Common Carriage Privacy Redux

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ABSTRACT: In a landmark regulatory shift, the Federal Communications Commission's (FCC) in its 2015 Open Internet Order subjected for the first time broadband internet access services (BIASs) to the Communication Act's section 201 common carrier regulation. The FCC also subjected BIASs to section 222 privacy protections, placing numerous requirements on their collection and use of proprietary network information (CPNI). However, section 201 gives the FCC power to regulate in traditional areas of common carriage—which includes common carriers' duties not to disclose the content of messages entrusted to them. Looking into long-ignored 19th century precedent, this article examines how the FCC could use section 201 to impose privacy obligations on internet firms—and how this power is significantly different from that which section 222 grants for the purposes of protecting CPNI. The paper also examines how this potential regulatory burden, focused only on BIASs, exacerbates the regulatory inequality between BIASs, regulated as common carriers, and fringe providers, which are not—even though they often engage in the same commercial activities.

Introduction

The Federal Communications Commission's (FCC's) 2015 Open Internet Order, one of the most controversial regulations in recent memory, has exerted federal power, for the first time, over the entire internet network.[1] The FCC received over 3.5 million comments from interested individuals and organizations, reflecting a groundswell of popular interest that, in fact, crashed the agency's computers.[2] And, the Open Internet Order was probably the first rulemaking proceeding ever to be the subject of commentary from late night comedians such as John Oliver,[3] Jimmy Kimmel[4] and Saturday Night Live's Gennifer Owens.[5]

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[1] Fed. Comm. Comm'n., In the Matter of Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order (2015), https://www.fcc.gov/article/fcc-15-24a1 [hereinafter "2015 Open Internet Order"] The Order hedges on the precise parameters of its jurisdiction. While previous orders considered only consumer relations with their broadband providers, the Order now exerts jurisdiction over transit between broadband providers, i.e. the internet backbone. *See id*. ("we find that broadband Internet access service is a 'telecommunications service' and subject to sections 201, 202, and 208 (along with key enforcement provisions). As a result, commercial arrangements for the exchange of traffic with a broadband Internet access provider are within the scope of Title II, and the Commission will be available to hear disputes raised under sections 201 and 202 on a case-by-case basis: an appropriate vehicle for enforcement where disputes are primarily over commercial terms and that involve some very large corporations, including companies like transit providers and Content Delivery Networks (CDNs), that act on behalf of smaller edge providers. But this Order does not apply the open Internet rules to interconnection.").

[2] Stephanie Mlot, *Net Neutrality Public Comments Top 3M***,** PC MAG. (Sept. 16, 2014, 9:55 AM), http://www.pcmag.com/article2/0,2817,2468576,00.asp.

[3] Amanda Holpuch, *John Oliver's cheeky net neutrality plea crashes FCC website*, THE GUARDIAN

Beyond the public discussion, remarkable for an arcane regulatory matter, the 2015 Open Internet Order enacted a change that advocates of a more regulatory FCC stance long sought: reclassification of internet service from Title I's ancillary jurisdictional authority to Title II's common carriage jurisdictional authority. This legal change is momentous, for as the FCC learned through a series of set-backs from the D.C. Circuit, Title I jurisdiction proved a weak vessel for virtually any ambitious policy of internet regulation.[6] Title II, on the other hand, has formed the basis of the FCC's 70 year old, comprehensive regulation of interstate communications. Faced with its Title I regulatory impotence and strong political pressure—including some from President Obama, FCC Chairman Wheeler in the 2015 Open Internet Order classified broadband internet service as Title II common carriage.[7]

Even though the FCC used its authority under section 160[8] to forbear from many duties found in Title II of the 1934 Communications Act,[9] the FCC will apply many portions of Title II of the Communications Act to the internet. Most notably, the FCC will apply Section 201 that gives power to the FCC to require common carrier interconnection and

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(June 3, 2014, 2:33 PM), http://www.theguardian.com/technology/2014/jun/03/john-oliver-fcc-website-net-neutrality; Marvin Ammori, *John Oliver's Hilarious Net Neutrality Piece Speaks the Truth*, SLATE (June 6, 2014,3:17PM), http://www.slate.com/articles/technology/future_tense/2014/06/john_oliver_s_net_neutrality_segment_speaks_the_truth.html.

[4] Jimmy Kimmel Live, *People with Funny Names Arrested*, YOUTUBE (Sept. 10, 2014), https://www.youtube.com/watch?v=xqgmUURct4I.

[5] *Saturday Night Live*: *Episode 14 Net Neutrality* (NBC television broadcast Feb. 28, 2015), http://www.nbc.com/saturday-night-live/video/net-neutrality/2850291.

[6] Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, Memorandum Opinion and Order, 23 F.C.C.R. 13,028 (2008), vacated Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) (holding that the FCC acted beyond its statutory authority when punishing Comcast for protocols aimed at discouraging peer-to-peer traffic).*Preserving the Open Internet, Report and Order*, *GN Docket No. 09-191*, *WC Docket No. 07-52*, 25 FCC Rcd. 17905 (2010) [hereinafter cited as 2010 Open Internet Order] aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014), on remand, *Protecting and Promoting the Open Internet*, *GN Docket No. 14-28*, *Notice of Proposed Rulemaking*, 2014 WL 2001752 (rel. May 15, 2014) [hereinafter cited as 2014 Open Internet NPRM].

[7] Ezra Mechaber, *President Obama Urges FCC to Implement Strong Net Neutrality Rules*, WHITEHOUSE.GOV (Nov. 10, 2014 9:15 AM), https://www.whitehouse.gov/blog/2014/11/10/president-obama-urges-fcc-implement-stronger-net-neutrality-rules ; Mark W. Davis, *Sneaky, Stealthy and Serpentine*, US NEWS (Feb. 27, 2015 5:45 PM), http://www.usnews.com/opinion/blogs/mark-davis/2015/02/27/obama-net-neutrality-underhanded-power-grab-is-bad-for-the-internet.

[8] 47 U.S.C. §160 (date).

[9] Although the FCC did "forbear from 30 statutory provisions and render over 700 codified rules inapplicable," it did *not* forbear from the Communications Act's section 201 (common carriage), 202 (discriminatory or unreasonable charges or practices); 206 (enforcement); 207 (enforcement); section 208 (enforcement); 209 (enforcement); 216 (application to receivers and trustees); 222 (consumer protection); 224 (pole access); 225 (consumer protection); 229 (CALEA obligations); 251(a)(2) (disabilities access) 254 (universal service), and 255 (consumer interest). *See* FCC Open Internet Order, ¶¶ 51-57.

"establish . . . regulations for operating such through routes."[10] Section 201 goes on to state that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Section 202, which the FCC will also enforce, makes illegal for any "common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . .any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[11]

Section 201 is, as Gary Lawson, the great critic of the administrative state would say, a "niceness and goodness" statutory provision,[12] giving the FCC power broad powers not only over the rates common carriers charge, but also the terms and conditions of offering their services to ensure that they are "just and reasonable." What firm qualifies as a common carrier is far from clear as the definition is completely statutory.[13] In short, section 201 is an open invitation for the FCC to regulate in broad ways. As this Article argues, section 201 could have enormous, and some unintended, consequences—particularly for privacy.

When struggling to interpret section 201's vague terms, courts, in general, look to the historical meaning of common carriage for guidance.[14] And, there's the rub. Common carriage, the law that governs common carriers, is, of course, an ancient, and notoriously sprawling, set of rules that can trace its history to the 17th century and governs transportation, communications, and other "essential" industries.

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[10] 47 U.S.C. § 201(a).

[11] 47 U.S.C. §§ 202-03.

[12] *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994)

[13] Under 47 U.S.C. § 153(h), a common carrier is defined as "any person engaged as a common carrier for hire. . . ."

[14] Nat'l Ass'n of Regulatory Util. Com'rs v. F.C.C., 533 F.2d 601, 608 (D.C. Cir. 1976) ("the circularity and uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to the common law of carriers'); Nat'l Ass'n of Regulatory Util. Com'rs v. F.C.C., 525 F.2d 630, 640 (D.C. Cir. 1976) ("For purposes of the Communications Act, a common carrier is 'any person engaged as a common carrier for hire . . . The Commission's regulations offer a slightly more enlightening definition: 'any person engaged in rendering communication service for hire to the public.' However, the concept of 'the public' is sufficiently indefinite as to invite recourse to the common law of carriers to construe the Act.").

Most important for this Article's concern is a large, and largely forgotten, set of rules governing common carriers' privacy obligations. These rules mostly involve a telegram company's duties to keep messages secret. Telegrams were often carelessly delivered or delivery boys too curious or gossipy. Presumably, with the advent of the telephone, the need for these sorts of protections diminished. Telephone conversations are private by their nature, save technically difficult wiretapping, and, therefore, experience fewer privacy breaches.

Nonetheless, by ruling that section 201 governs broadband access service providers, the FCC has opened the door for these wide-ranging common carriage privacy protections—much wider than the privacy protections afforded in section 222. Nineteenth century and early twentieth century common carriage privacy law gives the FCC the power to demand that internet actors keep customers' *messages* private. This duty is different, if not broader, than simple customer protection network information (CPNI) confidentiality as required by section 222.

The Article proceeds as follows. First, it surveys the case law outlining the common carriage duties and liabilities and, in particular, examines a subset, the common carrier duty to keep messages private and secret. This body of law largely derives from the late 19th and early 20th century telegraph cases. Second, we examine the interplay between section 222 and section 201. Section 222 does create certain specific duties—and courts could interpret them as overriding any privacy duties derived from section 201. This section, however, concludes that courts would likely *not* read section 222 given previous precedent on reading the original 1934 Communications Act along with the amendments that the 1996 Telecommunications Act made. Finally, we examine the wisdom and practicability of applying 19th century privacy principles, developed primarily for telegraphs, to the modern internet age. In particular, the Article observes that application of section 201 on BIASs creates a bizarre regulatory asymmetry in email and other communications: email and other communications services provided by BIAS face a large mountain of potential privacy regulation under section 201 which edge providers do not.

I. Common Carriage Liability & Privacy

In a musty attic of telecommunications law, one finds common carriage liability. Given the "public" nature of common carriers' business, courts required "character and degree of care, diligence and skill commensurate with their undertaking."[15] Under common law, common carriers, such as telephone and telegraph companies, had a duty to deliver messages in good faith and a non-negligent manner.[16] State and federal courts developed a body of law dealing with transmission omissions and errors of all sorts committed by telegraph and telephone companies.

[15] Tedson J. Meyers, *Liability Limitations in International Data Traffic: The Consequences of Deregulation*, 16 CASE W. RES. J. INT'L L. 203, 214 (1984)

[16] BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY (1999).

Common carrier common law liability, as discussed in Section IV, became obsolete with the emergence of state public service commissions, the Interstate Commerce Commission (ICC), the Federal Communications Commission, and the development of the filed tariff doctrine as discussed in Section III. In short, common carrier liability became a regulatory concern, not a matter for common law courts. Nonetheless, as this section shows, virtually all matters that came under the purview of common carrier common law liability remain within the FCC's authority under section 201.

"It is in the telegraph cases, rather than the telephone cases, that expansive interpretations of the carriers' basic duties are found."[17] The relative importance of telegraphy in case law is probably due to technological differences between telegraphy and telephony. A common carrier's duty is to transmit and deliver a message, and there are more possible instances of error or mistake in telegraph messages than in telephone messages, which are much more automated. For instance, the telegrapher could make errors of transcription, failure to send at all, or an error of delivery. Nonetheless, there can be errors in early telephone systems as well, which typically required more human oversight, i.e., a connecting operator, than more automated, modern telephone systems.

The types of negligent or, willful, injuries that telegraph and telephone companies could commit seem a bit quaint to our modern legal notions of injury, although they were apparently quite real to those in the late 19th and early 20th centuries. These injuries fall into several categories, ranging from the telegram or telephone operator who failed to be on duty as required or operate a machine correctly[18] -- or even willfully fail to connect a phone call.[19]

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[17] Meyers, *supra* note 15, at 214, citing Holman v. Southwestern Bell Tel. Co., 358 F. Supp. 727 (D. Kan. 1973), quoting with approval Wilkinson v. New England Tel. & Tel. Co., 327 Mass. 132, 97 N.E.2d 413 (1951) ("Because of the complexities and intricacies of the modern telephone system in which the personal element has been substantially eliminated and much if not all of the means of making usual telephone calls is left to mechanical devices, such a regulation [limiting liability] is not unreasonable.").

[18] Jennings v. SW. Bell Tel. Co., 307 S.W.2d 464, 467 (Mo. 1957) ("that an operator of the defendant was given all of this information and requested to make the connection with the fire department, but that the operator failed to do so"); Arndt, Inc. v. Wisconsin Tel. Co., 58 N.W.2d 682, 684 (Wis. 1953) ("The extent of the undertaking by the defendant, whether the communication by the unnamed person was sufficient to inform the operator that the caller wanted to be connected with the fire department, whether there was unreasonable delay in making the connection or whether the caller hung up before the connection was completed, the extent of the unreasonable delay and whether it was a proximate cause, if proven, of the damages of the plaintiffs, and the extent of the damages attributable to any unreasonable delay proven, are all questions of fact"); Peterson v. Monroe Indep. Tel. Co., 182 N.W. 1017, 1018 (Neb. 1921) ("Telephone companies are under the duty of furnishing to their subscribers reasonably prompt and efficient service in the way of giving them connections with other subscribers, and they are liable for any pecuniary loss directly traceable to a breach of such duty as the proximate cause thereof."); Christenson & Vinson v. Southern Bell Tel. & Tel. Co. 188 Ala 292, 66 So 100, (1914) (failed switchboard operator).

[19] Texas Cent. Tel. Co. v. Owens, 128 S.W. 926, 927 (Tex. Civ. App. 1910) ("appellant's operator made no effort to get the doctor to the telephone, but that he, in fact, answered the call, pretending to be the

First, with the telegram, there could be an error in telegraphic transcription or copying. ("Buy seventy thousand porkbellies rather than "Buy seven thousand porkbellies"). Courts typically recognized liability in such instances, based upon general common carrier duties. But, courts did allow carriers to limit damages contractually under certain conditions. The Supreme Court recognized that while a telegraph company can contract out of liability for an erroneous telegraphed message, it could not so contract if the sender paid extra for a "repeat message.[20] This meant that telephone companies had to offer customers the option of sending an "insured" repeated message, i.e., a message that was sent twice and which the telegrapher compared for errors, but full liability did not attach to telegraphs sent the normal "unrepeated" way. In this manner, courts gave telegraph and telephone companies more flexibility in liability compared to shippers and railroads, which could not contract out of liability. On the other hand, common law courts required communications common carriers to at least offer to assume liability using "repeated messages."[21]

Second, given the large number of people who handled a telegram (the operator, delivery boys, and other office employees), there was ample opportunity for willful delivery error or accidental mis-delivery. A telegraph company could be liable for injuries caused as well as emotional injury.[22] Third, a telegraph company could be liable for a delay or failure in delivery or transmission of a message, and aggrieved parties had a remedy in tort.[23]

Finally, and of most immediate importance for this Article, there is a largely

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doctor, and thereby deceived the plaintiff into believing that the doctor would make an immediate call upon, and relieve the sufferings of, his wife.").

[20] Primrose v. W. Union Tel. Co., 154 U.S. 1, 14, 15-16 (1894) ("Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce . . . .the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by negligence of its servants or otherwise."). Interestingly, when the ICC took jurisdiction over interstate messages, it abandoned this rule. C. S. Potts, *Limitation of Liability in Interstate Telegraph Messages*, 1 TEX. L. REV. 336, 341 (1923) ("The soundness of the rules promulgated by the Interstate Commerce Commission, in refusing to allow public service concerns to contract against the negligence of themselves or their servants, and the success of these rules in bringing about a reasonable relation between the charges made and the liabilities assumed by the companies in the transmission of the different kinds of messages, together with the great convenience to the public in having uniform rules throughout the country, strongly suggest the wisdom of similar action by the several states with reference to intrastate messages.'); *see also* C. C. Marvel, *Liability of telephone company for mistakes in or omissions from its directory*, 92 A.L.R.2d 917 (1963).

[21] BARBARA A. CHERRY, THE CRISIS IN TELECOMMUNICATIONS CARRIER LIABILITY (1999).

[22] Baker v. Western U. Teleg. Co. (1923); Paton v. Great Northwestern Teleg. Co. 141 Minn. 430, 170 N.W. 511(1919);18; Western U. Teleg. Co. v. Cunningham 99 Ala. 314, 14 So. 579 (1892); *see also* Arkansas & L. Ry. Co. v. Stroude, 77 Ark. 109 (1905).

[23] Bluefield Milling Co. v. Western Union Telegraph Co., 139 S.E. 638 (1927); Western Union Tel. Co. v. Hearn, 110 Ark. 176 (1913); Wood v. Western Union Telegraph Co61 S.E. 653 (1908); Western Union Telegraph Co. v. Bickerstaff, 100 Ark. 1 (1911); Western Union Telegraph Co. v. Elliott, 115 S.W. 228 (1909); Western Union Telegraph Co. v. Merrill, , 39 So. 121(1905).

forgotten body of law holding that telephone telegraph companies had a duty, qua common carriers, to keep secret the contents of their customer's messages. An American legal commentator, citing an English case, made this point in a legal note about a West Virginia case. The author writes:

> It is alleged that the telegraph company turned over to a jealous husband a bunch of telegrams passing between his wife and certain friends of hers, and as a result of the information thus gained the husband has threatened to sue for a divorce. The wife thereupon has brought suit against the telegraph company for $25,000 damages. Under the doctrine laid down with respect to banks in *Tournier v. National Provincial and Union Bank of England* (1924)1 K.B. 461 the cause of action would seem to be well founded, the obligation of secrecy being as much implied in the contract of the sender of a telegram as in that of a bank depositor. The implication of such a duty is strengthened by the fact that in many states statutes forbid under penalty the disclosure to unauthorized persons of the contents of any telegram.[24]

As this excerpt shows, courts widely acknowledged the right to privacy, or more precisely, the common carrier's duty not to disclose the contents of messages.[25] This

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[24] 28 Law Notes Edward Thompson Co. 104, 104 (1924); *see also* 74 AM. JUR. 2D *Telecommunications* § 57 (2016) ("It is part of a telegraph company's undertaking with respect to the transmission and subsequent handling of a message that its contents must not be disclosed to any unauthorized person, and the company acts at its peril if it divulges the contents of a message without the consent of either the sender or the addressee and will be liable to the extent of actual damages.").

[25] Newfield v. Ryan, 91 F.2d 700, 704 (5th Cir. 1937) ("One of those conditions is that telegraph companies are common carriers, subject to federal regulation and control, and that messages filed with them while protected from the prying of the merely curious, and from other unauthorized disclosures, are not protected from 'the demand of other lawful authority."); W. Union Tel. Co. v. Aldridge, 66 F.2d 26, 27 (9th Cir. 1933) ("The evidence is undisputed that when the young lady who disclosed the contents of the telegram was employed by the telegraph company she was informed of her duty to maintain inviolate the contents of telegraphic messages"); Barnes v. Postal Tel.-Cable Co., 72 S.E. 78, 79 (N.C. 1911) ("It is a part of the undertaking of the telegraph company, with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any person whomsoever, without the consent of either the sender or addressee, and, if it does divulge the contents without being released from the obligation of secrecy, it acts at its peril."); W. Union Tel. Co. v. McLaurin, 66 So. 739, 740, 741 (Miss. 1914) ("It also appears that the messenger of the company at Selma disclosed the contents of the telegraphic correspondence. . . .The telegraph company did . . . violate its public duties."); Cock v. W. Union Tel. Co., 36 So. 392, 392 (Miss. 1904) ("Involved in every contract for the transmission of a telegraphic dispatch is an obligation on the part of the transmitting company to keep its contents secret from the world."); In re Renville, 61 N.Y.S. 549, 554 (App. Div. 1899) ("No statute requires a telegraph company to communicate to the public dispatches which it has received from other individuals, to be transmitted to specified persons. On the contrary, such a communication is prohibited [by New York state statute]."); *see also* Hearst v. Black, 87 F.2d 68, 71 (D.C. Cir. 1936) ("if a Senate Committee were to attempt to force a telegraph company to produce telegrams not pertinent to the matters the committee was created to investigate, the company could be restrained at the instance of the sender of the telegrams."); Hellams v. W. Union Tel. Co., 49 S.E. 12, 14 (S.C. 1904) ("We do not think that the law imposes upon telegraph companies the duty to telephone a message, as that would seriously impair the confidential relations assumed in the delivery, receipt, and transmission of telegraphic communications."); Barnes v. W.U. Tel. Co., 120 F. 550, 553 (C.C.N.D. Ga. 1903) ("If a telegram has enough upon its face to show that it relates to the value of property offered for sale, it would seem sufficient to put the company on its guard

recognition was widespread. Indeed, even the United States Supreme Court acknowledged the duty as discussed *infra*.[26] At the same time, the rights of the parameters are not clear. The following section, which is probably the first analysis of this case law in a century, attempts to reconstruct the nature of this duty.

II. Origin of the Duty Not to Disclose

Courts consistently have recognized the duty not to disclose telegraph messages. Courts have been less consistent, however, as to the origin and basis of the right. Some courts have pointed to state statutes that set forth a duty not to disclose the contents of messages. Indeed, in the 19th and early 20th century, several states, including New York[27], Mississippi[28], and Wisconsin[29] had laws prohibiting the telegraph operators from disclosing the contents of telegraphs.

Others courts point to an implied contractual provision, stemming from telegraph's and telephone's common carriage "public" calling, just like the other common law liabilities and obligations discussed in the previous section.[30] Still, other courts simply assume the duty exists without specifying the duty's precise basis, suggesting that the duty not to disclose was simply a matter of common sense.[31]

There is an important and interesting line of cases in which plaintiffs allege the antitrust laws required telegraph companies to provide open access to public stock market quotations and other exchange information. Stock markets quite naturally only wanted to provide this information to their subscribers and other affiliated parties. In its consistent rejection of such suits, courts would often reason that because telegraph companies have a duty not to disclose transmissions, they cannot be forced to make the information they transmit public. Typically, however, courts would simply assume the duty existed without stating the exact basis of the right.

The United States Supreme Court, in *Moore v. New York Cotton Exchange*,[32] reflects this analysis. In *Moore*, the New York Cotton Exchange contracted with the Western Union Telegraph Company for receiving and distributing market quotes and prices to such persons as the exchange approves. The Odd-Lot Exchange challenged this contract under the antitrust laws. In rejecting the claim, the Court simply stated,

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against errors in transmission."); W. Union Tel. Co. v. Bierhaus, 36 N.E. 161, 162 (Ind. Ct. App. 1894) ("the legislature of this state also passed an act prohibiting in express terms the disclosure of telegraphic messages, and giving a remedy in damages to the party injured to the extent of such injury, and making such company liable for failure or negligence in the performance of their duties generally.").

[26] Moore v. New York Cotton Exch., 270 U.S. 593, 605 (1926) ("As a common carrier of messages for hire, the telegraph company, of course, is bound to carry for alike. But it cannot be required-indeed, it is not permitted-to deliver messages to others than those designated by the sender.").

[27] *See* In re Renville, 61 N.Y.S. 549, 554 (App. Div. 1899).

[28] *See* Cock v. W. Union Tel. Co., 36 So. 392, 392 (Miss. 1904).

[29] *See* Marlatt v. Western Union Telegraph Co., 167 N.W. 263, 265

[30] Barnes v. Postal Tel.-Cable Co., 72 S.E. 78, 79 (N.C. 1911); W. Union Tel. Co. v. McLaurin, 66 So. 739-41 (Miss. 1914).

[31] W. Union Tel. Co. v. Aldridge, 66 F.2d 26, 27 (9th Cir. 1933).

[32] 270 U.S. 593, 601 (1926).

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Similarly, in *Hearst v. Black*, a case involving the unauthorized release of telegraphs from William Randolph Hearst to an investigating Senate committee, the Court stated "[t]elegraph messages do not lose their privacy and become public property when the sender communicates them confidentially to the telegraph company. Indeed, in many of the States their publication without authorization . . . is a penal offense; and this is so because of an almost universal recognition of the fact that the exposure of family confidences and business and official secrets would as to telegrams equally with letters, 'be subversive of all the comforts of society.'"[34] While this article does not take a position on the "correct" basis of the common carriage duty to not disclose, the weight of the cases demonstrates that this duty is deeply linked to common carriage.

The duty not to disclose is straightforward. A telegraph company employee could not disclose the contents of a telegraph—that much is clear, but beyond that basic principle, the legal rules become somewhat fuzzy. For instance, many court decisions examine the level of malfeasance (negligence or willfulness) required to permit recovery and whether punitive damages are available for disclosure of information.[35] While the courts are not completely consistent, they seem to require willfulness.[36] There were also numerous limitations on the right, which we might find quaint. For instance, courts tended not to allow recovery for disclosure of embarrassing facts that cast shadows on the plaintiffs' moral character.[37] These courts reasoned that the immoral telegrammer bore contributory liability for the damages caused. [38]

III. The Twilight of Common Carrier Common Law Liability

The growing administrative state absorbed common law common carrier liability. The process took several decades. Federal regulation of interstate communications began in 1910, when the Mann-Elkins Act placed interstate telephone and telegraph services under the supervision of the Interstate Commerce Commission.[39] The Act empowered the ICC to investigate rate complaints and, upon reaching a conclusion that rates were

[33] Moore v. New York Cotton Exch., 270 U.S. 593, 605 (1926)
[34] 87 F. 2d 68, 70 (D.C. 1936).
[35] W. Union Tel. Co. v. Aldridge, 66 F.2d 26, 27 (9th Cir. 1933); Cock v. W. Union Tel. Co., 36 So. 392, 392 (Miss. 1904); Marlatt v. Western Union Telegraph Co., 167 Wis. 176, 167 N.W. 263, 265.
[36] Barnes v. Postal Tel.-Cable Co., 72 S.E. 78, 79 (N.C. 1911); W. Union Tel. Co. v. McLaurin, 66 So. 739-41 (Miss. 1914).
[37] Cock v. W. Union Tel. Co., 36 So. 392, 392 (Miss. 1904).
[38] *Id.*

[39] Commerce Court (Mann-Elkins) Act, Pub.L. No. 218, ch. 309, Section 7, 36 Stat. 544 (1910) (amending the Interstate Commerce Act of 1887, ch. 104, Section 1, 24 Stat. 379 (1887)) (provisions relating to telegraph, telephone, and cable companies repealed 1934 with the passage of the Communications Act).

"unjust" or "unreasonable," to declare those rates unlawful.[40] Western Union and other telegraph companies filed tariffs that contained warranties for levels of service.

Interpreting this Act, the Supreme Court, in *Western Union Tel. Co. v. Esteve Bros. & Co.*, adopted the filed tariff doctrine, ruling that any tariff lawfully filed with the ICC cannot be challenged in a common law court. Rather, the tariff had to be challenged at the ICC. In *Esteve Brothers,* Western Union limited the liability of unrepeated messages, and the Court concluded that "the limitation of liability attached to the unrepeated cable rate is binding upon all who send messages to or from foreign countries until it is set aside as unreasonable by the Commission."

In this way, the terms and conditions that telegraphs and telephone undertook when accepting and sending messages were set forth in filed tariffs. These tariffs contained-and continued to contain throughout the 20th century—liability provisions. Common law courts accepted these terms and conditions as valid, and consumers could not challenge tariffs in court. Only the administrative agency could review their validity.

The FCC took off where the ICC left off, assuming regulation of interstate telephone and telegraph companies under the Communications Act of 1934. Section 203 of the Communications Act of 1934 mandates that all common carriers file tariffs showing "all charges" for the "interstate and foreign wire or radio communications services" they provide, as well as "the classifications, practices, and regulations affecting such charges."[41] For many years, the "filed rate doctrine barred all actions to enforce payment arrangements other than those delineated in the tariff" for all interstate telecommunications services.[42]

Western Union continued to file telegraph tariffs into the 1990s as did other even more esoteric communications like international data cables. These tariffs contained, to a greater degree than telephone tariffs, liability obligations for mis-deliveries. There are a few areas in which the FCC continues to require tariff filing to this day.[43]

On the other hand, the FCC (and Congress) have eliminated tariffing requirements for virtually every other telecommunications service. With the emergence of competitive long-distance firms in the 1980s such as MCI and Sprint, "the burden [of accepting and reviewing countless tariffs] proved too onerous for the FCC, and thus the Commission began its unrelenting campaign in favor of detariffing."[44] The FCC began to eliminate the requirement that telephone companies file tariffs for long-distance and other

[40] Kathleen B. Levitz, *Loosening the Ties That Bind: Regulating the Interexchange Services Mkt. for the 1990s*, 2 F.C.C. Rcd. 1495, 1495-96 (1987).

[41] 47 U.S.C. § 203 (1994) .

[42] 7 Bus. & Com. Litig. Fed. Cts. § 85:58 (3d ed.).

[43] *See* Electronic Tariff Filing System (ETFS), https://apps.fcc.gov/etfs/etfsHome.action; *see also*

[43] Meyers, *supra* note 15, at 215-16

telecommunications services.[45] Rather, they could charge what they will. At first, the FCC attempted to deregulate by administrative fiat, but the courts rejected its efforts, ruling that section 203 required tariffs.[46] In response, Congress passed section 160 to allow forbearance, *inter alia,* from section 203's tariffing requirement.[47]

Detariffing, however, did not revive common law actions against common carriers. Rather, courts ruled that the FCC's decision to de-tariff preempted federal and most state common law actions.[48] Courts viewed the decision *not* to regulate was a kind of negative decision to regulate. This decision to forbear regulation foreclosed federal and state common law. The only recourse individuals now have against the dread "unjust" interstate telephone rates prohibited in section 201 is to file a complaint under section 208. Of course, with the radical transformation of electronic communications since the 1980s, market mechanisms no doubt keep carriers from abusive power, at least of the sort that the old common carrier liability regime attempted to control. But, the power to regulate in these areas remains with the FCC under section 201, and it is to this power we now turn.

IV. Sections 201 and 222 and CPNI

With the exception of section 605, a strange provision that has played little role in communications law and policy,[49] the Communications Act's only privacy requirements can be found in section 222, the provision concerning customer proprietary network information (CPNI). Passed as part of the Telecommunications Act of 1996, Section 222

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[45] Interstate Interexchange Marketplace, 14 FCC Rcd. 6004 (1999); Interstate Interexchange Marketplace, 11 FCC Rcd. 20,730 (1996); Interstate Interexchange Marketplace, 12 FCC Rcd. 15,014 (1997).

[46] MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 221 (1994); MCI Telecomms. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[47] The FCC attempted to eliminate the requirements of section 203 during the 1980s, but the courts rejected the effort. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1337-38 (1998) ("After experimenting in the early 1980s with making tariffs optional for non-dominant carriers the FCC attempted in 1985 to prohibit non-dominant carriers from filing any tariffs for their services . . . This mandatory detariffing was struck down by the D.C. Circuit as inconsistent with the Communications Act.").

[48] Boomer v. AT & T Corp., 309 F.3d 404, 422 (7th Cir. 2002) ("detariffing does no alter the fundamental design of the Communications Act, nor modify Congress's objective of uniformity in terms and conditions for all localities"); Dreamscape Design, Inc. v. Affinity Network, Inc., 414 F.3d 665, 670 (7th Cir. 2005) ("[T]he FCA continues to provide federal remedies for customers seeking to challenge the justness and reasonableness of long-distance charges and practices."); Christy C. Kunin, *Unilateral Tariff Exculpation in the Era of Competitive Telecommunications*, 41 CATH. U. L. REV. 907 (1992).

[49] Lauritz S. Helland, *Section 705(a) in the Modern Communications World: A Response to DiGeronimo*, 40 FED. COMM. L.J. 115, 116-17 (1988) ("one of the wordiest provisions in the Communications Act has sailed the seas for more than three-quarters of a century without any significant attempt . . . to explain its purpose or intended effect.").

of the Communications Act places requirements on telecommunications carriers to protect CPNI.[50] The statute defines CPNI as follows:

> information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and . . . information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.[51]

As the FCC states, "practically speaking, CPNI includes information such as the phone numbers called by a consumer; the frequency, duration, and timing of such calls; and any services purchased by the consumer, such as call waiting."[52]

On February 26, 1998, the Commission released the CPNI Order that set forth regulations implementing section 222.[53] The FCC amended these rules a few times afterward.[54] The rules create an opt-in regime under which telecommunications carriers must obtain a customer's knowing consent before using or disclosing his or her CPNI to a third-party.[55] However, the CPNI rules only covered "telecommunications carriers" which meant (in the early 2000s) almost exclusively traditional telephone companies.[56] Thus, they only covered information related to traditional phone calls. The regulations were, of course, limited in this fashion because at the time section 222 was passed and its

[50] Telecommunications Act of 1996, § 702, 47 U.S.C. § 222.

[51] 47 U.S.C. § 222(a).

[52] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Customer Proprietary Network Info. & Other Customer Info., 21 F.C.C. Rcd. 9990, 9991 (2006).

[53] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998).

[54] *See, e.g.*, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended; and 2000 Biennial Regulatory Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, CC Docket Nos. 96-115, 96-149, and 00-257, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860 (2002).

[55] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers Use of Customer Proprietary Network Info. & Other Customer Information, 21 F.C.C. Rcd. 1782, 1784-85 (2006).

[56] *Id.* at 1785-86.

implementing regulations promulgated, the FCC only regulated telephones under Title II, having exercised only more limited Title I authority over internet access.[57]

The 2015 Open Internet Order, as discussed above, greatly expanded the FCC's jurisdiction, reclassifying large swathes of the internet as Title II and subjecting much of the internet to section 222. While the order is somewhat unclear over the extent of its jurisdiction, the FCC made clear that it regulates—and subjects to section 222—what it terms "broadband internet access service" or "BIAS." As discussed, *supra*, this category includes most traditional telephone and cable companies, such as Verizon or Comcast, but not fringe providers such as Google or Facebook.

Under the proposed rules, the data coming under CPNI protection include: (1) service plan information, including type of service (e.g., cable, fiber, or mobile), service tier (e.g., speed), pricing, and capacity (e.g., information pertaining to data caps); (2) geo-location; (3) media access control (MAC) addresses and other device identifiers; (4) source and destination Internet Protocol (IP) addresses and domain name information; and (5) traffic statistics.[58]

These proposed rules are creating quite a furor and will no doubt have a large impact on internet privacy. They might keep BIASa at a significant disadvantage in marketing because Facebook and Google and other "fringe" or "content" provider will, under these rules, still be able to collect and control CPNI. Indeed, the rules create an unexplainable regulatory inequality that will likely not protect privacy. Customer proprietary information is not truly "protected" if Google, Ebay, Apple, and every other fringe provider can collect it, but every BIAS must go through the expense and trouble of complying with section 222.

Regardless of the effect of the new section 222 regulations, this Article has shown that section 222 is but one weapon in the FCC's arsenal. Section 201 offers the FCC the power to impose another type of privacy protection. Notice the important difference between section 222 and traditional common carrier privacy obligations. Section 222 requires information *about* a subscriber, like service plan information and information *about* pricing and capacity. Traditional common carrier non-disclosure, on the other hand, goes to protecting the privacy, integrity, and content of messages.

Of course, the content of messages is highly compromised in the internet. For instance, Google and other email providers typically "read" email to discover words that might reveal the buying preference of their senders—and better sell advertisements. Facebook, of course, does the same thing. Texts and other electronic messages receive similar treatment.

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[57] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C. Rcd. 4798, 4801-18 (2002).

[58] In the Matter of Protecting the Privacy of Customers of Broadband & Other Telecommunications Services, FCC 16-39, 2016 WL 1312850, ¶ 41.

A first, straightforward application of section 201 common carrier privacy obligations would be to broadband providers—and presumably any email or message-sending services they provide. They would have to keep secret any emails or text entrusted to them. Alternatively, following *Primrose v. W. Union Tel. Co.*,[59] courts could create some sort of split the baby alternative, where BIASs would have to offer confidential communication services. This option could cost more, of course, just as telegraph companies charged more for repeated messages.

The old common carriage disclosure cases do not answer the question of whether BIASs would be liable for confidentiality breeches that interconnecting providers or services that fringe providers offer. While this obligation could be an extension of common carrier privacy duties, it underscores the almost ludicrous regulatory asymmetry that the 2015 Open Internet Order creates. Only services that BIASs offer face this potential regulation; every other message sending service on the internet does not face such regulation.

The FCC, however, could expand its jurisdiction to require all internet actors to protect the inviolability of messages. In this way, section 201 and traditional common carrier obligations present an entirely new and quite radical approach to FCC privacy regulations. The details of such regulation—let alone the wisdom of any such regulation—are vague. The point of this article is not to argue for or against such regulations—or even suggest ways to implement them. The article makes the more simple point that has remained largely unrecognized in the brouhaha over the Open Internet Order: the order has a potential to make radical transformations in privacy law. And, it is worth observing that section 201 obligations—and their concomitant common carrier privacy obligations—create an unbalanced playing field with BIASs at extreme disadvantage. Beyond the inequities of such an asymetrical regime, it would be unlikely to protect consumer privacy.

Conclusion

Radical, of course, derives from the Latin word for "root" and originally connoted dramatic change returning to some essential core. For better or worse, section 201 places 19th century common carriage law, an inconsistent and sprawling body of law, at the core of United States telecommunications regulations. Its principles continue to inform the limits of FCC power. The FCC's recent re-classification of the internet, or at least large portions of it, as Title II common carriage asserts this ancient core of regulation over the modern world's most modern communication medium.

As this paper shows, traditional common carriage regulation gives the FCC a power to impose a type of privacy not provided by any other part of the Communications Act. Unlike section 222, which simply protects information, traditional common carriage

[59] 154 U.S. 1, 14, 15-16 (1894).

common law protects the content, privacy, and integrity of messages. The immediate application of this common law principle would give the FCC the power to prohibit broadband providers from "revealing" email or texts to third-parties, even for marketing purposes. Of course, the FCC could simply require a knowing waiver of that right—or perhaps require the broadband provider to offer at least one "private" email service. Similarly, the FCC could expand its jurisdiction to cover email and texts services provided by non-BIASs such as Google or Facebook. But, regardless of the form of any such hypothetical regulation, it would fall exclusively on BIASs, not any other provider of internet services. Such a regime is neither fair nor likely to provide meaningful consumer privacy.