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# THEORY APPLIED: WALKING THE HALLS OF POWER AND THE STREETS IN THE SUCCESSFUL CAMPAIGN TO END PREDATORY LONG DISTANCE PRISON PHONE RATES

CHERYL LEANZA<sup>1</sup>

## I. INTRODUCTION

The costs of telephone calls to incarcerated people in the United States are often extraordinarily high—well beyond what most people in our country pay for telephone service. It is often cheaper to call Singapore at 12 cents a minute from a cell phone than it is to speak to someone in prison or jail. These high rates are used to subsidize either the cost of running the prison, or, in some cases, to augment state general purpose revenues. The high rates are a terrible burden on the friends and family members of incarcerated people—who often have to choose between basic needs and communication with someone they love. And the high telephone rates undermine social networks that can help inmates reintegrate into society when they are released: this policy is not only harsh, but counterproductive to the goal of reducing recidivism and overall crime. Further, given the disproportionate confinement of African Americans and Latinos, the high-cost of phone calls creates a de-facto community destabilization policy that impacts the overall health and wellbeing of communities of color. Finally, the most frustrating: although permitted for many years, these practices were certainly in violation of the federal Communications Act, which is intended “to make available, so far as possible, *to all the people of the United States*, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities *at reasonable charges*. . . .”<sup>2</sup> Thus a policy which is evidently counter-productive and

<sup>1</sup> Cheryl A. Leanza, J.D., M.P.P., president, A Learned Hand Consulting, LLC, consultant to United Church of Christ, OC Inc. and Leadership Conference Education Fund in the inmate calling advocacy campaign. See [www.alearnedhand.com](http://www.alearnedhand.com).

<sup>2</sup> 47 U.S.C. § 151 (emphasis added).

almost certainly in violation of federal law nonetheless was common practice more than 25 years after its inception, and shows signs of being expanded into even newer technology.<sup>3</sup>

While the efforts to change these policies are almost as old as the policies themselves, success has been rare. During 2012 and 2013, collaboration combined the efforts of long-standing activists, grassroots organizers, major national civil rights organizations, prisoners and prisoner family advocates, and public interest advocacy groups specializing in telecommunications. Using new strategies the newest effort was able, within two years, to persuade the Federal Communications Commission to cap long distance telephone rates to prisons, jails and detention centers.<sup>4</sup> This article discusses the elements of success in the final years of a 10-year campaign to end these practices, culminating in a positive vote by the Federal Communications Commission in August 2013,<sup>5</sup> and compares on-the-ground activities with relevant scholarship. This success, like most policy change, was the result of a combined effort of a variety of actors and policymakers. This comparison between past efforts and the new collaborative effort to influence the federal regulatory process offers both scholars and advocates insights about a successful policy campaign.

While at one level seemingly very simple, predatory prison phone rates represent one of those challenging problems which are comprised of a complex set of interrelationships among multiple levels of policymaking and law, and the mechanisms used to achieve social justice change. Thus, it is a good opportunity to evaluate current scholarship from a variety of academic disciplines, including political science, community organizing,

<sup>3</sup> For example, Access Corrections offers paid e-mail access to prisoners in several state prison systems, including the Kansas, Alabama, Oregon, and Oklahoma Departments of Corrections. See <https://www.accesscorrections.com/> (last visited Oct. 10, 2013). The prices for these services are not evident without creating an account. Another example is fees being imposed on inmates for Skype and video conferencing in Virginia. See testimony of Delegate Hope, *Workshop on Inmate Calling*, F.C.C. (July 10, 2013) at 92-95, available at <http://apps.fcc.gov/ecfs/document/view?id=7520930723>.

<sup>4</sup> *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd. 14107 (2013). The successful campaign described here addressed long distance interstate rates, local rates have not yet been successfully capped nationwide.

<sup>5</sup> *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd. 14107 (2013). The rules went into effect February 2014. After the FCC issued its order, several prison phone companies and the National Sheriffs Association sued to block the decision. Several components of the order were temporarily stayed, but the rate caps of 21 and 25 cents per minute were left in place. *Securus Techs. Inc. v. FCC*, No. 13-1280 and Consolidated Cases (D.C. Cir. Jan. 13, 2014). Since the FCC subsequently released another notice of proposed rulemaking, *Rates for Interstate Inmate Calling Services*, Second Further Notice of Proposed Rulemaking, Docket No. 12-375, FCC Rcd. (rel. Oct. 22, 2014), the litigation is being held in abeyance. *Securus Techs. Inc. v. FCC*, No. 13-1280 and Consolidated Cases (D.C. Cir. Dec. 16, 2014).

and law. As detailed below, the scholarship does a good job of explaining two components of the successful policy campaign: using the correct legal venue and redefining the problem in compelling terms. In addition, the literature on coalition work is useful as far as it goes, particularly in identifying how coalitions strategically incorporate members and how coalitions are effective at influencing policy.

This article breaks new ground in looking at not just how a public interest or civil rights policy advocacy campaign can succeed by changing policy, but also utilizing the rich literature on community organizing to analyze how it can ethically represent and empower historically disenfranchised people impacted by the policy—leaving those people in a more powerful position than they were before the campaign. Coalitions are a strong model because they can both empower disenfranchised groups *and* leverage political and legal expertise. Coalitions can authentically walk the halls of power and also authentically walk the streets. As such, coalition-based advocacy offers unique contributions to ethical organizing, legal representation, and policy change.

## II. NEGATIVE IMPACT OF PREDATORY PRISON PHONE RATES

To start this case study, it is helpful to understand the many problematic aspects of predatory prison phone rates.<sup>6</sup> At a time when the cost of a phone call is approaching zero, until recently one population was forced to pay astronomical sums to stay in touch: the families of incarcerated people. Before reform, a typical interstate collect call from a prison had a \$3.00 connection fee (regardless of the length of the call), while rates per minute were as high as almost *90 cents per minute*.<sup>7</sup> This could result in charges of \$10-17 for a 15-minute collect call or \$250 per month for a weekly one-hour call. On top of high per-minute rates, individuals were often charged additional fees that can only be described as usury. For example, the Prison Policy Initiative found that fees make up 38 percent of the \$1 billion annual cost of calling prisons, including fees for depositing money into accounts,

<sup>6</sup> The cost structures of prison phone rates are similar for both long distance interstate calls and local calls. While this article describes the successful effort to cap long distance rates, an effort to address local rates is underway. The Federal Communications Commission's most recent Notice of Proposed Rulemaking proposed limiting local rates. *Rates for Inmate Calling Services*, Second NPRM, WC Docket 12-375 (rel. Oct. 17, 2014), 79 FED REG 69, 682.

<sup>7</sup> John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, PRISON LEGAL NEWS (April 15, 2011) available at <https://www.prisonlegalnews.org/news/2011/apr/15/nationwide-pln-survey-examines-prison-phone-contracts-kickbacks/>.

closing accounts, and even for merely holding money in an account.<sup>8</sup> Quite often, prisoners do not bear these costs; instead family members and loved ones outside of prison pay these extremely high rates.<sup>9</sup>

The high rates are caused by the system used to procure telephone service at correctional institutions. Prisons, jails or detention centers request bids from competing telephone companies, requiring each bid to include the payment of a fee or commission to the prison, in addition to the provision of telephone service. The costs of the calls are passed on to prisoners' families in the form of higher telephone rates, while the prison reaps the benefit of the extra fees and commissions.<sup>10</sup> Thus, prisons have every incentive to choose bids that maximize fees and maximize telephone rates—a clear “moral hazard.”<sup>11</sup> While in other areas of telecommunications policy, competition is considered a primary tool for constraining telephone prices,<sup>12</sup> in this case the rate payers—prisoners and their families—have no voice in the selection of the carrier. The prison system that does select the carrier actually benefits from the higher rates, leaving the actual consumers as a literally captive market, unable to shop around for lower prices.

Healthy relationships with their families and other members of the community are one of the most important factors in prisoners' successful return to their neighborhoods.<sup>13</sup> Maintaining the bonds of a family and support network is a very effective way to reduce recidivism among inmates, which is an important national goal. The rate of recidivism is at crisis levels in the U.S.: within three years of being released, 67 percent of ex-prisoners re-offend and 52 percent are re-incarcerated. Americans are paying dearly for this trend. According to the Pew Center on the States,

<sup>8</sup> Drew Kukorowski, Peter Wagner and Leah Sakala, *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, PRISON POLICY INITIATIVE (May 8, 2013) available at <http://www.prisonpolicy.org/phones/pleasedeposit.html>.

<sup>9</sup> While many of these systems require the person receiving a call to pay for the call, in other cases prisoners must put their money in an account to pay for calls. Prisoners do not have access to much income. For example, women in some prisons maintain a monthly income of \$22.50 with a percent dedicated to court costs. See Testimony of Cheryl A. Leanza at FCC Inmate Calling Workshop, WC Docket 12-275 (July 10, 2013.) available at <https://org2.salsalabs.com/o/6587/images/Cheryl%20Leanza%20Inmate%20Calling%20Service%20Workshop%20July%2010%202013.pdf>.

<sup>10</sup> *Supra*, note 7. Both privately-owned prisons, such as those run by Corrections Corporation of America (CCA), and publicly-owned prisons, charge predatory rates.

<sup>11</sup> Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 392 (explaining that prison phone contracts are third-party beneficiary contracts which ignore the welfare of the supposed beneficiaries).

<sup>12</sup> See, e.g., 47 U.S.C. §§ 160, 161, 257.

<sup>13</sup> Letter from the Am. Civil Liberties Union to Julius Genachowski, Chairman, F.C.C. (March 25, 2013), available at <http://apps.fcc.gov/ecfs/document/view?id=7022134772>.

state and federal spending on corrections has quadrupled over the past 20 years, from about to about \$52 billion.<sup>14</sup> Yet, predatory phone rates discourage regular telephone contact with stable family members and others in the community.

Prisoners' friends and families often provide the only opportunity incarcerated individuals will have to re-connect with a job and a support network that can prevent them from returning to prison. Policies increasing the costs of those interactions are counterproductive toward the overall policy of reducing recidivism, which reduces future crime.<sup>15</sup>

While these high charges are common, they are by no means universal. The U.S. Bureau of Prisons and several states that have rejected these commission payments charge more reasonable rates and maintain superior levels of security. A study by the Government Accountability Office found that the Bureau of Prisons typically charged less than most state prison systems, yet continued to produce some profit for use by the prison, and also met its security objectives. To illustrate, the Bureau of Prisons charges 6 cents per minute for local calls and 23 cents per minute for long-distance calls, and generated \$34 million in profits in 2010.<sup>16</sup> *Prison Legal News'* comprehensive study highlighted rates of 10 cents per minute in Nebraska, and 5 cents per minute in New York and Minnesota.<sup>17</sup>

### III. HISTORY OF FEDERAL PRISON PHONE RATES ADVOCACY AND OVERVIEW OF THE NEW CAMPAIGN

In light of the costs' daily impact on the mental health of family members and prisoners who are suffering from separation and emotional turmoil at a time of incarceration and the dysfunctional marketplace, it is not surprising that efforts have been afoot to change this system are long-standing. Attempts to change these policies have been spread across the many federal, state and local jurisdictions with authority to change these

<sup>14</sup> Pew Center on the States, *State of Recidivism* (2011) available at [http://web.archive.org/web/20130910220321/http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2011/Pew\\_State\\_of\\_Recidivism.pdf](http://web.archive.org/web/20130910220321/http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf) (last visited Aug. 15, 2015));

<sup>15</sup> Some jurisdictions have limited capacity in local prisons and thus send their prisoners far from home, increasing reliance on telephone calls, and exacerbating the costs of family members staying in touch. See, for example, the plight of prisoners from Hawai'i housed in Oklahoma and Arizona. United Church of Christ General Synod Resolution 05-GS-59, *Religious Freedom for Native Hawaiian Prisoners*, available at <http://uccfiles.com/synod/resolutions/RELIGIOUS-FREEDOM-FOR-NATIVE-HAWAIIAN-PRISONERS.pdf> (last visited Nov. 26, 2014).

<sup>16</sup> Bureau of Prisons, *Improved Evaluations and Increased Coordination Could Improve Cell Phone Detection*, GOVERNMENT ACCOUNTABILITY OFFICE, GAO-11-893 at 12-13 (September 2011).

<sup>17</sup> John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks*, PRISON LEGAL NEWS at 16 (April 2011).

rates. The effort has bubbled up again and again in a variety of places and by a variety of actors—most assuredly because they impose such a terrible and unnecessary burden on the families of incarcerated people.

### *A. Early History of the Federal Effort*

The original effort to bring this question to the Federal Communications Commission began, like many prison phone reform efforts, with federal litigation. This lawsuit built upon the long-standing effort by CURE, the Coalition United to Reform Errants, a group founded by clergy and prisoner families to advocate for a wide range of criminal justice reforms. CURE founded the Equitable Telephone Charges (ETC) campaign in 2000.<sup>18</sup> As part of that campaign, CURE and others brought a class action lawsuit against the Corrections Corporation of America (CCA) and several prison phone companies,<sup>19</sup> alleging that the prison phone agreements between the parties violated, among other things, federal anti-trust law.<sup>20</sup> The CURE litigation was brought by the D.C. Prisoner's Rights Project in the name of Martha Wright and twenty other plaintiffs, who were forced to pay these very high rates. The plight of the first plaintiff, Martha Wright, was particularly notable. An elderly grandmother relying on social security, she was trying to stay in touch with her incarcerated grandson. This system forced Mrs. Wright to choose between medication and phone calls.<sup>21</sup>

The D.C. District Court, however, rejected the claim in an unpublished decision, sending the issues to the Federal Communications Commission because the Commission had expertise in the matter, and directing the Commission to act “with dispatch.”<sup>22</sup> The plaintiffs filed a petition at the Commission in 2003 and an amended petition in 2007.<sup>23</sup> The 2007 petition,

<sup>18</sup> See Comments of Citizens United for Rehabilitation of Errants at 2, Billed Party Preference for 0+ InterLATA Calls (No. 92-77), available at <http://apps.fcc.gov/ecfs/document/view?id=1152520001>. While CURE began the ETC campaign in 2000, its efforts at the FCC go back at least to 1993.

<sup>19</sup> While the original suit was brought against CCA, a private prison corporation, the problem of predatory prison phone rates applies to private and public facilities.

<sup>20</sup> Drew Kukorowski, *The price to call home: state-sanctioned monopoly in the prison phone industry*, PRISON POLICY INITIATIVE, Sept. 11, 2012, at 8, available at <http://www.prisonpolicy.org/phones/report.html>.

<sup>21</sup> Mrs. Wright died in January 2015, fortunately living to see her petition partially addressed by the FCC. Commissioner Mignon Clyburn, Statement on the Passing of Mrs. Martha Wright (January 20, 2015) available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-331556A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-331556A1.pdf).

<sup>22</sup> *Wright v. Corr. Corp. of Am.*, C.A. No. 00-293 (D.D.C. Aug. 22, 2001) (dismissing plaintiffs' claims under doctrine of primary jurisdiction).

<sup>23</sup> Petition for Rulemaking by Martha Wright, *et al.*, on referral from *Wright v. Corrections Corporation of America*, CA No. 00-293 (GK) (D.D.C.) at 1-2, available at <http://apps.fcc.gov/ecfs/document/view?id=6515782164>. In 2003, the petition asked the FCC to open a rulemaking that would prohibit “exclusive inmate calling service agreements at privately administered

which the FCC ultimately addressed, asked the FCC to address the matter by setting benchmark rates of 20 cents per minute for debit calling and 25 cents per minute for collect calls and no per call charges.<sup>24</sup> Because the FCC is a federal agency with jurisdiction only over interstate calls (between states), the petition focused on long-distance rates. Despite at least one serious effort to address the claims raised, almost ten years passed before the Commission addressed the petitions in 2013.<sup>25</sup>

The Wright petitions were handled by sophisticated telecommunications counsel, requesting action styled in the manner that was well-suited to action by the FCC. They focused first on competition, and second on requesting a “benchmark” rate—which is simpler for the agency to implement than a full rate case. The Wright petitioners were also able to activate support from several actors—people like Pat Nolan, a leading conservative advocate who runs the Prison Justice Fellowship;<sup>26</sup> Congressman Bobby Rush who introduced legislation to pressure the agency to act;<sup>27</sup> and Senators Leahy and Feinstein.<sup>28</sup> And yet, by early 2012, although the Obama Administration was elsewhere heavily focused on reducing recidivism and facilitating re-entry,<sup>29</sup> the FCC, led by an

prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems.”

<sup>24</sup> Martha Wright, *et al.*, Petitioners Alternative Rulemaking Proposal, CC Docket 96-128, DA 03-4027 (filed March 1, 2007), available at <http://apps.fcc.gov/ecfs/document/view?id=6518909011>.

<sup>25</sup> The FCC made a preliminary analysis of prison phone rates prior to the Wright petition, deciding at the time that it would monitor rates and act if competition proved insufficient to bring down rates. See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 17 FCC Rcd. 3248, 3252 (2002) (“Inmate Payphone NPRM”). In 2008, then-FCC Chair Kevin Martin began to take up the issues in the Wright Petition, but ultimately did not adopt an order before his term ended. See *ex parte* filings November and December 2008, CC Docket 96-128. For example, see the following *ex parte* letters: Martha Wright, *et al.* (Dec. 23, 2008); Brennan Center for Justice (Dec. 10, 2008) <http://apps.fcc.gov/ecfs/document/view?id=6520191501>; Securus Technologies, Inc. (Dec. 17, 2008) <http://apps.fcc.gov/ecfs/document/view?id=6520191363>; Pay Tel Communications, Inc. (Dec. 9, 2008) <http://apps.fcc.gov/ecfs/document/view?id=6520190472>; Ad Hoc Coalition for the Right to Communicate, (Dec. 4, 2008).

<sup>26</sup> Letter from Frank Krogh to Sec’y Dortch, FCC, CC Docket 96-128 (May 7, 2008), available at <http://apps.fcc.gov/ecfs/document/view?id=6520008973> (documenting meetings between Pat Nolan and FCC Chairman Kevin Martin).

<sup>27</sup> Family Telephone Connection Protection Act of 2005, HR 4466. The bill was reintroduced in 2007, 2009, and 2013. See <http://rush.house.gov/press-release/rush-re-introduces-hr-1403-family-telephone-connection-protection-act-2013>

<sup>28</sup> Letter from Senators Leahy and Feinstein to FCC Chairman Julius Genachowski (May 13, 2010) CC Docket 96-128, available at <http://apps.fcc.gov/ecfs/document/view;jsessionid=SDFPrmYY4BnX1kR7ktqhKQGvvhLKNzxHHnZHT3GhxnVnICtjyC!-321460796!1471562840?id=7021135073>.

<sup>29</sup> See, e.g., Press Release, Justice News, Attorney General Eric Holder Convenes 3rd Federal Reentry Council Meeting (May 10, 2012) available at <http://www.justice.gov/opa/pr/2012/May/12-ag-606.html>; See also Cynthia Caporizzo, Prisoner Reentry Programs: Ensuring a Safe and Successful Return to the Community, THE WHITE HOUSE (Nov. 30, 2011) available at <http://www.whitehouse.gov/blog/2011/11/30/prisoner-reentry-programs-ensuring-safe-and-successful->



Obama appointee, still had not opened a proceeding to seek comment on proposed rules.

### *B. Overview of the Present-Day Federal Effort*

After some activity in 2011, in early 2012 two overlapping collaborations began anew a strong push at the FCC. The first collaboration was coordinated by The Leadership Conference on Civil and Human Rights, and joined several of its over-200 members, including the NAACP, National Urban League, and National Council of La Raza, with several of the leading public interest groups active and media and telecommunications advocacy, such as Consumers Union, Free Press, and Public Knowledge.<sup>30</sup> This collaboration focused on messaging and public policy advocacy, primarily in Washington DC. The second effort was called the Campaign for Prison Phone Justice, which was jointly led by the Center for Media Justice's Media Action Grassroots Network (MAGNet), Nation Inside,<sup>31</sup> and the Human Rights Defense Center, publisher of *Prison Legal News*. The Prison Phone Justice Campaign comprised a large number of local justice organizations from around the country, building on many years of research and journalism by *Prison Legal News* in exposing predatory prison phone rates and Nation Inside's history lifting up the stories of inmates and their families as part of the Thousand Kites project.<sup>32</sup> These collaborations overlapped membership with each other but used distinct strategies and approaches, harmonizing and mutually reinforcing these through regular communication. Both of these collaborations worked alongside CURE and its *pro bono* counsel, as well as other organizations like the United Church of Christ's media justice ministry, which had already been active in the issue as well.<sup>33</sup>

return-community.

<sup>30</sup> The members of the prison phone justice collaborative were: Asian American Justice Center, Center for Media Justice, Consumers Union, Free Press, The Leadership Conference on Civil and Human Rights, NAACP, National Council of La Raza, National Hispanic Media Coalition, National Urban League, New America Foundation, National Organization for Women, and Public Knowledge. Many of these actors are members of the Leadership Conference, a coalition of national civil and human rights advocacy organizations.

<sup>31</sup> Nation Inside is a network that connects and supports people who are building a movement to systematically challenge mass incarceration in the United States. See [nationinside.org/about](http://nationinside.org/about).

<sup>32</sup> For many years Thousand Kites aired radio programs in local regions that featured messages from families to prisoners. See, e.g., <http://thousandkites.org/community-radio/>. Nation Inside is a project of Working Narratives. See <http://workingnarratives.org/project/nation-inside/>.

<sup>33</sup> The list of organizations touched by this new effort is quite large, connecting through several networks of networks. See Prison Phone Justice Campaign at <http://web.archive.org/web/20120509012737/http://www.kitescampaigns.org/campaign/who-we-are/prison-phone-justice/> and <http://www.civilrights.org/press/2012/in-joint-letter-left-right.html>.

Over the course of 18 months, the organizations used a variety of advocacy and messaging techniques to persuade the FCC to act. The first goal was to persuade the FCC to release a Notice of Proposed Rulemaking and seek public comment on a proposed rule.<sup>34</sup> Only after the agency had built a record through the comment process could it adopt a rule addressing the Wright Petition. The organizations prepared letters that demonstrated support for ending predatory rates by both progressives and conservatives, spent innumerable hours developing stories and opinion pieces to run the news media, and used their connections on Capitol Hill and the White House to engender support and mute opposition. At a rally held on a cold November day in 2012, the organizations learned that the FCC would release a proposal. The proposal was voted and released by December 2012, receiving unanimous support from all five commissioners. The next challenge was to get beyond a proposal to binding rules, largely through developing a compelling record at the FCC, and engendering political support from a variety of constituencies. CURE and its *pro bono* counsel collaborated with experts like the Human Rights Defense Center to produce detailed comments, while the Leadership Conference-led collaboration focused on increasing awareness and support among policymakers and legislators. Both MAGNet and the Leadership Conference members developed support among other advocacy organizations, such as the criminal justice sector, and continued to work the press—leading to a variety of stories and op-eds publicizing the issue.

In the spring of 2013, then-FCC Chair Julius Genachowski left his post, leaving the agency in the hands of Acting Chairwoman Mignon Clyburn. Ms. Clyburn had been vociferous in her support for agency action, but as an interim agency head, it was possible that she would not have the latitude to move forward in this docket. And yet, in August 2013, the seemingly impossible occurred—after almost 10 years, the FCC voted to cap long distance predatory prison phone rates. In addition to capping rates, the FCC went further, proposing additional rules to cap local predatory rates and asking whether it could address the particular challenges of inmates with hearing disabilities. The vote this time, unfortunately, was not unanimous: the lone Republican issued a 15-page dissent raising a variety of procedural and substantive issues at the behest of several of the prison phone companies.<sup>35</sup> Moreover, the prison phone companies proceeded to

<sup>34</sup> Under the Administrative Procedure Act, the FCC must seek notice and comment on a proposed rule published in the Federal Register before it can adopt a binding regulation. See 5 U.S.C. §553.

<sup>35</sup> See *Rates for Interstate Inmate Calling Services*, Report and Order and Further Notice of

challenge the FCC's decision in federal court, requesting a stay while the court considered the legality of the new rules.<sup>36</sup> As of this writing, the federal court has granted a partial stay of the FCC's rules, but left in place the caps of 21 cents and 25 cents per minute.<sup>37</sup>

How specifically was this new effort able to succeed when so many past efforts had not? As in described in more detail below, the 2012 effort had at least four important attributes. First, it was working in a venue most likely to produce success—the Federal Communications Commission. Second, it was able to redefine the problem in the mind of the public and policymakers. Third, by utilizing coalitions, the advocacy was able to strategically respond to the policy environment and overcome challenges that might otherwise have held it back. Fourth, it benefitted from an extraordinary leader at the Commission during a critical period. As developed below, the first two of these attributes are well-discussed in the policy and advocacy literature. The second two attributes illustrate the limitations of the existing literature to capture the dynamic field of creating policy change in the U.S. Finally, using a coalition combining grassroots and federal policy entrepreneurs led not only to policy success, but also to a more ethically sound exercise in legal representation and community organizing.

#### IV. EVALUATING THE CAMPAIGN AS A CASE-STUDY TO TEST THE STRENGTH OF THE LITERATURE ON POLICY CHANGE

##### A. Literature on Policy Change

In many ways, the new 2012 effort was a classic implementation of Baumgartner and Jones' groundbreaking work describing policy change as

Proposed Rulemaking, WC Docket No. 12-375, 28 FCC Rcd. 14107 (2013); *See also, e.g.*, letter from Glenn B. Mannishin, Counsel, Troutman Sanders LLP, to Marlene Dortch, Sec'y, F.C.C., Docket No. 12-375 (July 26, 2013) *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017460680>; Marcus W. Trathen, Counsel, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Inc., to Marlene Dortch, Sec'y, F.C.C., Docket No. 12-375 (July 31, 2013) *available at* <http://apps.fcc.gov/ecfs/document/view?id=7520934691>; Letter from Danielle Burt, Counsel, Bingham McCutchen LLP, to Marlene Dortch, Sec'y, F.C.C., Docket No. 12-375 (July 30, 2013) *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017461059>; Letter from Melissa E. Newman, Vice President, Federal Policy and Regulatory Affairs, to Marlene Dortch, Sec'y, F.C.C., (August 1, 2013) *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017461498> (describing meetings with FCC staff and Commissioner Pai's aide raising questions about *de facto* rate-of-return regulation and lower rates for jails).

<sup>36</sup> *Securus Technologies, Inc. v. Federal Communications Commission*, D.C. Cir. Docket 13-1280 (filed Nov. 25, 2013).

<sup>37</sup> *See supra* note 5. Technically, the 2013 FCC order adopted interim rates pending a data collection and further consideration. The current litigation is being held in abeyance while the FCC addresses, *inter alia*, long-term long distance rates and local rates. *Id.*

a punctuated equilibrium.<sup>38</sup> Baumgartner & Jones offer a useful theoretical description of the process of how non-profits change public policy in modern times, specifically as it applies to this case. In particular, Baumgartner & Jones emphasize the importance of venue and problem definition as key elements of engendering a period of rapid change. The new collaborations were able to implement two strategies described by Baumgartner and Jones: 1) they increased their technical capacity in the legal venue most likely to produce change—the FCC and 2) added a layer of political dialogue which brought the broader moral issues surrounding the policy question into play in that narrow FCC venue. Vaughan and Arsneault’s useful summary of the literature concisely translates it: “a change in venue . . . coupled with a change in the perception of the policy problem.”<sup>39</sup> Vaughan and Arsneault explain that public policy advocacy combines images, empirical analysis, emotive appeals, symbols and metaphors to emphasize certain considerations, which influence public opinion and policymakers. Key to the outcome, they emphasize, is definition of the problem, and, the decision-making venue.<sup>40</sup> “[H]ow a problem is perceived dictates how it will be addressed.”<sup>41</sup> Policy entrepreneurs undertake significant work to ensure that the definition of the problem and the venue for decision-making are best-suited for their desired result.<sup>42</sup> They describe policy entrepreneurs who utilize a range of skills and tactics to affect policy change in the face of “economic interests that are part of iron triangles of dominance in their respective policy areas.”<sup>43</sup> “Policy entrepreneurs are basically change agents.”<sup>44</sup>

This description is a particularly useful tool for understanding the dynamics involved in prison phone advocacy. As explained in detail below, the FCC was the logical venue for achieving change. But, in order to succeed, the problem of prison phone rates needed to be redefined in a way that could bring to bear voices and a moral dynamic that are not typically

<sup>38</sup> FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (Univ. of Chicago Press) (1st ed., 1993).

<sup>39</sup> Shannon K. Vaughan & Shelly Arsneault, *Not-for-Profit Advocacy: Challenging Policy Images and Pursuing Policy Change*, 25 REV. OF POLICY RESEARCH 411, 411-28 (2008).

<sup>40</sup> *Id.*

<sup>41</sup> See Vaughan & Arsneault at 412, *supra* note 38. The importance of framing, particularly in policy debates involving race, has been thoughtfully explored and utilized by the Praxis Project, Berkeley Media Studies Group and many others. See, for example, *Meta Messaging Framing Your Case and Reinforcing Your Allies* (January 2005), available at <http://www.thepraxisproject.org/sites/default/files/Miles/201201/Meta%20Messaging.pdf>

<sup>42</sup> Vaughan & Arsneault, *supra* note 38, at 413.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

part of FCC deliberations.

### B. Venue

Efforts to address predatory phone rates have been percolating for many years in many venues. One of the complexities of inmate phone rates is the wide range of government and non-governmental entities that can influence the price of a call. In some cases prison and jail administrators have the latitude to make the decision.<sup>45</sup> In other cases, the prison is directed by the state legislature to raise a particular amount of revenue via the telecommunications system.<sup>46</sup> State telephone regulators also have general authority over the so-call “intra-state” or local and “local long distance” telephone rates throughout the state, while the Federal Communications Commission retains jurisdiction over interstate telephone rates.<sup>47</sup> To understand why the FCC was a good venue, it is important to understand why prior efforts in other venues did not succeed.

#### 1. Low Level of Success in Court and State Legislatures

Previous literature has documented the difficulty in obtaining relief via litigation or state legislation.<sup>48</sup> In her comprehensive 2004 article, Severin reviews a wide range of attempts to obtain relief for inmates and families through litigation. She performed an extensive review of the various doctrines that have been used—or could be used—to persuade courts to

<sup>45</sup> Nebraska is one such example. Interview by the author with Harold Clarke, former prison administrator of Nebraska; *see also* The Campaign to Promote Equitable Telephone Charges, run by CURE for many years. <http://web.archive.org/web/20140626143727/http://www.etccampaign.com/>; Ben Iddings, Note, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?* 8 NC JL TECH 159 at 177 (2006).

<sup>46</sup> Transcript of Reforming ICS Rates Workshop at 54, 92, 120 (July 9, 2014) (Hon. Patrick Hope, VA House of Delegates, stating that approximately \$3.5 million is deposited into Virginia’s general fund, which finances, among other things, roads, transportation, education, and health care) available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-328596A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-328596A1.pdf).

<sup>47</sup> 47 U.S.C. § 152 (Federal act applies to all interstate communication and no jurisdiction over intrastate communication service).

<sup>48</sup> Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 FED. COMM. L.J. 391, 392 (2002) (noting popular press accounts of excessive prison phone rates and anti-consumer practices and demonstrating that prison-phone company contracts are economically inefficient); Madeleine Severin, *Is There a Winning Argument Against Excessive Rates For Collect Calls From Prisoners?*, 25 CARDOZO L. REV. 1469, 1469 (2004) (comprehensive review of existing state and federal litigation and the doctrines used to block prisoner suits to obtain relief for prison phone rates); Nicholas H. Weil, *Dialing While Incarcerated: Calling for Uniformity Among Prison Telephone Regulations*, 19 WASH. U. J.L. & POL’Y 427, 429 (2005) (reviewing circuit split on whether inmates have a First Amendment right to use the telephone and arguing that they do); Ben Iddings, Note, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 NC JL Tech 159 at 177-89 (2006) (reviewing a variety of outcomes under state legislative efforts and concluding that federal agency advocacy is a better venue for success).

dismiss suits filed on behalf of inmates and their families. Several of these doctrines, such as the filed rate doctrine and the traditional immunity from anti-trust interference that are part of the highly-regulated landscape of telephone rates, are strong barriers for sophisticated telecommunications litigants, let alone the counsel that typically represent those in the criminal justice system.<sup>49</sup> In fact, the decision that sent Mrs. Wright's original claim was pursuant to one of those doctrines.<sup>50</sup> From the perspective of an experienced telecommunications lawyer, Severin is correct that it is unlikely that inmates or their families are likely to obtain broad, prospective relief through litigation.

State legislatures could be a viable venue for relief. In particular, while states have limited jurisdiction over telephone regulation,<sup>51</sup> state legislatures do govern the operations of prisons in their states. If states refused to accept commission revenue based on telephone call charges, the problem would be halted at its source. One natural limitation of state legislation as a tool, however, is that advocates must mobilize in every state to obtain relief.

Despite the potential of state legislation, Iddings' analysis reviewed a variety of state telephone rates and legislation and concluded that legislation is not reliably effective. States with ostensibly aggressive legislation have some of the highest prison phone rates, while states with no legislation have some of the lowest rates. For example, he contrasted New Hampshire's low rates, which are not governed by statute, with New Mexico's much higher rates that are governed by statute.<sup>52</sup> He concluded that it is largely the mind-set of the prison or jail administrators that govern rates.<sup>53</sup> He cites examples where state legislators were able to use public

<sup>49</sup> Generally speaking, in the area of utility regulation (which arose from the practice of state-sponsored monopoly service provision), the law grants a utility provider a fair amount of immunity from generally applicable laws, in exchange for supposedly more intrusive and comprehensive regulatory structure. In the event of agency capture and with the trend toward less regulation, a company faces neither regulatory constraints nor general legal constraints. When there are also no competitive constraints, as in the prison phone market, the situation leaves few tools for redress. *See generally*, Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 427 (1990).

<sup>50</sup> *Wright v. Corr. Corp. of Am.*, C.A. No. 00-293 (D.D.C. Aug. 22, 2001) (dismissing plaintiffs' claims under doctrine of primary jurisdiction).

<sup>51</sup> States have authority only over calls that occur within their own borders—for the most part local calls or local long-distance within particularly large states. Most states regulate telephone rates via a state regulatory commission, a state-level analog to the FCC. *See* 47 USC § 153(48).

<sup>52</sup> Iddings, *supra* note 44, at 178 (noting New Mexico's law providing that prison telephone contracts shall be awarded to the lowest bidder "that meets the correctional facility's or jail's technical and functional requirements for services," and prohibiting commissions "based upon amounts billed by the telecommunications provider for telephone calls made by inmates"); *see also* New Mexico Legislation HB 133, available at <http://www.nmlegis.gov/sessions/01%20Regular/FinalVersions/HB0133FV.html>.

<sup>53</sup> Iddings, at 177-89 (2006).

pressure to bring down rates when they could not influence state legislation or budget policies.<sup>54</sup> Conversely, he points to Washington state legislation that supposedly limits rates but appears to do nothing to ease Washington's status as imposing some of the highest rates in the nation.<sup>55</sup> Unfortunately, Iddings' findings in 2006 seem to continue nine years later. For example, California recently completed implementation of a state legislative directive to improve prison phone rates, and yet it appears the state prison system is still supporting its operations through high rates.<sup>56</sup> In addition, while Michigan was long considered a state that had successfully reformed its rates through legislation, recent efforts by the state department of corrections have increased rates again using a legal loophole.<sup>57</sup> Because of the continued pressure to find revenue for prisons, Iddings correctly notes that political pressure on prison administrators is critical for continued success.<sup>58</sup>

## 2. Federal Communications Commission

In contrast to states, the Federal Communications Commission has jurisdiction over interstate telephone rates—telephone calls that cross state lines, most often, what we used to call “long distance” calls.<sup>59</sup> Its authorizing legislation directs it to regulate in order “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities *at reasonable charges*. . . .”<sup>60</sup> The Federal Communications Commission is an

<sup>54</sup> *Id.* at 180 (describing efforts of Missouri legislators).

<sup>55</sup> *Id.* at 184-85.

<sup>56</sup> Letter from Benjamin T. Rice, General Counsel, California Department of Corrections and Rehabilitation to Marlene Dortch, Sec’y, FCC, WC Docket No. 12-375 (describing high rates and need for funds to subsidize other prison functions) (March 25, 2013) *available at* <http://apps.fcc.gov/ecfs/document/view?id=7022134811>.

<sup>57</sup> Marcus Wright, *Prisoner phone rates increased*, NATIONINSIDE.COM (July 10, 2011) (stating that starting in July 2011, local calls from prison went from 12 cents per minute to 20 cents per minute and interstate calls went from 15 cents per minute to 23 cents per minute) *available at* <http://nationinside.org/campaign/prison-phone-justice/press/prisoner-phone-rates-increased> (last visited Nov. 26, 2014); Diane Bukowski, *Michigan Prisoner and Families Betrayed by Phone Scheme*, Voice of Detroit (July 30, 2011) (stating that prison officials cited the need for equipment as the reason for the raise in prison phone rates, an element for which Michigan law permits recovery) *available at* <http://voiceofdetroit.net/2011/07/31/michigan-prisoners-and-families-betrayed-by-phone-scheme/> (last visited Nov. 26, 2014).

<sup>58</sup> *See infra* section VII for a discussion of the importance of inmates and their supporters obtaining mechanisms to impose political pressure.

<sup>59</sup> 47 U.S.C. § 152 (2014).

<sup>60</sup> 47 U.S.C. § 151 (emphasis added). Each state has a regulatory commission that regulates telephone rates within the state borders; including local calls and long distance calls within the states.

independent agency—this means, in practical terms, it is not technically part of the Administration. There are four commissioners and one chair, who is designated by the President (and thus traditionally of the same party).<sup>61</sup> Congress oversees the FCC, via the Senate Committee on Commerce, Science and Transportation, and the House Energy & Commerce Committee. These congressional committees play an important role in influencing the FCC, via letters, hearings and other means.<sup>62</sup>

The literature captures well the challenges of federal agency venues as applied to this case study. In particular, telephone companies and the Federal Communications Commission are often considered to be emblematic of a captured agency or “iron triangle” of a mutually reinforcing regulatory structure. Telephone companies (and media companies) are uniquely concerned with the operations and rules of the Federal Communications Commission, and the impact on most individuals is fairly diffuse, thus making the FCC largely the provenance of the large companies.<sup>63</sup> In addition, as demonstrated by Severin, because of this iron triangle, the law is set up to favor companies and favor referral of telecommunications issues to captured agencies. To succeed at the FCC, parties require significant technical expertise in the particular law and culture of FCC decision-making. This type of expertise is particularly outside of the knowledge base of the aggrieved parties in predatory prison phone rates and the non-profits, intermediaries and counsel who assist them. Inmates and detainees unfortunately do not wield much political power in the best of circumstances, but at an agency like the FCC they were, in some ways, more than invisible.

The jurisdictional strengths of the FCC, combined with the strategy and expertise of the advocates, outweighed these challenges. The FCC could have immediate, nation-wide impact if it chose to act—lowering all long distance, interstate rates in one fell swoop. The FCC has direct regulatory authority over all telephone service providers. The FCC has more technical competence with respect to telephone rates than any other federal agency or the courts. In fact, it had issued previous decisions recognizing that payments to prisons (or any facility that hosts pay phones) are not part of

*See* 47 USC § 153 (48).

<sup>61</sup> The FCC has particularly stringent sunshine rules, and a robust system of lobbying and disclosures. *See, e.g., Rulemaking Process at the F.C.C.*, FCC.GOV, <http://fcc.gov/encyclopedia/rulemaking-process-fcc> (last visited Nov. 24, 2014).

<sup>62</sup> PHILIP M. NAPOLI, FOUNDATIONS OF COMMUNICATIONS POLICY 240-41 (Hampton Press, 2001).

<sup>63</sup> *Id.* at 263.



the legitimate cost of providing telephone service.<sup>64</sup> Moreover, an FCC decision would create political pressure and offer a roadmap for other state or local decision-makers who might consider the issue. And while traditionally the FCC shares its jurisdiction over telephone rates with states, the particular statutory provisions referencing prison rates mean that the FCC could assert authority over intrastate rates if states failed to act.

CURE's use of expert telecommunications counsel in the original Wright Petitions meant that other barriers inside the FCC were easier to overcome. For example, in the last two decades, price regulation has fallen out of favor in telecommunications regulation. At one time, both the FCC and state commissions regulated rates through review of tariffs and complex cost formulas and accounting, but now most regulators rely on the constraints of competition to keep costs down.<sup>65</sup> Originally, during the Bush Administration, CURE asked the FCC to employ competition to bring down telephone rates.<sup>66</sup> This effort, while astute politically, did not succeed. Inmate calling services, as described above, are uniquely immune to the pressures of competition;<sup>67</sup> in addition the prison phone industry argued that security would not permit competition.<sup>68</sup> Once competition proved an unlikely solution, CURE asked the FCC to adopt a benchmark rate. Because the technical expertise of the agency has moved away from regulatory rate-making into other arenas, benchmark rates have become a more streamlined and feasible manner to address rates that violate statutory constraints. These technically appropriate and realistic requests within the world of telecommunications regulation made an important difference in enabling the FCC to ultimately take action, in contrast with the law suits that were blocked by the regulatory environment.

While the FCC is an expert on telecommunications regulation, which was critical given the legal backdrop, it was not an expert on criminal justice matters. Even though lower telephone rates had a strong connection to reducing recidivism—a major emphasis of the Obama Administration—

<sup>64</sup> Rates for Interstate Inmate Calling Services, 28 FCC Rcd. 14107 at 16 (Sept. 26, 2013).

<sup>65</sup> See generally, 1996 Telecommunications Act, 47 USC 160, Section 10, which allows the FCC to “forbear” from regulation if forbearance will promote competition; see also Order, *Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd. 3271 (1995). These efforts draw on the historic DOJ breakup of AT&T in the 1980s, which successfully introduced competition to long distance calling. For a detailed look at the intersection of pro-competition policies and its impact on prison phone rates, see Steven J. Jackson, *Mapping the Prison Telephone Industry* in PRISON PROFITEERS (Tara Herival, Paul Wright eds., 2007).

<sup>66</sup> Martha Wright, *et al.*, CC Docket 96-128, Petition for Rulemaking, (Oct. 31 2003), available at <http://apps.fcc.gov/ecfs/document/view?id=6515782164>.

<sup>67</sup> See *supra* part II.

<sup>68</sup> See, e.g., Comments of T-Netix, CC Docket 96-128 (filed Marc h10, 2004), available at <http://apps.fcc.gov/ecfs/document/view?id=6516082433>.

FCC decision-makers lacked competence on those issues. Thus, an important role of the Leadership Conference was to connect its members with strong competence and networks in Washington DC circles on criminal justice to the FCC. The Leadership Conference presented information in fora like the Justice Roundtable, which is a sophisticated and well-established network of organizations working to reform the criminal justice system.<sup>69</sup> The Leadership Conference developed materials that facilitated participation by those groups in the FCC process.<sup>70</sup> In addition, because of the outreach, several groups filed their own analysis.<sup>71</sup> These groups could explain the larger set of issues surrounding reentry and recidivism as it links to inmate support networks and public safety. These efforts helped to remediate one drawback in the FCC as a venue, and also were part of the overriding effort to change the perception of the problem.

### *C. Changing the Perception of the Problem*

The literature also gives great weight to not only selecting an appropriate venue, but also to “changing the perception of the problem.” In this case, the policy solution, similarly, relied not only on a campaign inside the FCC where there was legal likelihood of success, but also on setting the FCC debate within a broader political dialogue about the impact of these rates in the halls of justice and, most important, on families and communities. The importance of using a justice frame was twofold. First, because the FCC exists within the federal policymaking world in Washington DC, it is not immune from political pressure. Public support, particularly bi-partisan political support, would be essential for the FCC to act. Second, if the debate was conducted within the dry confines of the merits of ratemaking, it would be difficult to develop sufficient attention and action at the FCC. The change-seeking coalitions needed the urgency and moral authority of regular everyday people who were being bled dry financially for no reason other than their desire to keep connected with loved ones who needed it most.

<sup>69</sup> See Justice Roundtable informational flyer, available at [http://opensocietypolicycenter.org/wp-content/uploads/OSI\\_JUSTICERNDTBL-PF2.pdf](http://opensocietypolicycenter.org/wp-content/uploads/OSI_JUSTICERNDTBL-PF2.pdf).

<sup>70</sup> Letter from American Civil Liberties Union, *et al.* to Chairman Genachowski, *et al.* Docket 13-375 (filed March 25, 2013) available at <http://apps.fcc.gov/ecfs/document/view?id=7022134772>.

<sup>71</sup> See, e.g., Comments of the Vera Institute of Justice, Docket 12-375 (filed March 14, 2013), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2012/db0924/DOC-316432A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0924/DOC-316432A1.pdf).17; American Immigration Lawyers Association (filed March 25, 2013) available at <http://apps.fcc.gov/ecfs/document/view?id=7022134796>.

### 1. Bi-partisan and High-Level Political Support

The first part of issue-redefinition was to show broad-based support for change. Because the FCC was created by Congress and is accountable to it, the partisan political environment is an important backdrop to any decision it might make. In particular, for the Democratic Obama FCC, the Republican House leadership in the Energy and Commerce Committee could make decisions very difficult. Appropriations riders, for example, can be a vehicle to stop FCC action on particular initiatives. But it is not just ending opposition that is key to political action: support is also critical. With, at a minimum, supporters and opponents, political actors can debate but balance each other and allow the Commission to do its job with minimum interference. The Leadership Conference collaboration was particularly instrumental in developing widespread understanding and support in Congress and in the Administration. As it began its advocacy, it developed a letter bringing together conservative leaders and progressive leaders—featuring such prominent advocates such as David Keene, president of the National Rifle Association, and the NAACP.<sup>72</sup> Conservatives and progressives could agree that the market was broken, that our communities would be safer if inmates could reintegrate into society more successfully, and lamented the huge costs of the U.S. sky-high rates of incarceration.

Afterward, through a series of meetings and advocacy in a variety of settings, the collaboration's members briefed a large number of Senators and Representatives and urged them to support the FCC publicly if the need arose. Similarly, the Leadership Conference was able to fold the issue into criminal justice briefings with extremely high-level Administration officials in the Department of Justice and the White House. In Congress, the Congressional Black Caucus took a particular role in becoming champions, urged on by the civil rights community, and building on the prior work of Congressman Rush.<sup>73</sup> These contacts meant that the FCC was on firm political footing once it built the necessary evidentiary record to take action.

<sup>72</sup> See Letter to Chairman Genachowski from The Leadership Conference on Civil and Human Rights, *et al.*, Docket 96-128 (filed May 18, 2012) available at <http://apps.fcc.gov/ecfs/document/view?id=7021918702>.

<sup>73</sup> Sabrina Eaton, Congressional Black Caucus Chair Marcia Fudge seeks fair phone call rates for prison inmates, *Cleveland Plain Dealer* (April 24, 2013) available at [http://www.cleveland.com/open/index.ssf/2013/04/congressional\\_black\\_caucus\\_cha.html](http://www.cleveland.com/open/index.ssf/2013/04/congressional_black_caucus_cha.html).

## 2. Families and their Plight at the Center

A critical part of the problem definition was continually moving the focus of the FCC and other influential thought-leaders toward the plight of the families put in the untenable position of choosing to pay high fees to remain in touch or to use scarce funds for other urgent needs, such as food, housing, or legal assistance.<sup>74</sup> Building on previous successful efforts in campaigns like the one in New York State,<sup>75</sup> one strategy was to focus on days when most people were in touch with their families—like Mother’s Day and Father’s Day. Two years in a row, the Prison Phone Justice campaign held action days on Mother’s Day.<sup>76</sup> The United Church of Christ and the United Methodists held a Kids Can’t Call Dads campaign in June 2012.<sup>77</sup> The voices of the religious community (from both conservative evangelical and progressive mainline protestant) highlighted the immorality of the practice.<sup>78</sup>

To reframe the issue in the media, the Leadership Conference-led collaborative developed several new frames, such as the term “predatory” prison phone rates and the idea that it costs less to call Singapore on your cell phone than it is to call many people in prison. These concepts appeared over and over again in the press.<sup>79</sup> Experts in image definition, the Prison Phone Justice campaign was able to build on these concepts. Through their networks they were able to stay connected to the individuals who were most directly impacted and frame the message. This work enabled them to lift up stories of individuals in the press whose lives were severely impacted. Early work from the Leadership Conference led to op-eds in major publications like the *New York Times* in favor of action in the middle of 2012.<sup>80</sup> The press coverage of the prison phone issue started slowly and

<sup>74</sup> Jamilah King, *The Secret Weapon in the Prison Phone Rate Fight? Families*, COLOR LINES NEWS FOR ACTION (August 12, 2013) available at [http://colorlines.com/archives/2013/08/families\\_the\\_secret\\_weapons\\_in\\_prison\\_phone\\_fight.html](http://colorlines.com/archives/2013/08/families_the_secret_weapons_in_prison_phone_fight.html).

<sup>75</sup> See *The New York Campaign for Telephone Justice*, CCRJUSTICE.ORG, <http://ccrjustice.org/get-involved/action/new-york-campaign-telephone-justice> (last visited Nov. 26, 2014).

<sup>76</sup> See *Prison Phone Justice Campaign Roundup*, THE CTR. FOR MEDIA JUSTICE BLOG (May 17, 2012), <http://centerformediajustice.org/2012/05/17/prison-phone-justice-campaign-roundup/>, and <http://nationinside.org/campaign/prison-phone-justice/posts/sign-this-mothers-day-letter-to-the-fcc/>

<sup>77</sup> See *Kids Can’t Call Dads — Stop Predatory Prison Phone Rates!*, available at SECURE3.CONVIO.NET, <https://secure3.convio.net/ucc/site/Advocacy?alertId=969&pg=makeACall>.

<sup>78</sup> See *Prison Phone Costs: A Moral Issue*, UCCMEDIAJUSTICE.ORG, [www.uccmediajustice.org/prisonphones](http://www.uccmediajustice.org/prisonphones) (last visited Nov. 16, 2014).

<sup>79</sup> See Kenneth Mallory, *MMTC Honors Leaders in the Fight to Lower Prison Phone Rates at BBSJ Summit*, BROADBAND SOCIAL JUSTICE, (Jan. 20, 2013) available at <http://broadbandandsocialjustice.org/2013/01/mmtc-honors-leaders-in-the-fight-to-lower-prison-phone-rates-at-bbsj-summit/> and video at <https://vimeo.com/58350843> (remarks of Cheryl Leanza at 29:00).

<sup>80</sup> See *Costly Phone Calls for Inmates*, N.Y. TIMES, Sept. 23, 2012,

began to rapidly snowball. During key parts of the campaign, new stories featuring the injustice were coming out every few weeks.<sup>81</sup>

The Campaign for Prison Phone Justice played a particularly important role in bringing the power of media to its aid. When Hollywood helped to promote the injustice of predatory phone rates by including a campaign on the issue as part of the major motion picture release of *Middle of Nowhere*, the campaign screened the film at the Federal Communications Commission.<sup>82</sup> The film screening and question and answer period at the FCC featured plaintiffs from the Wright petition, who for the first time, were able to speak to FCC Commissioners in person. In addition, the high profile of the film, whose director Ava DuVernay who was the first African American woman to win best director at Sundance for the film, raised the profile of prison phone rates to many people who would otherwise never hear about regulatory policy.<sup>83</sup>

The Prison Phone Justice campaign, because it was rooted in community organizing and community empowerment focused heavily on bringing the stories of individuals who were harmed by predatory rates. For example, through its Strong Families, Safe Communities Rally in November 2012, the Campaign brought 75 people to the front lawn of the FCC.<sup>84</sup> At the rally, the Campaign delivered 40,000 online petition signatures from Sum of Us, Participant Media and Campaign for Prison Phone Justice. Speaking at the rally were individuals who could hold up their long phone bills and talk about their challenges. Most impressive was the Campaign's ability to influence the record at the FCC. The campaign's work produced over 1,700 handwritten requests from prisoners themselves, which were submitted into the docket.<sup>85</sup> In all of its press outreach, the Prison Phone Justice

<http://www.nytimes.com/2012/09/24/opinion/costly-phone-calls-for-state-inmates.html>; see also, *A Needless Charge for Prison Families*, N.Y. TIMES, November 27, 2012, [http://www.nytimes.com/2012/11/28/opinion/a-needless-charge-for-prison-families.html?\\_r=2&](http://www.nytimes.com/2012/11/28/opinion/a-needless-charge-for-prison-families.html?_r=2&).

<sup>81</sup> For a selection of the press coverage, see <http://nationinside.org/campaign/prison-phone-justice/press/>.

<sup>82</sup> The film's production company, Participant Media, routinely associated political action with its films.

<sup>83</sup> See, e.g., Huffington Post interview with Ava DuVernay, <http://live.huffingtonpost.com/r/segment/middle-of-nowhere/50648e3d78c90a433d000032>.

<sup>84</sup> See Phone Justice, Prison Legal News, available at [https://www.prisonlegalnews.org/%28S%28enolz145jfl0vf45rawh5m31%29%29/7096\\_displayListServ.aspx](https://www.prisonlegalnews.org/%28S%28enolz145jfl0vf45rawh5m31%29%29/7096_displayListServ.aspx); see also "Strong Families, Safe Communities" Sends Clear Message for Phone Justice <http://nationinside.org/campaign/prison-phone-justice/posts/mel-motel-strong-families-safe-communities-sends-clear-message-for-phone-ju/>.

<sup>85</sup> Malkia Cyril, executive director of the Center for Media Justice, *FCC chairman puts end to 10 years of sky-high prison phone rates*, THE HILL (August 15, 2013) available at <http://thehill.com/blogs/congress-blog/civil-rights/317101-fcc-chairman-puts-end-to-10-years-of-sky-high-prison-phone-rates>.

Campaign featured the stories of regular people who had faced these high charges.

These two efforts worked in tandem. The gravitas of organizations such as the Leadership Conference, Rev. Jesse L. Jackson, Sr.,<sup>86</sup> and the voice of the *New York Times* undergirded the dynamic efforts of the Prison Phone Justice Campaign's grassroots coalition. The real stories of people who were harmed by the rates were brought to life the statements of Washington DC advocates. A Washington lobbyist is only as powerful as the people she represents. While a corporate lobbyist can rely on the power of his employer, a public interest lobbyist requires the moral authority of thousands of people who are suffering and deserve relief. The two efforts worked together to effectively redefine the problem, giving weight, political clout, and humanizing the victims. It is certainly possible that either collaboration could have been successful on its own, but it is highly unlikely.

#### *D. Value of a Coalition in Policy Advocacy*

While an important element of the success of these collaborations was the combination of technical expertise with community organizing and lobbying savvy, executing such collaboration is not easy. This kind of collaboration takes a particularly thoughtful set of actions to bring two very different communities together. While it is theoretically possible to bring all of those skills together in a single organization, coalition work is particularly well-suited to this type of effort. This strength of coalitions is consistent with the findings articulated by Nelson and Yackee, who did a quantitative study of the merits of coalition lobbying in the federal regulatory context and concluded that "coalition lobbying holds more influence over policy when a clear signal of support or opposition is sent to agency officials and when larger, expanded coalitions are present."<sup>87</sup> In particular, Nelson & Yackee theorize that consensus is important because coalition members send a consistent message to policy makers. They theorize that the size and diversity of a coalition is important because a

<sup>86</sup> See Rev. Jesse L. Jackson Sr., 30<sup>th</sup> Annual Everett C. Parker Lecture (September 25, 2012), video available at [http://www.youtube.com/watch?v=-HBdDbE\\_CMw](http://www.youtube.com/watch?v=-HBdDbE_CMw); see also Letter from George Korn to Marlene Dortch, Sec'y, Federal Communications Commission, WC Docket No. 12-375 (Dec. 10, 2012) (describing Jesse Jackson meetings at the FCC) available at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/121312rainbow2.pdf>.

<sup>87</sup> David Nelson and Susan Webb Yackee, *Lobbying Coalitions and Government Policy Change: An Analysis of Federal Agency Rulemaking*, THE JOURNAL OF POLITICS, Vol. 74, No. 2, April 2012, p. 339-353 at 340.

variety of participants are important to success. Specifically, they note that coalition leaders will often recruit participants strategically, when the benefit of a new participant exceeds the cost of the additional coordination and resources required to add more coalition members.<sup>88</sup> In the case of the prison phone coalition efforts, specific groups—and staff of each group—brought different strengths.

As described above, because the FCC was more likely to act if it had bipartisan support, therefore the coalition recruited conservative leaders to join their effort.<sup>89</sup> Large, traditional civil rights organizations carried organizational weight in certain contexts—such as in obtaining meetings with certain Congressional offices or with the FCC Chair. It is likely they also signaled to journalists and editorial boards considering this question that it was a “safe” topic to cover or upon which to take a position. The coalition successfully obtained support letters from groups representing criminal justice advocates at the local and national level.<sup>90</sup> The national coalition of state regulators adopted a resolution, providing support from one of the key players in FCC rulemakings on telephone rates.<sup>91</sup> Other organizations, such as MAGNet’s network of local grassroots organizations, were able to tap into particular constituencies, such as immigrant communities. MAGNet was also able to use its direct connections with community members to identify and elevate stories. The United Church of Christ developed trust relationships with some of the groups who had been working for many years on the issue, and provide a conduit for discussions on policy matters among the organizations. MAGNet also strategically developed relationships with organizations with expertise, for example law clinics that could represent individual mini-coalitions within the broader group.

Each of these collaborators or coalition partners were sought out because

<sup>88</sup> *Id.*

<sup>89</sup> See Letter from The Leadership Conference on Civil and Human Rights *et al.*, to Julius Genachowski, F.C.C. Chairman (May 18, 2012), available at <http://apps.fcc.gov/ecfs/document/view?id=7021918702> (listing leaders that have joined the coalition in their effort).

<sup>90</sup> *Advocates Urge Federal Communications Commission to Take “Community-Based” Approach to Reduce Cost of All Inmate Communication*, MAG-NET, <http://www.pitchengine.com/pitches/a02bf680-6798-4520-811f-9423fb6888ba> (including quotes from criminal justice national organizations) (last visited Nov. 24, 2014).

<sup>91</sup> Amalia Deloney, *Victory! NARUC Calls on FCC and States to Take Action on the Cost of Prison Phone Calls*, THE CENTER FOR MEDIA JUSTICE BLOG (Nov. 14, 2012), <http://centerformediajustice.org/2012/11/victory-naruc-calls-on-fcc-and-states-to-take-action-on-the-cost-of-prison-phone-calls/>. While state regulators might not ordinarily considered a powerful force, in FCC debates opposition from states can sometimes be a stumbling block for proposed rules because of the strong role allocated to states in the Communications Act.



of a particular role they might play. In some cases, a partner was pursued for political strategy, in others because a demographic group would be heavily impacted by the decision and community organizers felt it was important to gain their participation. In all cases, each additional supporter advanced the goal of developing a broad groundswell of support for action. It is important to note that not all collaborators became part of a coalition. Some individuals and organizations signed a letter, others developed networks of activists and in turn recruited more supporters themselves.<sup>92</sup>

### *E. Importance of Political Leadership*

Although much of policy advocacy can be strategically developed and planned, another component can be more idiosyncratic. One of the most important elements of the successful outcome, and in particular the timing of that outcome in this case, was the leader at the Federal Communications Commission. Mignon Clyburn, a commissioner and Acting Chair played a critical role. From early in the effort, Ms. Clyburn took a leading role, noting the importance of the FCC addressing the long-pending petition. Her role demonstrates the importance of diversity in decision-makers, and also the role of serendipity in even the most well-orchestrated campaign.

When she was nominated by President Obama in 2009, Ms. Clyburn brought an interesting perspective to the agency. She was elected to the South Carolina Public Service Commission in 1998, won reelection five times, and served as the Chair of that body from 2002 to 2004, despite being one of only two Democrats on the panel. In addition, she ran her family's weekly local newspaper the *Coastal Times* for 14 years, and is the daughter of Rep. James Clyburn, minority whip in the U.S House. She was involved in bringing down predatory prison phone rates in South Carolina.<sup>93</sup>

Most relevant to this discussion, Clyburn quickly made a reputation built on her civil rights bona fides for making the public interest one of her top priorities. She campaigned strongly for open internet policies, for data to support civil rights initiatives, and for limits on media consolidation. These efforts quickly made her a trusted policy-maker for many of the groups

<sup>92</sup> *Campaign for Prison Phone Justice*, NATION INSIDE, <http://nationinside.org/campaign/prison-phone-justice/who-we-are/> (detailing the list of supporters on the prison phone justice campaign) (last visited Nov. 24, 2014).

<sup>93</sup> Justin Moyer, *After almost a decade, FCC has yet to rule on high cost of prison phone calls*, THE WASHINGTON POST (Dec. 2, 2012), [http://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3\\_story.html](http://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3_story.html)



involved in FCC advocacy. She also realized the importance of an advocate inside the agency for an issue like prison phone rates. With so much of the agency's agenda driven by the largely corporate world of media and communications policy, she knew that it would take continual pushing from within to move ahead policy. While she was a commissioner she gave speeches and urged her former state colleagues to adopt a resolution in support of reform.<sup>94</sup> She raised the issue with then-Chairman Genachowski.<sup>95</sup> She dedicated a top aide to work tirelessly from within the agency.

Critical to the agency's ultimate action in August 2013, however, was Clyburn's ascension to Acting Chair in May 2013, the first woman to head the agency. Chairman Genachowski left, and while President Obama's nominee was awaiting confirmation, Clyburn took the reins, impressing the communications bar with her skill in resolving several long-pending issues.<sup>96</sup> She also directed the agency staff to work to complete their long-delayed work in the prison phone docket. As discussed below, Clyburn's leadership and status as a trusted figure made the advocacy and coalition successful despite some of the collaborations' limitations. The fact that the Commission was poised to act while she was Chair was partially the result of planning (advocates knew she might take on that role during the relevant time), but also was in part simple good fortune.

## V. ETHICAL CONSIDERATIONS FOR COMMUNITY EMPOWERMENT

The collaborations, thus, were well suited to achieve policy change through its tactics and its composition. In addition to creating a successful policy change campaign, however, to be truly successful as an agent for justice, the coalition must also incorporate some key ethical elements that are highlighted in the law and organizing literature. Specifically, that scholarship has wrestled with the moral and ethical dimensions of the relationships between politically disenfranchised people and lawyers and

<sup>94</sup> She supported, for example, a resolution at a national commissioner conference in November 2012. As a result, Clyburn was thanked for her leadership. *NARUC Urges Quick Action to Resolve Unreasonable Inmate Phone Service-Rates*, NAT'L ASS'N OF REGULATORY UTIL. COMMISSIONERS, (December 28, 2012), available at <http://www.naruc.org/News/default.cfm?pr=342&pdf>.

<sup>95</sup> Brendan Sasso, *Clyburn pushes FCC to cut prison phone rates*, THE HILL (Sept. 24, 2012, 10:47 PM), available at <http://thehill.com/blogs/hillicon-valley/technology/251369-clyburn-pushes-fcc-to-cut-prison-phone-rates>.

<sup>96</sup> Brooks Boliek, *Mignon Clyburn's making her mark as acting head of FCC*, POLITICO (Sept. 26, 2013, 5:14 PM), available at <http://www.politico.com/story/2013/09/mignon-clyburn-fcc-97372.html>.

advocates who seek to help them. It is important for advocates to ask ourselves, in obtaining a policy change, did we leave the people we were trying to help in a stronger position? Have we addressed the underlying problem of their political disenfranchisement? Are they better able to effect change in the future? Moreover, have we left the civil rights and media justice movements stronger? Community organizing is thought to help the community understand and change policy—putting the community leaders in the driver’s seat, thus changing underlying power dynamics and getting at the root of the harm. For this reason, the literature on law and community organizing is helpful. Lawyers (and non-lawyer policy advocates) must take care to ensure that the advocacy does not disempower the people suffering the policy harms they are attempting to redress.

In their helpful review of the theoretical origins of law and organizing, Cummings and Eagly show how law and organizing techniques were developed from a critical legal studies (CLS) analysis which questioned whether poverty lawyers were failing to serve their clients. They questioned whether simple representation of clients was akin to a band-aid solution, doing nothing to address the underlying injury.<sup>97</sup> Addressing the underlying injury often means moving from individual case work to efforts to change the structural barriers the limit access to basic needs, often by class action litigation, or, by increasing civic participation and political power. As such, involving community members in an advocacy campaign would appear to directly implement this goal. But as Cummings and Eagly point out, even a pure community organizing approach can bring with it the same set of power dynamics present in the larger society.<sup>98</sup> Thus questions of who is being empowered by federal advocacy remain salient.

#### *A. Making the Levers of Power Accessible to Community Members*

For example, Cummings and Eagly point to a number of the practical difficulties in the law and organizing model which were present in the prison phone advocacy campaigns. One of the most relevant to the instant advocacy is the practical challenge of aiding ordinary people as they

<sup>97</sup> Scott L. Cummings and Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 459-60 (2001).

<sup>98</sup> *Id.* at 488-90, 482 (citing Alinsky model of organizing which was “organizing to win, despite the fact that winning might involve the organizers making the key decisions...”); Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. Pub. Int. L.J. 4, 16 (2008) (describing vividly the problems when lawyers assert hierarchical control in an organizing context, failing to appreciate the professionalism and process necessary to develop trust relationships with clients and community members).

navigate the unfamiliar territory of legal, or in our case policy, advocacy. They note that law practice has its own special pressures and deadlines<sup>99</sup>—so does a lobbying practice. Legal ethics require lawyers to act in the clients best interests given the relevant deadlines. The individuals in directly impacted often have limited time and resources to spend on advocacy, and the few that do have the capacity to participate are often pulled in multiple directions. A good illustration of this in the present case study was the desire of policy-makers to encourage Martha Wright or her grandson to participate, even though each faced constraints. Ms. Wright was blind, elderly, and typically unable to travel by herself. Her grandson, who was released from prison before the FCC acted, was on parole and holding down a job, limiting the time that he could spend participating in rallies, panel discussions and meetings. Similarly, many of the organizers and families did their advocacy work as volunteers, holding down full-time jobs. When the FCC scheduled meetings or workshops during the workday on short notice, it was not easy to help people attend the meetings. It took significant time and sacrifice for many of the most impacted to engage the political process. And yet, to empower them to act on their own behalf in the future, it was important to create opportunities where these individuals could speak for themselves and learn about how to influence policy.

An example of an event created specifically to help the impacted community participate was the Safe Families Rally described above. The Prison Phone Justice Campaign selected a date and location that overlapped with a conference in nearby Baltimore. The campaign recruited speakers and developed an agenda well in advance. They provided transportation from Baltimore. And on top of this, they deliberately framed the rally, not in opposition to the FCC leadership, but in a supportive role, focusing on the improvements in public safety that would result once the FCC acted. This rally represents the complex interaction of expertise and genuine grassroots participation in this work. Rallies of this type require considerable expertise and planning by intermediaries who can facilitate participation by impacted people. For the rally to be successful, it had to not only incorporate real people and their stories, help them to be comfortable and prepared, but also had to include framing that would not alienate the very political leaders it was trying to reach. This is a challenging balance. And without the community organizers with the connections and expertise to develop such a rally, it is unlikely to be successful in procuring policy change. Which means such a rally could not

<sup>99</sup> *Supra* note 92, at 500.

be led only by impacted families with no political expertise.

If impacted families are to have an opportunity to present their concerns to decision-makers in the future when the heat and light of an active campaign run by professional community organizers subsides (as it most assuredly will), families who are charged exploitive rates will only obtain relief if there is a simple-to-use infrastructure in place to permit them to find redress and make their concerns known. Ideally a policy or legal solution would include mechanisms that would empower and enhance the ability of the impacted groups to participate. For example, mechanisms such as complaint processes can provide a means by which inmates and their families can document their concerns and can potentially trigger government action, creating political pressure. If a complaint mechanism is easy-to-use and captures stories as well as data, it can continue under the auspices of the agency beyond the end of an advocacy campaign. In addition, the collection of this data and stories will be useful to impose political pressure, which, as noted above in the discussion about state legislation, is important.<sup>100</sup>

In the case of the FCC proceeding, we know that aggrieved consumers will be able to lodge informal complaints at the FCC. Informal complaints will allow the FCC to monitor the number of consumers who continue to face high rates and will give it data to determine whether it should start its own investigation or enforcement proceedings.<sup>101</sup> The complaint mechanism adopted in the FCC's decision to cap rates benefits from using an existing enforcement infrastructure familiar to FCC staff. It might suffer from limitations if consumers cannot use the system. Thus, an important part of the complaint process will be the FCC's ability to work with community groups and advocates to ensure that victims of unjust rates are able to use the complaint mechanisms at their disposal. In many cases, consumer advocates break down into simple terms the ways consumers can vindicate their rights.<sup>102</sup> Effective outreach will help make the complaint system effective.

<sup>100</sup> This is not to say that such a mechanism would be sufficient, but it would be a start toward a process that is more susceptible to influence by people without significant policy expertise.

<sup>101</sup> If many consumers are still facing rates in violation of the FCC's rules, a formal complaint process will offer another option. A formal complaint, however, typically requires representation by counsel and a more detailed allegation, but does empower the FCC to require refunds and other action.

<sup>102</sup> See, for example, the information released by the United Church of Christ, OC Inc. and the Prison Phone Justice campaign the day the new rates went into effect. Lower Prison Phone Rates Start Today, blog post, (Feb. 11, 2014) available at [http://www.uccmediajustice.org/o/6587/p/salsa/web/blog/public/?blog\\_entry\\_KEY=7137](http://www.uccmediajustice.org/o/6587/p/salsa/web/blog/public/?blog_entry_KEY=7137).

### *B. Trust Relationships and Representation in Decision-Making*

The attempt to use the existing political infrastructure to reform the power balance maintained by that infrastructure is evidently in tension with itself. Advocates seeking to ensure that the people who will be impacted by a policy change are involved in advocacy on that policy face an uphill battle. In the ideal world, each step of such a campaign would permit adequate time for people who are not familiar with the policy process, but who are affected by the policy in question, to absorb the next strategic set of questions and participate in advocacy strategy. Relationships would be developed over many years and trust and understanding would grow until the point of political opportunity is exploited. Nevertheless, the reality of policy-making in Washington DC does not often adhere to such a timetable or such an inclusive process, and, at the same time the speed and technical nature of policy making is often an excuse to maintain the existing power dynamics rather than to change them. In a traditional lawyer-client relationship, integrity comes from the interaction between lawyer and client, with the client receiving deference and becoming educated and involved during her case. In policy advocacy, a model might look like a coalition with members that deliberately represent the varying assets the coalition needs to succeed as policy advocates and ethical empowerment agents. Moreover, coalition members must not only trust each other, contain the necessary expertise for success, but the constituency it intends to help must trust the coalition to act in its interest.<sup>103</sup>

In the prison phone campaign, the successful 2013 effort worked explicitly because of the many connections among activist organizations. CURE (and the D.C. Prisoner's Project) formed the heart of the trust relationships, with the extensive connections and long track record of its Executive Directors Charlie and Pauline Sullivan, and the leader of its ETC campaign, Kay Perry. CURE developed a strong relationship with several partners including the D.C. Prisoner's Rights Project. *Prison Legal News* had more than a decade of leadership in the space. MAGNet spent over four years building a relationship with those two institutions to develop the Prison Phone Justice Campaign. Similarly, the UCC's media justice ministry had a long track-record as an outspoken champion on social justice in both the criminal justice and media justice fields, and had worked with one of its own members who was one of the *pro bono* lawyers

<sup>103</sup> The critical importance of personal relationships is highlighted by an essay written by organizer Betty Hung. Betty Hung, *Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. PUB. INT. L.J. 4, 25-27 (2008-09).

representing CURE. Carefully attuned to collaboration among local and grassroots advocates and national advocates, The Leadership Conference effort held an all-day meeting to bring all of the organizations together to learn from each other and build networks. Moreover, staff for the NAACP and CURE, while not allied previously on prison phone rates, had a long-standing mutual trust and respect between their staffs. The UCC media justice ministry had different but also long-standing trust relationships with the civil rights community and with MAGNet. The members of the civil rights community had clearly defined roles within various subject matters—for example while NAACP and NUL both represent the interests of African Americans, NAACP had a longer institutional leadership role in the criminal justice context.

At the same time the collaborations benefitted from a variety of different interlocking trust relationships and consultations, the diverse nature of the collaborators meant that the whole effort did not have as strong a center as might be desirable. In the case of the prison phone rate campaign, an ideal solution would be to identify a small core of 3 to 5 people who represent the range of skills and interests who are designated the lead decision-makers—particularly in a time of rapid decision-making. During the course of the campaign, those decision makers would have routinely worked together on smaller decisions and strategy so that they would have built trust relationships and understanding of each other's expertise. In addition, each of the members ought to have the trust of the constituencies involved. Thus, for example, for the decision to be ethically sound, the decision-makers must include someone who can has the knowledge necessary to understand and represent the direct impact on families and inmates and the trust of those constituencies—ideally someone impacted herself. The decision-makers would also need to include someone with technical expertise in communications law to match wits with the highly-technically competent commercial interests on the other side. Ideally, it would include members who have influence with policymakers. And among the group would need to be people that each constituency trusted to act with their best interests at heart. Because of the compressed timeframe for some policy decision-making, the small core group would need to agree to confer with each other and refuse to support any proposal without inclusion of the whole group. The broader coalition should know how the smaller group would make decisions and when they would be included.

Trust is often not explicitly discussed and continually evolves throughout the process. A successful collaboration that does not exacerbate power dynamics requires each collaborator to be aware of her strengths and

limitations, and be willing to defer when appropriate. It requires a shared understanding of both policy goals and process goals, and a commitment to communicate and collaborate when differences of opinion arise. Such a self-aware team is not easy to create.

In the case of the prison phone collaborations, while regular meetings were a part of the campaigns for most of the effort, a smaller core group was never used. Despite this limitation, the diverse membership of the collaborations and the unique ending to the FCC's proceeding enabled the organizations to succeed regardless. The FCC prison phone advocacy was atypical in the sense that, after a decade of waiting, the FCC action in 2013 was, of necessity, pretty swift. While the FCC's process was more than adequate in terms of its obligations with regard to the Administrative Procedure Act, it was quite rapid compared to much policymaking which takes place at the behest of the public interest community. After the FCC spent a number of months collecting formal comments in 2013, the priority and timeline of Acting Chairwoman Clyburn meant that a number of the final trade-offs in the FCC action were made with almost no consultation with advocates. On the one hand, this speed meant the advocates did not face the question of which people would help shape the trade-offs the FCC would ultimately adopt. On the other hand, it also meant that none of the advocates were in a position to weigh the relative merits of the different regulatory pathways to reform available to the FCC.<sup>104</sup>

This process worked because two of the central figures in the proceeding were trusted deeply by others. Because Martha Wright *et al.* and CURE had their own counsel and had taken such a strong leadership role, the coalition's efforts toward consensus were simplified because most coalition members were able to support the Wright petition and the positions ultimately taken by CURE. The collaborations did not spend much time debating among themselves the details of the FCC proposals. In addition, this case is also the very rare instance when virtually all the advocates were able to trust the lead policy-maker to strike the right balance on this issue. Chairwoman Clyburn and her staff were empowered to make the final

<sup>104</sup> One item that might have been subject to consultation in a different circumstance was the appropriate response to the threat of a dissent by Republican Commissioner Ajit Pai. Commissioner Pai made unjustifiable claims that the Commission had not complied with the Administrative Procedure Act in adopting its final order. While the basis of his dissent was not sound, in another context, advocates might have helped weigh the relative merits of offering him a concession in exchange for withdrawing his dissent. While the legal merit of his dissent will likely be proven unsound when the FCC's decision is reviewed in court, it clearly would be easier to successfully defend the decision without such a dissent. See Federal Communications Commission, Report & Order and Further Notice of Proposed Rulemaking, Rates for Interstate Inmate Calling Services, *supra* note 35 (Commissioner Pai, Dissent).

decisions—not just legally, but morally and politically as well.

### *C. Coalitions as Models*

Law and organizing literature, while it acknowledges coalition-based action, focuses predominantly on single organizations which employ both organizers and lawyers.<sup>105</sup> Coalitions deserve more attention. Coalition work offers unique strengths that mitigate many of the weaknesses of the law and organizing approach. Coalitions can enable groups that might not agree on much else to coalesce behind a single policy proposal. Coalitions can combine technical expertise in a venue as specific as the Federal Communications Commission and still include groups and individuals that directly represent the constituency served in a more ethical manner. Coalitions can authentically walk both the halls of power *and* the streets. With a grounded and self-aware process and participants, both experts and constituencies can participate.

On the other hand, because of the competing goals, strategies and timelines of coalition members, the collaborative effort can suffer if they lack intentionality. In particular, as Hung explains, it is important that the overall campaign goals and strategy be commonly understood. But it is also true that in advocacy coalitions, many of the participants have very different overall goals and strategies. For example, in the prison phone context, while all coalition partners wanted to end the predatory rates, each viewed that particular campaign in a different context. Traditional civil rights organizations might see the advocacy as a way to advance their core criminal justice goals while capitalizing on an opportunity to enhance their competency in an area such as communications policy. Grassroots organizations rooted in families of prisoners may want to find a concrete victory and are heavily focused on immediate and enforceable relief. For some groups, this campaign was a major aspect of their total operations, for others, this was one small short-term effort in the context of decades of advocacy. For conservatives, the goal might be to highlight the market failures and the cost-savings if a reform is adopted. Some actors might want to use the opportunity as a way to criticize the Obama Administration, others might want to praise it. In a coalition, there is no single leader and not necessarily any mechanism by which to come to common decisions and stick with them. While all the groups in the prison phone coalition want to ensure historically marginalized people “have a voice in making decision

<sup>105</sup> Cummings and Eagly, *supra* note 92, at 466-68, 470-79, 83-85.



and devising solutions that affect them,”<sup>106</sup> exactly how such a goal is realized can be different for different people and different organizations.

While in the prison phone campaigns, the different collaborations did meet regularly for a significant part of the campaign, ideally all of the key groups should have gotten together more often to discuss overall goals of the reform effort, not just tactics. This is part of the resource challenge, but also a critical part of working with local and historically disempowered communities to ensure that they are increasing their capacity to engage on policy questions and also are significantly involved in decision-making.

And yet, divergent goals and tactics can be an asset. While common goals and a mechanism for avoiding mutual sabotage is clearly necessary, a completely coherent coalition is not. Often in advocacy, a range of tactics and roles are employed by various individuals and organizations. Some organizations are best at public outcry, others at behind-the-scenes legal negotiation. Both sets of actions are useful, and often they cannot be performed by the same organization.<sup>107</sup> For example, only Washington DC groups, such as those led by The Leadership Conference would likely have been able to successfully develop a letter featuring the head of the National Rifle Association. At the same time, only the Prison Phone Justice campaign was likely to be successful making personal connections necessary to obtain over a thousand postcards from individuals in prison. Thus, the benefit of coalition advocacy, while adopting a minimal framework for joint action, might be in the very diversity of goals and tactics.

## CONCLUSION

In the coming years and months, the pending litigation challenging the FCC’s decision will be resolved, and hopefully either it or individual state regulatory commissions will address predatory local rates.<sup>108</sup> During this time, additional coalition work, advocacy, and lawyering will be necessary to preserve and expand the victory already achieved. The lessons from this campaign can be put to good use with respect to this issue and more

<sup>106</sup> Hung, *supra* note 96, at 20.

<sup>107</sup> While organizations in Washington DC are accustomed to creating so-called “strange bedfellow” coalitions, in the author’s experience grassroots activists find it more difficult to identify common activities and common ground with organization or individuals they see as directly opposed to their interests. Neither approach is inherently better, but both approaches are not likely to be employed by a single organization.

<sup>108</sup> The Federal Communications Commission’s most recent Notice of Proposed Rulemaking took the next step toward limiting local rates. Rates for Inmate Calling Services, Second NPRM, WC Docket 12-375 (rel. Oct. 17, 2014), 79 FED REG 69, 682.

broadly.

Civil rights organizations and other advocates are often propounding the benefits of diversity in business, policy and many facets of life. No less is true of public interest advocacy. An effective campaign requires diversity in participants, expertise, and tactics. Successful advocacy brings together community organizing, impacted individuals, public policy entrepreneurs, and traditional public interest lawyering. Success means reviewing past efforts for successes and failures, with a keen eye not only to proposal substance and outcomes, but also to the most ethical, effective and empowering process.

Predatory prison phone rates are coming down. Like any policy change, the actors who benefitted from the predatory rates will take action to reverse course. Advocates and families defending fairness and justice must remain vigilant to continue bending the arc of history toward justice.