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The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities

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The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities

Renewed attempts to prevent the use of telephone and telegraph facilities in connection with gambling have raised the question whether utility service can be legally withheld from such users as bookmakers and wire news services. The theory behind any such action must be that the prohibition of discrimination among the customers of a utility does not require extension of service to those using it for illegal purposes. For convenience the topic here discussed will consider only whether and how service may be denied to those using it in connection with off-track ("bookie") betting on horse races; moreover, the prohibition by most states of gambling is assumed to indicate that such activities are undesirable.[1]

Nature of the Use of Communications

The individual bookie makes extensive use of his telephone to reach customers and otherwise conduct his business. Denial of this vital facility would obviously hamper a bookie's activities. But, the center of the national bookmaking syndicate is said to be the wire news service. Off-track bookmaking requires information as to present track odds, exact off time, results, prices paid, jockey changes, late scratches, and track conditions. This material is furnished by the Continental Press Service which obtains the information at the track, arranges and transmits it over leased telegraph wires to local "drops" or receivers which transfer the news by telephone or teletype to the eagerly waiting bookie, all within approximately a minute and a half.[2] This system, through

1 For an excellent discussion of gambling practices, history, and the effects of syndicated gambling upon law enforcement, see Peterson, Gambling—Should It Be Legalized? (Published by Chicago Crime Commission, 1945).

2 California Commission on Organized Crime, Second Progress Report (1949) 6. Historically, the Payne Telegraph Service early in this century started a wire service of news from race tracks. Mont Tennes of Chicago was given exclusive rights in the Chicago area, by which means he perfected control of bookies and eventually took over the wire service on a national scale. In 1927 Moe Annenberg bought into Tennes' company, by 1934 uniting all the 13 competing companies into a national monopoly, of which he was exclusive owner by 1937. Pennsylvania opened an attack upon Annenberg's interests in 1938 (reportedly for political reasons), and in 1939, as part of the income tax investigations, the U.S. Attorney in Chicago requested A. T. & T. to withdraw wires leased to Annenberg's Nationwide News Service. A. T. & T. is alleged to have leased these same wires back to Annenberg confederates under their own names, so that in 1940, after Moe Annenberg was in jail for income tax evasion, the federal authorities took further steps to cut off the news service. Since then the history of racing news has been highlighted by the James Ragen and "Buggsy" Siegel killings of recent years. In 1948 the California authorities began a new drive against the news service, and other states have taken this up. *Ibid.* (discussion of California activities); Pennsylvania Utility Com. v. Bell Tel. Co., 25 P.U.R. (N.S.) 452 (Pa. P.U.C. 1938) (history of wire service). That racing news is big business is shown by the fact that Nationwide News Service

its monopoly position, is a means of organizing the gambling syndicate, for non-subscribing bookies who rely on newspapers and radio are at a disadvantage, being unable to settle quickly with their customers, lacking essential information such as late scratches or present odds, and risking the possibility of taking bets after a race has been run from customers who have learned of the winner elsewhere.[3] Obviously, the removal of communication facilities would ruin the news service, thus seriously hampering the operations of bookies, and perhaps destroying the organization of the gambling syndicate itself.

Action of this type is not easily undertaken. Since the common law and most utility statutes require non-discriminatory service, withdrawal of facilities must depend upon some theory of unlawful use. The illegality of bookmaking is clear, but the most practical benefit will accrue from striking directly at the news service itself.[4] Unfortunately, however, few courts have held rapid transmission of racing news to be illegal. The general opinion seems to be that the provider of such information is not criminally liable because his customers misuse it.[5] The only exceptions to this have been a few attempts to charge a conspiracy of news providers with bookies to violate the gambling laws.[6] Otherwise specific legislation has been required to make the news service itself illegal.[7]

Although criminal actions against the news services have been generally unsuccessful, the courts have sanctioned a denial of the use of telegraph wires to the news service on the theory that illegal use of the information after it is transmitted makes the transmission itself unlawful if

ranked only behind Associated Press, United Press, I.N.S., and R.C.A. as A. T. & T.'s largest customer. Flynn, Smart Money, Colliers, January 11, 1940 (a four part, rather wordy, biography of Moe Annenberg).

3 Cal. Com. on Crime, Second Progress Report (1949) 4. The Chicago Crime Commission Claims that Continental Press is now operated by the survivors of the Capone syndicate. *Cf.* Stearns v. Court, 62 Nev. 102 142 P. (2d) 206 (1943) (importance of news service suggested by suit to enforce "exclusive" right to racing news in Las Vegas).

4 Withdrawal of telephone service from bookies is at best an indirect method of attack, which seems most useful where the police may tap wires and thus hear bets being placed without necessarily identifying the culprit. *Cf.* Cullen v. New York Tel., 94 N.Y.S. 290 (App. Div. 1905) (service denied where place had bad repute); Hiegel v. New York Tel., 195 N.Y.S. 332 (1922) (denied to apartment house where various renters used phone to place bets); *In re* Knapp, 83 N.Y.S. (2d) 919 (1948) (employer permitted employee to take bets). Effect upon bookie activity of cutting off the wire service is noted in Cal. Com. on Crime, Second Progress Rep. (1949) 18.

5 Kreling v. Superior Court, 18 Cal. (2d) 884, 118 P. (2d) 470 (1941) (racing news publication not a public nuisance); Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938) (not a crime). The cases cited at note 8 *infra* all state that providing such news is not a crime.

6 People v. Corica, 55 Cal. App. (2d) 130, 130 P. (2d) 164 (1942) (indictment of news service operator and bookies in conspiracy to conduct gambling). In 1939 and 1940 the operators of the news service and a few bookies were indicted for conspiring to violate the anti-lottery law, 28 Stat. 963 (1895), (readopted, 62 Stat. 862 (1948), 18 USCA §1301 (USC Cong. Serv. 1948)). It was charged that people did not bet on a horse but upon the number which the wire reported as being the winning horse—a lottery. This ingenious attempt was ultimately dismissed in the federal court for the Northern District of Illinois in 1940, but by that time threat of the indictment had driven Annenberg out of business and caused the telephone and telegraph companies to cut off the wire service. Nationwide News Service v. A. T. & T. (N.D. Ill. 1940, unpublished opinion) (the key case refusing to enjoin A. T. & T. from withdrawing wires).

7 New Jersey Stat. Ann. (1939) c. 171-3 (illegal to transmit news or messages to help anyone carrying on an illegal business); Pa. Stat. (Purdon, 1941) §1701 et seq. (laws passed in the 1938 and 1939 attack upon Annenberg); Code of the City of Chicago (1939) c. 191-9 (illegal to publish odds or tips on horse races).

it is for the purpose of such illegal use.[8] This requires that the recipients of this information use it illegally before the communication of the information can be said to be wholly tainted with unlawfulness. It has generally been presumed that most of the subscribers to the news service are conducting illegal enterprises, for the news service was designed for the specific task of rapidly conveying technical information capable of only the narrowest use, since few non-gamblers need quick and detailed news of this nature, and even fewer could afford the requisite one hundred dollars a week.[9] Some difficulty has arisen around those "drops" of the news service which distribute their material to local bookies by having the bookie call up the office over the regular telephone when he wants news. Since the offices of many racing news sheets provide similar facilities for readers to call up for late news, and some "drops" have combined these practices, at least two courts have been unable to find that there is sufficient illegal use of news in these cases to render the transmission unlawful.[10] It is always a question of fact in each case whether there can be enough legitimate users to preclude action against the news provider, but once it has been established that the use is illegal, the question arises as to who can take action.

Action by the Utility Company

In some states, the telephone companies have voluntarily adopted the practice of discontinuing service upon police notification of illegal use by the subscriber.[11] Usually the company also states that it will act upon its own finding of illegality, but as a practical matter most action is initiated by police findings. In the field of interstate transmission and the leasing of wires, Western Union, A. T. & T., and the Bell System

8 McBride v. Western Union, 171 F. (2d) 1 (C.A. 9th 1948) (illegal use of the facilities means illegal use by anybody on either end of wire, not just illegal use by the particular person leasing from the utility); Application of Annette, 74 N.Y.S. (2d) 330 (1945), appeal denied, 298 N.Y. 498, 82 N.E. (2d) 44 (1948) (knowledge of future illegal use of information makes its transmission unlawful); Cullen v. Ohio Bell Co., 36 P.U.R. (N.S.) 152 (Ohio Com. Pl. 1940) (illegal nature of bookie customers of wire service taints the whole business).

9 California P.U.C. Decision No. 41415 (April 6, 1948) (telephone companies ordered to withdraw service to wire service); Partnoy v. Southwestern Bell, 70 P.U.R. (N.S.) 134 (Mo. P.S.C. 1947) (customers of wire service all presumed to be bookies).

10 Pennsylvania Publications v. Pennsylvania Ut. Com., 349 Pa. 184, 36 A. (2d) 777 (1944) (since other than bookies may call for information, and since only the winners are revealed, this system was not the same as the wire service; opinion notes that Ut. Com. thought this merely a ruse to evade prohibition of wire service); H & R Publishing Co. v. Illinois Bell, 26 Ill. Commerce Com. 155 (1946) (10 telephones to give late news—company may not deny service unless customer actually convicted of crime).

11 At present the following states follow this practice: California, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Ohio, and possibly Pennsylvania. *See,* Solomon v. So. Cal. Tel. Co., 61 P.U.R. (N.S.) 525 (Cal. RR. Com. 1945); Cologiavanni v. So. New Eng. Tel., 65 P.U.R. (N.S.) 171 (Conn. P.U.C. 1946); United Sound System v. Ill. Com. Com., Order No. 36077 (1948), appealed to Superior Court of Cook County; Howard Sports Daily v. Weller, 179 Md. 355, 18 A. (2d) 210 (1941); Rodman v. New Eng. T. & T., 61 P.U.R. (N.S.) 242 (Mass. D.P.U. 1945); *Re* Michigan Bell, 34 P.U.R. (N.S.) 65 (Mich. P.S.C. 1940); Partnoy v. Southwestern Bell, 70 P.U.R. (N.S.) 134 (Mo. P.S.C. 1947); Berenato v. N.J. Bell, 76 P.U.R. (N.S.) 1 (N.J.D.P.U. 1948); Shillitani v. Valentine, 296 N.Y. 161, 71 N.E. (2d) 450 (1947); Cullen v. Ohio Bell, 36 P.U.R. (N.S.) 152 (Ohio Com. Pl. 1940); Pennsylvania Publications v. Pennsylvania P.U.C., 349 Pa. 184, 36 A. (2d) 777 (1944).

companies have all adopted tariff provisions similar to the following regulation of A. T. & T.:

> "The service is furnished subject to the condition that it will not be used for an unlawful purpose. Service will not be furnished if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law, or if the Telephone Company receives other evidence that such service is being or will be so used."[12]

Authorization for such company regulations is found in the rule which developed in general utility law that customers, if they have any right or property in utility service at all, have a right conditioned upon legal use.[13] This right of the utility to prevent illegal use of its facilities by withdrawing service is not considered to be unreasonable discrimination which is generally forbidden.[14] Although recognizing such a right to prevent illegal use, some courts have held that transmission of gambling messages is not unlawful because these messages are said to become illegal only after receipt by the bookie, but most courts do not try to decide this nice question of just when the action becomes illegal, holding rather that it is all one unlawful process.[15]

Since denial of service must rest on the company's right to prevent unlawful use of its property, logically the company itself should initiate the practice. However, some courts feel that this is improper since it is likely to constitute the utility a censor of public and private morals.[16] This is not the general view, and some courts will even go so far as to talk of a duty rather than a right in the utility to cooperate in law enforcement.[17] All jurisdictions seem to agree that the company may

12 By letter of Jan. 6, 1949, the F.C.C. requested that A. T. & T. and the Bell System file tariffs, pointing out that Western Union's tariff had been upheld in McBride v. Western Union, 171 F. (2d) 1 (C.C.A. 9th 1948). There is some indication of a similar request in 1945, probably following the F.C.C.'s study of the effect of illegal users upon the shortage of telephone facilities. Cologiavanni v. So. New Eng. Tel. Co., 65 P.U.R. (N.S.) 171 (Conn. P.U.C. 1946) (company adopted rule pursuant to 1945 request of F.C.C.).

13 Bryant v. Western Union, 17 F. 825 (C.C. Ky. 1883) (two years after teletype invented company permitted to refuse to give market quotations to bucket shop); Thurston v. Union Pacific, 23 Fed. Cas. 1192, No. 14019 (C.C. Neb. 1877) (notorious card sharp may be put off train despite duty as common carrier to take all passengers); Godwin v. Carolina T. & T., 136 N.C. 258, 48 S.E. 636 (1904) (house of prostitution cannot demand telephone service). 1 Wyman, Public Service Corporations (1911) §607.

14 *Cf.* Nichols, Public Utility Service and Discrimination (1928) 188-198.

15 People v. Brophy, 49 Cal. App. (2d) 15, 120 P. (2d) 946 (1942) (illegal actions of bookie occur after transmission); Dooley v. Coleman, 126 Fla. 203, 170 So. 722 (1936) (same); Commonwealth v. Western Union, 112 Ky. 355, 67 S.W. 59 (1901). McBride v. Western Union, 171 F. (2d) 1 (C.C.A. 9th 1948) (weight of authority recognizes that transmission is unlawful).

16 Western Union v. Ferguson, 57 Ind. 495 (1877) (company may not censor message "send me four girls, on first train"); Gray v. Western Union, 87 Ga. 350, 13 S.E. 562 (1891) (only threat of prosecution excuses refusal of message). Fear of censorship seems to apply more to refusal of single messages than discontinuance of entire service. Western Union v. Hammond Elevator, 165 Ind. 492, 76 N.E. 100 (1905) (not required to give "ticker" service to bucket shop); Edwards v. Ashland Tel. Co., P.U.R. 1918C, 691 (Ill. 1918) (continued usage of profanity over phone will permit discontinuance but just a few bad words will not allow cutting off). That the general rule is opposed to the first part of this note, see note 11 *supra*.

17 Hamilton v. Western Union, 34 F. Supp. 928, 929 (N.D. Ohio 1940) (duty of company to cooperate in cutting off Annenberg wire service system); Application of Manfredonio, 52 N.Y.S. (2d) 392 (1944) (duty of company to obey police requests).

discontinue service if it is threatened with prosecution for providing facilities to designated users.[18]

Once the company's right to initiate discontinuation has been established, there still remains a possibility that abandonment of service must be approved by the state utility commission.[19] Although this requirement does not usually refer to discontinuation of service to individual customers pursuant to valid regulations of the company, any possible doubt could be satisfied by obtaining approval of the commission upon the original adoption of such a practice.[20]

Upon withdrawal of service the customer will have recourse either to the public utility commission to complain of discrimination or to a court of equity for an injunction or mandamus to restore service, at which time the company must show that its facilities are likely to be illegally used in the future. A preponderance of the evidence will satisfy the company's burden, for this is not a criminal action to punish the customer for past acts of his but is an attempt by the company to prevent future improper use of its property.[21] Of course, this probable future use must be inferred from past use. Since the company's action is usually based upon a police request for discontinuation, generally the procedure followed is for the police to present their evidence of illegal use in behalf of the company. This is necessary because the company may not evade its responsibility for providing equal service to all by blindly following the request of others.[22] In line with this theory the District of Columbia court held recently that the Bell System tariff providing for withdrawal of service upon police notification cannot be followed as it reads, for the company can discontinue service only upon reasonable proof of unlawful use and it must assume the risk that police requests are supported by proper evidence.[23]

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18 Hagerty v. So. Bell, 145 Fla. 51, 199 So. 570 (1940) (permitted discontinuance to part of Annenberg system despite previous Florida decisions contra); Gray v. Western Union, 87 Ga. 350, 13 S.E. 562 (1891) (dictum); Kronenberg v. So. Bell, 36 P.U.R. (N.S.) 513 (W.D. La. 1940) (Annenberg system again).

19 *Cf.* Nichols, Public Utility Service and Discrimination (1928) 50-60 (collects cases requiring approval of commission).

20 *Re* Michigan Bell, 34 P.U.R. (N.S.) 65 (Mich. P.S.C. 1940) (request of approval of change permitting company to discontinue service at request of police); Solomon v. So. Cal. Tel. Co., 61 P.U.R. (N.S.) 525 (Cal. RR. Com. 1945) (customer can not complain about rule of company permitting discontinuance at police request since he had previous opportunity before approval to object).

21 *In re* DiBenedetto, 83 N.Y.S. (2d) 920 (1948) (good discussion of procedure: presumption that citizen entitled to service, which company must rebut with preponderance of evidence showing future misuse can be inferred); Ganek v. New Jersey Bell, 57 P.U.R. (N.S.) 146 (N.J.P.U.C. 1944) (reasonable cause to believe future misuse justifies denial). *Cf.* People *ex rel.* Restmeyer v. New York Tel. Co., 159 N.Y.S. 369 (1916) (affirms denial of service even though customer was discharged by magistrate from charge of bookmaking); Hiegel v. New York Tel. Co., 195 N.Y.S. 332 (1922) (acquittal). *Contra,* H & R Publishing Co. v. Illinois Bell, 26 Ill. Commerce Com. 155 (1946) (company may not discontinue service unless customer convicted of crime).

22 Shillitani v. Valentine, 296 N.Y. 161, 71 N.E. (2d) 450 (1947) (police commissioner not proper party defendant in suit to prevent discontinuation of service because it is company alone which has acted); Cologiavanni v. Southern New Eng. Tel. Co., 65 P.U.R. (N.S.) 171 (Conn. P.U.C. 1946) (police evidence fails to show that customer is misusing wires). *But cf.* Rodman v. New Eng. T. & T., 61 P.U.R. (N.S.) 242 (Mass. D.P.U. 1945) (withdrawal not unreasonable if done at police request, but if done on company's own information then commission will inquire into proof).

23 Anderson v. Potomac T. & T., 17 L.W. 2535 (Dist. Ct. D.C. 1949).

Some courts have distinguished between the amount of evidence necessary only to excuse the company from any penalty for withdrawing service and that proof necessary to support a continued denial to the customer.[24] Although the fact that the police request discontinuation may justify the company's original action, all the available evidence should be presented to determine whether denial should be continued.

The utility companies may hesitate to precipitate action if there is any danger of their being sued for damages or for whatever statutory penalty is provided to prevent improper discrimination. This has occurred.[25] To avoid this, where damages are based upon breach of contract, the company can protect itself by making discontinuation a published regulation governing all service contracts; but, where the courts permit a tort action for loss of service, or there is an additional statutory penalty, the company might not be permitted to preclude liability through contract provisions.[26] Approval by the regulatory commission of a regulation precluding liability in case of such action has been used to avoid the threat of damage suits.[27]

Action by Law Enforcement Agencies

In practice the requests of the law enforcement authorities that the communications companies cooperate with them in eliminating unlawful use of wires seem to have been followed by the companies.[28] The federal authorities did find it necessary in 1940 to threaten prosecution of the company in order to secure cooperation, and such a threat to prosecute for furnishing service seems to be the only means available for initiating action where the requests of the police are not voluntarily followed, for enforcement agencies cannot directly order the companies to withdraw service.[29]

Prosecution of the company for furnishing service to illegal users must be based either upon a charge of aiding and abetting or upon a count of conspiracy. These theories require that the company have such an

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24 Berenato v. New Jersey Bell, 76 P.U.R. (N.S.) 1 (N.J.D.P.U. 1948) (approves company discontinuation upon request of police but orders service restored because evidence fails to show it will be misused). *Cf.* Cal. P.U.C. Decision No. 41415 (April 6, 1948) (requires company to discontinue service upon police request but provides appeal to P.U.C. for customer).

25 Giordullo v. C. & S. Bell, 71 N.E. (2d) 858 (Ohio Com. Pl. 1946) (suit for $50,000 damages; company must prove there was actually gambling because it so alleged in its answer); Western Union v. Ferguson, 57 Ind. 495 (1877) (awarded statutory penalty for refusal to send telegram). These cases are the only recorded ones demanding damages, probably because the facilities for halting the discontinuation of service are so adequate that damages never accrue in sufficient quantity.

26 The theory of damages for loss of service is in a state of flux, some courts not even certain whether the action is in tort or contract. *Cf.* the cases collected in Damages Recoverable from Telephone Company for Failure to Furnish or Interruption of Service (1923) 23 A.L.R. 952.

27 *Re* Michigan Bell, 34 P.U.R. (N.S.) 65 (Mich. P.S.C. 1940); Cal. P.U.C. Decision No. 41415 (April 6, 1948).

28 The cases cited at note 11 *supra* all seem to represent voluntary cooperation by the company.

29 Shillitani v. Valentine, 296 N.Y. 161, 71 N.E. (2d) 450 (1947) (it is the company which withdraws service from bookies, for the police cannot require company action). In 1940 the telephone company is alleged to have helped former associates of Annenberg to re-establish his business, and so the telephone company was indicted along with the wire service. Fogarty v. Southern Bell, 34 F. Supp. 251 (E.D. La. 1940) (mentioned in case refusing injunction of denial of service to one of these associates.

intent in common with the gamblers to violate the gambling law as to constitute promoting the crime.[30] It has been held that providing facilities with knowledge of their proposed use is promotion of the crime and gives a basis for prosecution of the company.[31]

Besides acting against the company, or prosecuting the users for their crimes, the enforcement agencies might proceed to enjoin the customer from using these facilities illegally. This has not been done, but it is similar to the 1940 attempt in California to enjoin certain individuals from operating a wire service.[32] This raises the question whether equity will enjoin a person from committing a crime, since subsequent imprisonment for contempt will really be denying a citizen of his right to a jury trial for criminal punishment. The courts are divided on the answer to this.[33]

Power of Regulatory Commissions to Compel Action

Sometimes it has been necessary for the regulatory commissions to force the utility companies to cooperate with police requests for discontinuation of service. Examples of forcibly overcoming unwillingness to cooperate are the 1938 attack upon Annenberg's Nationwide News Service by the Pennsylvania Utility Commission and the 1948 attack upon Continental Press Service by the California Commission.[34] The practice of the Federal Communications Commission in demanding the filing of tariffs stating the procedure the companies intend to follow has resulted in voluntary acquiescence by the companies to the proposal that they deny service to illegal users.[35]

Neither the California nor the Pennsylvania Commission has made clear from what statute it derived the power necessary to compel company action. The statutes of these two states make the practices of the companies subject to the approval of the commission: the California commission shall change those rules which are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient"; the Pennsylvania commission may change company rules in the interest of "accommodation,

30 Wharton's Criminal Law (12th ed., Ruppenthal, 1932) 350-368.

31 State v. Scott, 80 Conn. 317, 68 A. 258 (1907) (furnishing a "ticker" to a gambler makes one an accessory); State v. Western Union, 160 Ark. 444, 254 S.W. 838 (1923) (indictment under statute forbidding messages relating to illegal sale of cotton futures); United States v. Consumers Power Co. of Michigan, unpublished opinion (E.D. Mich. Jan. 29, 1940) (heavy fine imposed on utility for furnishing gas to illegal still). See Beamish, Responsibility of Utilities for Criminal Use of Service (1940) 25 Public Utilities Fortnightly 586 (Commissioner Beamish of Pa. P.U.C. hopefully predicts chastisement of A. T. & T. for helping Annenberg).

32 Kreling v. Superior Court, 18 Cal. (2d) 884, 118 P. (2d) 470 (1941) (reverses injunction of Annenberg lieutenants from ever gambling or running a wire service). Apparently some injunctions of this period which were never appealed are still in force. Cal. Com. on Crime, Second Prog. Report (1949) Appendix G.

33 See the collection of cases in Clark, Principles of Equity (1937) 322-324; McClintock, Equity (1936) 285-288.

34 Public Utility Commission v. Bell Tel. Co., 25 P.U.R. (N.S.) 452 (Pa. P.U.C. 1938); Cal. P.U.C. Decision No. 41415 (April 6, 1948). That the company helps the wire service to evade the police is charged by the Pennsylvania Commission; by Beamish, Responsibility of Utilities for Criminal Use of Service (1940) 25 Public Utilities Fortnightly 586 (followed by denial by telephone official); by the court in Fogarty v. So. Bell, 34 F. Supp. 251 (E.D. La. 1940); and by Flynn, Smart Money, Colliers, Jan. 20, 1940, p. 57.

35 Note 12 *supra*. This seems to be the general policy of the F.C.C. *Cf.* Ambassador Inc. v. United States, 325 U.S. 317 (1945) (upholds regulations as to hotel charges for telephone service which the companies adopted at request of F.C.C.).

convenience and safety."[36] What positive powers these statutes convey is undecided, there having been little litigation in this field. Similarly, the power granted the F.C.C. is to investigate and require adequate and non-discriminatory service.[37] In recent years of insufficient telephone and telegraph facilities it has been thought that the commissions could require the companies to make available all their equipment for legal users.[38] Another suggested basis for commission action has been the theory that serving unlawful users is an unreasonable practice of the company which the commission may change.[39]

There is no reason why the commissions in other states cannot do likewise if necessary. Generally they can all investigate the practices of the companies, with the effect any exposal of unhealthy conditions will have. They can recommend corrections. If there is necessity for positive command, then the commission may be able to act on the theory that a company practice to permit illegal use is unreasonable and harmful to the public interest and the commission is empowered to correct this.[40] Once a company does adopt a rule, either on its own initiative or under compulsion, the commission generally has power to require compliance with this regulation.

Of course, legislation could clarify the power of the commission. But, if the legislature is to act, it would be better that it clearly impose a duty upon the company to prevent illegal use of its facilities, for the commission can enforce such a duty.

Constitutional Limitations

Is denial of communication facilities, clearly a drastic step in this modern age, unconstitutional interference with freedom of speech or press?[41] The guarantees of the First Amendment of the United States Constitution and of the various state constitutions were designed to protect the presentation of news and information that the public may be enlightened as to all views of a subject.[42] In light of this interest there is a distinction recognized between information which should be available to the public if the concept of democratic action is to have any meaning, such as expression of reasons why gambling should be legalized, and information useable for no public benefit but rather for violating the

36 California General Laws (Deering 1944) Act 6386 §§31, 35. By SCA 13, amendment to Cal. Const. Art. XII, §22 (1946), Cal. P.U.C. replaces Cal. RR. Com. in this statute. Pennsylvania Stat. Ann. (Purdon 1941) §§1171, 1172, 1182.

37 48 Stat. 1070, 1076 (1934), 47 USCA §§201-3, 215 (Supp. 1948).

38 Partnoy v. Southwestern Bell, 70 P.U.R. (N.S.) 134 (Mo. P.S.C. 1947).

39 Hamilton v. Western Union, 34 F. Supp. 928 (N.D. Ohio 1940).

40 *Cf.* Ill. Rev. Stat. (1947) c. 111 2/3, §8 (commission to ascertain whether company complies with laws), §32 (promote public safety, health, convenience, and comfort), §41 (commission to establish rates, regulations, practices); Missouri Rev. Stat. (1939) c. 35, §5664 ("adequate", "just and reasonable" practices). *See,* Ill. Com. Com. v. N.Y.C. R.R., 398 Ill. 11, 75 N.E. (2d) 411 (1947) (order must recite that it is necessary for public safety or other interest). Spurr, Guiding Principles of Public Service Regulation (1924) 104-118.

41 The Constitution restricts governmental action, but action by a utility, particularly at police request and if approved by the state commission, might be considered state action. *Cf.* Shelley v. Kraemer, 334 U.S. 1 (1948) (enforcement by court of private contracts is governmental action).

42 *See* Bridges v. California, 314 U.S. 152 (1941) (even judges may not restrict newspapers).

law, like the odds offered on a particular horse in the fifth race at Jamaica.[43]

Information that may be restricted is generally defined under the famous "clear and present danger" test, which describes news immediately and materially threatening consequences which the state may forbid.[44] In some states this has been interpreted to cover the publication in any form of racing news, but the United States Supreme Court has never passed upon this.[45] Even though one might not condone blanket prohibition of all racing news, it should be recognized that the wire service, unlike some of the other publications, rapidly transmits specialized information designed for the use of bookies rather than for legitimate customers. Restriction of the wire service is not so much an attempt to prevent the presentation of ideas or facts as it is a denial of certain advantages which aid in violation of the law. The bookies are not prevented from finding out the news, but they are forced to stand on an equal footing with others who must rely upon the normal news sources. Under these circumstances, the cases do not suggest that restriction will be considered unconstitutional.[46]

Conclusion

The record shows that in many states action has been taken to prevent the use of telephone and telegraph facilities by bookies and by the wire news service. The theory of this action is that, although a utility must serve all legitimate customers without discrimination, it is not required to serve those using its facilities for illegal purposes. If bookmaking itself is illegal, it would seem clear that using a telephone for this purpose is also illegal, and it is generally accepted that the company may refuse its facilities to such a business. The wire news service presents a more difficult problem. The attempt, in absence of specific legislation,[47] is not to restrict the type of news delivered. That will still be available in newspaper or radio broadcast.[48] The wire service is undesirable because it is

43 Chafee, Free Speech in the United States (1941) 3-35, 145-152. As to whether legalization of off-track gambling will remedy the conceded practical evils of present day illegal gambling, see Peterson, Gambling—Should Be Legalized? (Published by the Chicago Crime Commission, 1945.)

44 Schenck v. United States, 249 U.S. 47 (1919) (espionage case in which clear and present danger test was formulated); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (freedom of religion or of speech does not permit violation of ordnance forbidding use of epithets designed to cause breach of peace).

45 State v. Sykes, 28 Conn. 225 (1859) (advertising of lotteries may be prohibited, but not news of past ones); Hart v. People, 26 N.Y. 396 (1882) (upholds prohibition of lottery news).

46 Fox v. Washington, 236 U.S. 273 (1915) (affirmed conviction for publishing newspaper story about troubles among members of a nudist colony); Howard Sports Daily v. Weller, 179 Md. 355, 18 A. (2d) 210 (1941) (points out difference between wire service and ordinary publication of news to the public).

47 *Cf.* Anti-lottery Law, 28 Stat. 963 (1895), 62 Stat. 862 (1948), 18 USCA §1301 (USC Cong. Serv. 1948). This statute was passed when state attempts to prohibit lotteries were being evaded through interstate commerce. Today, with the national spread of bookmaking, probably Congress should again pass a law closing interstate corridors to those bent on circumventing state laws.

48 Application of Capital Broadcasting Company, FCC 48-288 (Jan. 30, 1948) (FCC does not have power to require a radio station to cease broadcasting race results if the rest of the station's program material comes up to the statutory standards). *Cf.* 48 Stat. 1091 (1934), 62 Stat. 862 (1948), 47 USCA §326 (Supp. 1948) (censorship of programs prohibited). *See* 2 Socolow, The Law of Radio

designed to afford extra advantages to bookies and it is a means of organizing the gambling syndicate. Discontinuance of wire facilities used by the wire service requires recognition that the function of aiding bookies renders the whole process unlawful.

Logically the utility company itself should be able to initiate the practice of preventing illegal use of its property. Usually it is allowed to do so, particularly in more recent years.[49] But some instances do arise where the company is unwilling to act. In these cases the law enforcement authorities are able to prosecute the company for knowingly aiding and abetting illegal gambling. The regulatory commissions in these instances have power to require the company to desist from such an unreasonable and harmful practice which is contrary to the public interest as revealed in the gambling laws. Altogether, the power to prevent illegal use is present, and it has been exercised in many instances.

Where gambling is considered illegal, the problems of enforcing the law and convicting the gamblers are difficult. The task of the police should not be complicated by permitting the gamblers to use the conveniences of modern communications in order to circumvent public policy as revealed in the laws.

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Broadcasting (1939) 891 (discusses the limitation upon program content); *id.* at 1015 (discusses state rules).

49 *Compare* People v. Brophy, 49 Cal. App. (2d) 15, 120 P. (2d) 946, (1942) *with* McBride v. Western Union, 171 F. (2d) 1 (C.C.A. 9th 1948); *compare* Pioneer News Service v. Southwestern Bell, 61 P.U.R. (N.S.) 47 (Mo. 1945) *with* Partnoy v. Southwestern Bell, 70 P.U.R. (N.S.) 134 (Mo. 1947).