIBERTARIAN PAPERS 1, 1 (2010).

² On libertarianism, see DAVID BERGLAND, LIBERTARIANISM IN ONE LESSON (1986); Walter E. Block, *Sue for libel?*, LEWROCKWELL (Dec. 29, 2008), <http://www.lewrockwell.com/block/block124.html>; Walter E. Block, *Review of Huebert's Libertarianism Today*, LIBERTARIAN PAPERS (2010), <http://libertarianpapers.org/2010/19-block-review-of-hueberts-libertarianism-today/>; HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (2d ed. 1993); JACOB HUEBERT, LIBERTARIANISM TODAY (2010); JAN NARVESON, THE LIBERTARIAN IDEA (1988); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); Llewellyn H. Rockwell, Jr., *What Libertarianism Is, and Isn't*, LEWROCKWELL (Mar. 31, 2014), <http://www.lewrockwell.com/2014/03/lew-rockwell/what-libertarianism-is-and-isnt/>; MURRAY N. ROTHBARD, FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO (2d ed. 1973) [hereinafter FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO]; Tom Woods, *The Question Libertarians Just Can't Answer*, LEWROCKWELL (June 5, 2013), <http://archive.lewrockwell.com/woods/woods237.html>; WILLIAM C. WOOLRIDGE, UNCLE SAM THE MONOPOLY MAN (1970).

theories; indeed, it is difficult to mention one of them which would not, or, should not, have a view on this matter.

So, what is libertarianism? This is a perspective that asks but one question, and gives but one answer. The question? When is force, violence, justified in law? And the answer? Uninvited border crossings should be legal only in self-defense, or in response to a prior violation of the non-aggression principle (NAP) of libertarianism.³ That is to say, under libertarian law, each person may do exactly as he wishes, with the exception of threatening or engaging in murder, rape, theft, kidnapping, or other harmful activities.⁴ The opposite side of this coin of libertarianism involves private property rights based on homesteading.⁵ Libertarian law refers to law that would embody the moral code of libertarianism, which is defined by the NAP and the theory of property rights.⁶ The existing statutes in any jurisdiction are not identical to libertarian law. We are nevertheless interested in questions about what acts

³ *Id.*

⁴ *Id.*

⁵ A theory of property rights is necessary in order to be able to determine whether or not a given forced transfer of property is justified; it is, if the owner is seizing it from a non-owner, and not otherwise. On homesteading, see Walter E. Block, *Earning Happiness Through Homesteading Unowned Land: A Comment on "Buying Misery with Federal Land" by Richard Stroup*, 15 J. SOC. POL. & ECON. STUDIES 235 (1990); Walter E. Block, *Homesteading City Streets: An Exercise in Managerial Theory*, 5 PLAN. & MKT. 18 (2002); Walter E. Block, *On Reparations to Blacks for Slavery*, 3 HUMAN RIGHTS REV. 53 (2002); Walter E. Block & Michael R. Edelstein, *Popsicle Sticks and Homesteading Land for Nature Preserves*, 7 ROMANIAN ECON. & BUS. REV. 7 (2012); Walter E. Block & Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's "Toward a Better Distribution of Land: The Challenge of Agrarian Reform,"* 15 J. NAT. RESOURCES & ENV'T'L L. 37 (2000); Per Bylund, *Man and Matter: How the Former Gains Ownership of the Latter*, 4 LIBERTARIAN PAPERS 73 (2012); HUGO GROTIUS, LAW OF WAR AND PEACE (A.C. Campbell trans., London 1814) (1625); HOPPE, *supra* note 2; Hans-Hermann Hoppe, *Of Private, Common, and Public Property and the Rationale for Total Privatization*, 3 LIBERTARIAN PAPERS 1 (2011); Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, and Inalienability*, 17 J. LIBERTARIAN STUDIES 11–37 (2003); Stephan Kinsella, *How We Come to Own Ourselves*, LUDWIG VON MISES INST. (Sept. 7, 2006), <http://www.mises.org/story/2291>; JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGIN, EXTENT AND END OF CIVIL GOVERNMENT (1948); JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (1955); ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN (1987); SAMUEL PUFENDORF, NATURAL LAW AND THE LAW OF NATIONS (1673); FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO, *supra* note 2; Michael S. Rozeff, *Original Appropriation and Its Critics*, LEWROCKWELL (Sept. 1, 2005), <http://www.lewrockwell.com/rozeff/rozeff18.html>; Carl Watner, *The Proprietary Theory of Justice in the Libertarian Tradition*, 6 J. LIBERTARIAN STUDIES 289 (1982).

⁶ Rockwell, *supra* note 2.

would or would not be forbidden by libertarian law, if enacted. The questions about impersonation that we explore in this paper belong to this category.⁷

III. POTENTIAL CRIMES AGAINST THE RECIPIENT

We argue that an act of impersonation constitutes trespass against the recipient, and, in some cases, also the crime of fraud against the recipient under libertarian law.

A. *Trespass*

At first thought, it seems that the mere delivery of a message (whether in physical or electronic form) cannot possibly violate the property rights of the recipient, for the addressee can simply reject or dispose of it. But in reality, this is far from the case.⁸ We demonstrate this point by looking at two common ways in which an impersonating message can be sent, namely postal mail and email.

A person typically receives postal mail with a mailbox, which is his private property. Delivery of postal mail requires the insertion of letters into privately owned mailboxes. While there are no explicitly signed contracts between recipients and all possible senders of postal mail as to what material can be inserted into the recipient's mailboxes, tacit contracts nevertheless exist.⁹ Namely, recipients are generally deemed to allow "reasonable" mail to be inserted into their mailboxes.¹⁰ In the case of unwanted postings, the recipient can request that the sender stop transmitting certain types of mail, and the latter must comply; if not, the sender would clearly be guilty of a trespass.¹¹ Sending unwanted mail can be viewed as a form of trespass upon another's private property.¹²

⁷ *Id.*

⁸ Walter E. Block, Roy Whitehead & Stephan Kinsella, *The Duty to Defend Advertising Injuries Caused by Junk Faxes: An Analysis of Privacy, Spam, Detection, and Blackmail*, 27 WHITTIER L. REV. 925, 939 (2006).

⁹ See Stephan Kinsella, *Why Spam is Trespass*, STEPHAN KINSELLA (Sept. 19, 2006), <http://www.StephanKinsella.com/2010/01/why-spam-is-trespass/>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Since impersonating mail is deceptive in nature and generally undesired by recipients, it is sensible to assume that such mail does not fall under the “reasonable” mail that recipients are tacitly assumed to accept.¹³ Thus, by the above reasoning, senders of impersonating mail do aggress against the recipients of their largesse.

It is understood that there may be cases where a recipient has explicitly authorized the insertion of impersonating mail (or, for that matter, other types of generally unwanted mail) into his mailbox, such as when someone puts up a sign next to his mailbox saying: “Impersonating mail is welcome!” There is also the possibility of sado-masochist contracts between a sender and a recipient, whereby the latter agrees to be tortured by the confusion caused by receiving impersonating mail. However, these circumstances are rare exceptions and should not be included in the interpretation of tacit contracts in the general handling of mailboxes. In other words, there is a strong presumption that forwarding material of this sort is unwanted, although this presumption can be defeated by explicit action of the sort previously mentioned. Therefore, if a person explicitly states that he desires unwanted material, then it should not be presumed that he does not.

Another way in which impersonating messages can be sent is via email. Like postal mail, email also affects private property in the process of delivery. When a person receives an email, programs are run in his computer so as to update the status of his email inbox. In other words, the sender causes the electronic circuits in the recipient’s computer to engage and operate. Since impersonating emails can be presumed to be undesired, sending them is a violation of the tacit contract regarding what types of emails which the recipient agrees to receive, and by which his computer may be caused to operate. Thus, the sending of impersonating emails would constitute trespass against the recipient’s private property.¹⁴

¹³ *Contra* note 18.

¹⁴ Murray N. Rothbard, *Law, Property Rights and Air Pollution*, 2 CATO J. 121, 233–79 (1982) (discusses privity, the idea that a contract may not impose obligations on any party other than those signing the it. Applying this concept to the tacit contract between the owner of a mailbox and potential message deliverers leads to the question: should it be the postman or the sender who is to be held responsible for the trespass? Our response is that it is the former who is responsible. He delivered the unwanted (e.g., trespassing) material. However, he lacks mens rea, and, presumably, may properly turn around and sue the sender, who is the source of this problematic transfer. If a criminal sends a bomb through UPS, that company is not responsible for the resulting mayhem, even though it is the proximate cause thereof. The real malefactor is the initiator of this crime, the person who sends the bomb through the mail. A similar

B. Fraud

In addition to trespass, there is a second crime that the sender of impersonating messages may commit, though not intentionally, and that is fraud.¹⁵ Fraud means one's failure to supply the agreed upon good to the other party, as prescribed by a contract, after taking the good that the other party is required to supply under the contract.¹⁶ Recall that the non-aggression principle forbids the seizure or physical alteration of another's property without his consent.¹⁷ Such injustice could be committed by overt physical violence *or* by fraud. For example, if X offers to give Y an apple in exchange for Y's orange, and actually gives Y a fake (plastic) apple after receiving Y's (real) orange, X has violated the condition on which Y agrees to give X the orange, and has thereby obtained Y's property without Y's consent.

Perhaps counter-intuitively, if a sender uses impersonating messages to merely trick the recipient into destroying his own property or transferring his property to someone else, the sender has not committed fraud. An example of the former would be a collector angrily breaking a precious vase after receiving an impersonating phone call that pretends to be an expert telling him that the vase is of little value. An example of the latter would be someone sending money to some address upon receiving an impersonating email that pretends to be a friend needing to borrow money urgently. In order for fraud to occur, there must be a contract between the two parties. Suppose A asks B, a stranger, what is the time of day? The latter replies, "3:00 p.m." Whereupon the former tears up his lottery ticket, falsely thinking it is no longer of any value, since the deadline for cashing in has (seemingly) passed. B has not committed fraud on A since they are not contractually related to one another. However, if A paid B to tell him the time, then, yes, fraud has occurred.

analysis applies to the fake email website owner versus the sender; the former is the proximate cause, albeit innocent; the latter is the rights violator, even though indirectly so. Does the sender violate the property rights of the post office by putting impersonating mail in the post office's mailbox? Indeed, the sender did commit trespass against the post office; presumably a private one.). Rothbard, *supra* note 14.

¹⁵ *Id.* See also MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 77–84 (Mark Brandly et al. eds., 1998) [hereinafter *THE ETHICS OF LIBERTY*]. This includes cases of simply supplying nothing or supplying a fake item that does not satisfy the requirements of the contract.

¹⁶ Rothbard, *supra* note 14.

¹⁷ See *id.* at 45–50.

However, it should be stressed most strongly that this crime is strictly limited to cases where an actual piece of physical property is forgone, or when the physical integrity of the recipient's property is compromised. It does not apply to the recipient's loss of friendship with or respect for the victim, as a result of the misimpression. Mere changes in attitudes and thoughts, however regrettable they may be, do not belong to the realm of property right violations.¹⁸ Of course, this does not in the least detract from the generally condemnable nature of mental trickery and sabotage of interpersonal relationships.¹⁹

Finally, we note a difference between the circumstances under which the sender of impersonating mail commits trespass and fraud: even if the sender does not succeed in deceiving the recipient, the fact remains that he has shoved unwanted material into the recipient's mailbox or caused unwanted operation in the recipient's computer, hence violating the recipient's property rights.²⁰ By contrast, a mere unsuccessful attempt at fraud does not constitute criminal activity under libertarian law, for there has not occurred any nonconsensual seizure or physical alteration of property.²¹

IV. POTENTIAL CRIMES AGAINST THE VICTIM

A. Threat

Two seemingly obvious crimes that the sender of an impersonating message has committed against the victim are identity theft and libel. However, as we will elaborate in the next section, identity theft and libel are

¹⁸ See THE ETHICS OF LIBERTY, *supra* note 15; WALTER E. BLOCK, DEFENDING THE UNDEFENDABLE (Ludwig von Mises Inst., 3d ed. 2008) [hereinafter DEFENDING THE UNDEFENDABLE]. In chapter 7 of the latter book (supporting the legalization of libel and slander), Block explains why mere thoughts in peoples' minds (or changes therein) cannot constitute violations of property rights.

¹⁹ Suppose the sender tricks the recipient into committing a crime against some other individual? For example, X falsely tells Y that Z wants his flower beds turned over for mulch. Y obliges, without any mens rea at all. Most commentators would contend that X and X alone is the guilty party. We demur. Y should be careful about who he listens to. We would hold Y and him alone responsible for the destruction of Z's property. All bets are off if X can somehow hypnotize Y into doing his bidding. We hereby stipulate, arguendo, that hypnotism "works" against its innocent targets. In like manner, if voodoo was actually capable of inflicting physical harm on its targets, it would have to be outlawed, in the free society.

²⁰ See discussion *infra* Part III.A.

²¹ For the claim that attempted crimes are not criminal in the libertarian law code, see *Law, Property Rights and Air Pollution*, *supra* note 14.

not, in fact, criminal acts.²² Yet, this does not mean that the victim can never have any legal recourse against the sender, for there is one crime that the sender may easily have committed against the victim, namely, threat.

In the libertarian legal code,²³ and in that of many other philosophies, threats, not only physical violence, are proscribed.²⁴ If the muscle-man says to the proverbial 90-pound weakling, “give me your money or I’ll bash you,” that is a per se criminal act even if the bully does not need to employ any physical violence to attain his nefarious ends. This is the “assault” part of “assault and battery.” Thus, libertarians are not absolutists on the issue of free speech.²⁵ There are some speech “acts,” that may be considered “threats” and thus forbidden under libertarian law.

If the victim finds out about an impersonating message and perceives a threat of physical violence in it, the sender will have committed a crime against the victim. For example, suppose A sends in B’s name an email to a demolition company asking it to implode B’s house, and B finds out about it when the company goes to his house for inspection. If, as a result, B feels a threat of personal injury or property destruction from A, then A can be charged with the crime of assault, e.g., making a threat.²⁶

It should be emphasized that the sender does not necessarily have to succeed in deceiving the recipient in order for a threat against the victim to occur.²⁷ In the above example, suppose the company detects some flaws in the impersonating message, concludes that it is fraudulent, and informs the victim, B, about it. Even in this case, B may still perceive a threat of personal injury of property destruction by A, and is thus entitled to press such a charge against A.

²² See discussion *infra* Part V.

²³ See THE ETHICS OF LIBERTY, *supra* note 15, at 45–50, for what the libertarian legal code includes.

²⁴ Ben O’Neill & Walter E. Block, *Inchoate Crime, Accessories and Constructive Malice in Libertarian Law*, 5 LIBERTARIAN PAPERS 219, 220 (2013) [hereinafter *Inchoate Crime*].

²⁵ *Id.* at 239.

²⁶ Consider the case in which X viciously swings an axe against a wax sculpture of Y; Y sees it and perceives a threat against him in this act. Then the present authors claim X has committed a threat against Y. For a detailed analysis of cases of this sort, see *Inchoate Crime*, *supra* note 24, at 227–28.

²⁷ See *Inchoate Crime*, *supra* note 24, at 226.

B. Trespass

In the previous section we argued that the delivery of impersonating messages generally constitutes trespass against the recipient. Actually, the sender of impersonating messages may also be committing such a property rights violation against other parties.

There are several methods to make an email appear to be sent from someone else other than the erstwhile sender. The first is to create a new email account using the victim's name, and to transmit an email message from that account.²⁸ The second is to use computer software or programs to send an email such that when the recipient opens it, the "From" line is displayed as the victim's actual email address.²⁹ The third method is to seize control of the victim's computer and then send an email from an already logged-in email account.³⁰ The fourth is to hack into the victim's email account using one's own computer and send an email from there.³¹

While the first and second methods do not violate anyone's property rights, and third and fourth most certainly do. To begin with, email data are maintained on the servers of the email service provider. When someone registers a new email account, he effectively signs a contract with the service provider that entitles him to access the data that pertains to his account (and to show it to others voluntarily). Therefore, anyone who gains access to the victim's email account (using whoever's computer) without the latter's permission is, in effect, invading the email service provider's server. Furthermore, a person who does so on the victim's computer also commits

²⁸ Google's Gmail Help page shows that this method of impersonation is an existent possibility; see Gmail, *Gmail Help*, GOOGLE, <https://support.google.com/mail/answer/190735?hl=en> (last visited May 15, 2017).

²⁹ See Gregory P. Kruck & S.E. Kruck, *Spoofing—A Look at an Evolving Threat*, 47(1) J. COMP. INFO. SYS. 95, 96 (2006).

³⁰ See Olivia Becker, *Man Fined \$2,700 In Unprecedented Facebook 'Fraping' Case*, VICE NEWS (July 8, 2014), <https://news.vice.com/article/man-fined-2700-in-unprecedented-facebook-fraping-case> (showing that if one's electronic device is seized by another person, the second person can send messages using the first person's account).

³¹ This piece of news is an example of this technique in practice, thus proving its existence: Clifford Lo & Joyce Ng, *Regina Ip gets back US \$65,000 stolen in email scam*, S. CHINA MORNING POST (Feb. 7, 2015), <http://www.scmp.com/news/hong-kong/article/1705546/regina-ip-gets-back-hk65000-stolen-email-scam>.

trespass against the latter by manipulating his device in a non-consensual fashion.³²

There is a reason for the distinction between the third and fourth methods. If, say, X hacks into Y's *email account (not computer)* using X's own computer, X has not tampered with Y's property. X has only invaded the email service provider's property (namely, server).

V. THE EQUILIBRIUM AMOUNT OF IMPERSONATION

Let us stipulate, based upon the foregoing considerations, that most but not all identity theft should be illegal: it is legal if it does not involve any tampering with the victim's property, and if the recipient (tacitly or explicitly) agrees to receive impersonating messages. One example is when the mailbox provider specifies that impersonating messages are acceptable, and customers who are carelessly unaware of this specification sign up for a mailbox with this provider. Such customers may then receive impersonating messages from time to time that do not violate any rights.

How much of it will likely arise in the free society? Our contention is that that an optimal amount of it will tend to occur. For, if there is "too little" of it,³³ there will be little or no incentive for precautions against it to arise. On the other hand, if there is "too much" of it, countermeasures to it will come more and more to the fore.

There is a similar, but not exactly parallel story to be told with regard to libel. This practice too, is not a per se violation of rights.³⁴ If there is very, very little of it occurring in the libertarian society, it can be a powerful weapon. But as more and more of it occurs, not only will the harm it engenders increase at a decreasing rate, the additional damage from more of

³² See *Law, Property Rights and Air Pollution*, *supra* note 14 (asserting that the manipulation of another person's device without the latter's consent constitutes trespass).

³³ Why would there be a taste for this? Sheer bloody-mindedness is our explanation. Some people just enjoy making the lives of others less satisfactory. Perhaps there are some good and sufficient socio-biological explanations for this sort of anti-social behavior. Then, too, there is no accounting for tastes; *de gustibus non disputandum*. See Gene Callahan, *De Gustibus Non Est Disputandum*, LUDWIG VON MISES INST. (Apr. 27, 2001), <https://mises.org/library/de-gustibus-non-est-disputandum>; George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977); Edwin G. West & Michael McKee, *De Gustibus Est Disputandum: The Phenomenon of "Merit Wants" Revisited*, 73 AM. ECON. REV. 1110, 1110 (1983).

³⁴ See DEFENDING THE UNDEFENDABLE, *supra* note 18, at 47; see also THE ETHICS OF LIBERTY, *supra* note 15, at 126.

it will actually be reduced. Why? Because if slander comes thick and fast, it will be less and less likely to have the power to create injury; people will tend to ignore it; to not take it at a fixed value; to ask whether or not it is true. Mere allegations will not suffice.

We expect, then, that identity theft will undergo a similar metamorphosis. If hardly any of it ever occurs, people will hardly be cognizant of it. A bit more, and it can do real injury. More than that, and the market will spend more and more resources to counteract it, or people will be more cautious in verifying the authenticity of incoming messages, thus rendering identity theft relatively ineffective.

